

# Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?

Ramses A. WESSEL\*

*Studies on the (non-)compliance with CFSP norms often misinterpret the legal nature of those norms. Classifying CFSP norms as ‘non-binding’ may help in distinguishing this policy area from other European Union’s (EU) policies, but does not do justice to the committing nature of the norms. Irrespective of the limited role Court’s may play in relation to CFSP, the norms often intend to bind the Member States. This has been the case from the outset, but seems strengthened now, as the Lisbon Treaty streamlined procedures and consolidated the EU’s external action. In studying resistance to CFSP norms, it is worthwhile to take their legal nature into account. In that sense, the broad definition of soft law used in the introduction to this special issue is helpful as it includes binding norms without enforcement mechanisms. Yet, the question remains whether one can still hold that judicial enforcement and the principles of primacy and direct effect are completely alien to the area of CFSP.*

## 1 INTRODUCTION

The European Union’s (EU’s) Common, Foreign, Security and Defence Policy (CFSP/CSDP) is the only policy area that is located and regulated in the Treaty of European Union (TEU), rather than in the Treaty on the Functioning of the European Union (TFEU). The reason is that certain Member States wished to underline the special nature of CFSP and the norms produced in that policy area. Using the terminology of this special issue, from the outset certain Member States *resisted* a further integration of CFSP into the Union’s decision-making procedures. Perhaps ironically, the 2009 Treaty of Lisbon took further steps to integrate the Union’s external action, by combining objectives and streamlining procedures. While many still see CFSP norms as being different in nature,<sup>1</sup> both the Treaties and recent case law put these differences into perspective. Indeed, as Saurugger and Terpan argue in their introductory contribution to this special issue, CFSP can be seen as ‘a policy producing norms just as any other EU public policy does. Some of these norms enter in the category of soft law, and are supposed to

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\* Professor of International and European Law and Governance, Centre for European Studies, University of Twente, The Netherlands.

<sup>1</sup> See for instance S. Keukeleire & T. Delreux, *The Foreign Policy of the European Union*, 15 (Palgrave Macmillan, 2014).

be complied with even if the European Court of Justice (ECJ) has no competence in the field.<sup>2</sup> One of the values added of this special issue is that it aims at presenting a more nuanced picture of how CFSP is received (and perhaps resisted) at the domestic level. A reassessment of the legal nature of the CFSP norms, rules and principles will help in making that picture more complete. While over the years the legal nature of CFSP norms has been addressed,<sup>3</sup> research so far has hardly assessed the CFSP/CSDP norms post-Lisbon in the light of their legal nature.<sup>4</sup> Moreover, studies often focus on the ('intergovernmental') ways in which new CFSP norms are shaped, and not on the nature of the norms that are a result of those decision-making procedures. Somehow, the idea seems to be that intergovernmentalism results in softer law, whereas supranationalism would lead to hard law.

This contribution aims to look at this question from a legal perspective, using the Treaties and their development as a starting point. In relation to the main question underlying this special issue (why Member States do – or do not – comply with soft law when implementing CFSP decisions), this contribution will look at the legally binding nature of those norms (and rules and principles), in order to find out what exactly is expected of Member States. It is claimed here that a clearer insight into the legal normative nature of CFSP norms is a prerequisite for understanding potential resistance (or compliance) at the domestic level. The current treaty rules offer many reasons to argue that CFSP/CSDP norms are binding and actually restrain Member States in their external relations.<sup>5</sup> Rather than evading *politically* binding norms, Member States may be resisting *legal* facts. Recent case law of the Court of Justice of the EU offers new insights in the role of the Court in relation to CFSP norms which may further explain compliance or resistance (in terms of contestation, circumvention and diversion)<sup>6</sup> on the side of the Member States. More in general, a major development is that with the further integration of EU external objectives it becomes more difficult to isolate the CFSP area from other policy areas, which leads to an application of general EU fundamental rules and principles to the CFSP area as well.

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<sup>2</sup> S. Saurugger & F. Terpan, *Studying Resistance to EU Norms in Foreign and Security Policy*, introduction of this special issue, 20 *European For. Affairs Rev.* (2015).

<sup>3</sup> The present author made a first attempt shortly after the creation of CFSP in the Maastricht Treaty. See R. A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective*, Ch. 5 (Kluwer Law International, 1999). In a way, this contribution revisits the arguments made fifteen years ago with a view to the changed context post-Lisbon.

<sup>4</sup> With the recent exception of C. Hillion, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, in *The ECJ and External Relations: Constitutional Challenges* (ed. M. Cremona & A. Thies, Hart Publishing, 2014).

<sup>5</sup> C. Hillion & R. A. Wessel, *Restraining External Competences of EU Member States under CFSP*, in *EU Foreign Relations Law: Constitutional Fundamentals*, 79–121 (ed. M. Cremona & B. De Witte, Hart Publishing, 2008).

<sup>6</sup> Saurugger & Terpan, *supra* n. 2.

To supplement the other contributions to this special issue (which are mainly focused on *non-legal* or *legal-political* reasons for resistance), the current contribution thus takes a more classic legal-doctrinal perspective on norms. While acknowledging that the ‘CFSP *acquis*’ consists of a variety of norms, rules and principles,<sup>7</sup> our focus will be on legal norms. By referring to legal institutional theory, taking into account the new context and location of relevant treaty provisions and interpretations offered by the Court of Justice, this contribution will assess the current legal nature of the norms produced in CFSP/CSDP. While norms may be seen as ‘soft law’, the central argument in this contribution is that the current Treaties may provide reasons to reassess the two characteristics of soft law as presented in the Introduction to this special issue: the absence of legal enforcement mechanisms and the non-applicability of the notions of supremacy and direct effect. Irrespective of their ‘hard’ or ‘soft’ nature, CFSP norms (both procedural and substantive) can be seen as ‘legal facts’ (see below) that cannot be ignored by Member States and aim to shape their behaviour in various ways. More in general the present author would argue that only by understanding the legal nature of CFSP norms it is possible to normatively assess to what extent resistance of norms causes legal or practical problems. The conclusion may very well be confirmed that, indeed, ‘CFSP is a policy like any other, in other words a framework of norms which rule human and institutional behaviour’.<sup>8</sup>

This contribution will first of all address the consolidation of external relations in the current EU treaties through an upgraded role for the principle of coherence (section 2). This will be followed by an assessment of the legal nature of the CFSP obligations and the ways in which Member States are allowed to deviate from adopted decisions (section 3). Section 4 will address the role of courts (both EU and domestic) in relation to CFSP. And, finally, some conclusions on the alleged ‘soft’ nature of CFSP and its relationship to the question of ‘resistance’ will be drawn in section 5.

## 2 THE POST-LISBON CONSOLIDATION OF EXTERNAL RELATIONS

The fact that CFSP (including CSDP) is the only policy area that is not regulated by the TFEU but by the TEU may be interpreted differently. The TFEU is usually considered to be the operational treaty, whereas the TEU may be seen as the

<sup>7</sup> Cf. the statement by the European Commission that CFSP and CSDP ‘are based on legal acts, including legally binding international agreements, and on political documents. The *acquis* consists of political declarations, actions and agreements’, at: <<http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/>>.

<sup>8</sup> Saurugger & Terpan, *supra* n. 2.

constitutional foundation, providing the legal-constitutional framework for the EU's actions. Perhaps ironically, this would allude to a 'higher' or 'more important' status of CFSP norms. At the same time we know that it owes this special position to fears by certain Member States that aligning CFSP with some former Community policies could make an end to what they perceive as the 'intergovernmental' nature of CFSP.<sup>9</sup> This forms the reason for resistance against the application of the legislative procedure (which would amount to a far too extensive role for the Commission and the European Parliament), as well as (again in the perception of most Member States) against scrutiny by the Court of Justice. Yet, in practice legal basis issues are largely left to the legal services of the Institutions.

Indeed, the textbook classification of CFSP as 'intergovernmental' often conceals the fact that CFSP decisions are taken by the Union – following strict rules and procedures – and not by the Member States. Article 2(4) TFEU clearly refers to CFSP as an EU competence. CFSP issues appear on the Council's agenda alongside many other external action items and it has become increasingly difficult to isolate CFSP from other issues. CFSP is not the sum of national foreign policy issues; CFSP is primarily an EU policy. And, in the words of Keukeleire and Delreux: 'it is questionable whether EU foreign policy must automatically – and on all levels – be seen as a substitute or as a transposition of individual Member States' foreign policies to the European level. The specificity and added value of an EU foreign policy can be precisely that it emphasizes different issues, tackling different sorts of problems, pursuing different objectives through alternative methods, and ultimately assuming a form and content that differs from the foreign policy of its individual members.'<sup>10</sup>

Moreover, and irrespective of the origin of CFSP, the Lisbon Treaty strengthened this idea and made a deliberate attempt to consolidate the external relations of the Union and this forms a reason to revisit the issue. Not only was a European External Action Service (EEAS) established to function as a *de facto* Foreign Ministry,<sup>11</sup> the international diplomatic ambitions of the

<sup>9</sup> The intergovernmental nature is often related to Declarations 13 and 14 annexed to the Treaties, which indicate that CFSP does not affect 'the responsibilities of the Member States, as they currently exist for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organizations' and that it 'will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organizations [...]'. Yet, a close reading of these Declarations reveals that they mainly state the obvious and repeat rules that are also reflected in the general principle of conferral.

<sup>10</sup> Keukeleire & Delreux, *supra* n. 1, 18–19.

<sup>11</sup> See on the EEAS for instance S. Blockmans & M.-L. Laatsit, *Enhancing Coherence in EU External Action?*, in *EU External Relations Law and Policy in the Post-Lisbon Era*, 135–159 (ed. P. J. Cardwell, T.M.C. Asser Press, 2012); S. Vanhoonacker & N. Reslow, *The European External Action Service: Living*

Union<sup>12</sup> were clearly laid down and implemented through a revised network of diplomatic missions. References to upholding international law and to the United Nations (the latter appears no less than nineteen times in the EU Treaties and Protocols) increased and these days the EU is generally seen as an important factor in global governance.<sup>13</sup> In the Treaties, the external objectives can be found in Articles 3(5) and 21 TEU. Indeed, as argued by Larik, ‘The Lisbon Treaty has both expanded and streamlined the Union’s global objectives. [W]e can see that the EU Treaties codify a range of global objectives both in terms of substance but also specifically harnessing law . . . Together, these elements coincide with the idea of the Union as a “transformative power”, changing not only fundamentally the relations among its members but also of the world around it.’<sup>14</sup>

While there may be nothing new in arguing that the difference between CFSP and the other policy areas have diminished over the years,<sup>15</sup> the current treaty regime uses the principle of consistency in particular to establish a legal connection between all external objectives.<sup>16</sup> Thus, Article 21(3) TEU provides:

The Union shall respect the principles and pursue the objectives [...] in the development and implementation of the different areas of the Union’s external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Indeed, this provision imposes a binding obligation of coherence in EU external relations, illustrating that coherence is not merely an academic notion but a tangible legal principle of EU primary law. It thus connects the list of policy objectives in 21(2) to each other, and to the functioning of pertinent legal

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*Forwards by Understanding Backwards*, 15 *European For. Affairs Rev.* 1, 1–18 (2010); and recently S. Duke, *Reflections of the EEAS Review*, 19 *European For. Affairs Rev.* 1, 23–44 (2014). A legal assessment of the EEAS Decision can be found in S. Blockmans, M. Cremona, D. Curtin, G. De Baere, S. Duke, C. Eckes, C. Hillion, B. Van Vooren, R. Wessel & J. Wouters, *EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU Establishing the Organisation and Functioning of the European External Action Service* (ed. S. Blockmans & C. Hillion, CEPS/Sieps/EUI, 2013).

<sup>12</sup> R. A. Wessel & B. Van Vooren, *The EEAS’ Diplomatic Dreams and the Reality of International and European Law*, *Journal of European Public Policy* 9, 1350–1367 (2013).

<sup>13</sup> Cf. B. Van Vooren, S. Blockmans & J. Wouters (eds), *The EU’s Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013).

<sup>14</sup> J. Larik, *Entrenching Global Governance: The EU’s Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality*, in Van Vooren et al., *supra* n. 13, 7–22 at 10–11.

<sup>15</sup> R.A. Wessel, *The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation*, *European Constitutional Law Review*, 1, 117–142 (2009).

<sup>16</sup> This part is loosely based on Ch. 1 of B. Van Vooren & R.A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014). Credits are due to the co-author of that book, Bart Van Vooren.

principles, by imposing a legally binding obligation of coherence between all EU internal and external policies which must pursue them. Specifically through the case law of the Court of Justice the obligation of loyalty has become directly connected to the objective of ‘ensur[ing] the coherence and consistency of the action and its [the Union’s] international representation’.<sup>17</sup>

Article 21(3) specifically obliges the Commission, Council and High Representative to put coherence into effect, but the Treaties contain an almost overwhelming number of references to coherence in its material and institutional dimensions:

- Article 13(1) TEU imposes coherence as one of the over-arching purposes for the activities of the EU institutions: ‘The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.’ The explicit reference to the Member States can be read as meaning that it concerns not merely coherence between policies and action of the Union itself (horizontal), but also between that of the Union and its Member States (vertical).
- Article 16(6) TEU imposes on the General Affairs Council an obligation of substantive policy coherence between the work of the different Councils, and a specific obligation for the Foreign Affairs Council since it ‘shall elaborate the Union’s external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union’s action is consistent.’
- Article 18(4) TEU imposes a specific coherence obligation on the EU High Representative (HR) with a strong institutional dimension, as it relates to the connection between the work of the HR and that of the Commission: ‘The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union’s external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action. ...’.
- Article 26(2) TEU contains an obligation of substantive policy coherence specifically for the EU’s Common Foreign and Security Policy (CFSP): ‘The Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union.’

<sup>17</sup> Case C-266/03, *Commission v. Luxembourg*, [2005] ECR I-04805, para. 60; and Case C-476/98, *Commission v. Germany*, [2002] ECR I-09855, para. 66.

In the Treaty on the Functioning of the Union, we find coherence obligations that do not relate to the institutions as such, but are predominantly substantive in the nature of their requirement:

- Article 7 TFEU is found in Title II of that treaty, under the heading ‘provisions having general application’ and states that: ‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.’ Because this article is of general application and not specific to EU external relations, it must be read as requiring substantive, positive coherence between EU internal policies and EU external policies.
- Part five of the TFEU concerns ‘external action by the Union’. Article 205 TFEU is the first and general provision of that Title and reads that ‘the Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.’ This Article is a cross-reference to Articles 21 and 22 TEU and has a triple consequence: First, any of the external competences listed in Part Five of the TFEU (common commercial policy, development policy, and so on) must be conducted in line with the coherence obligation of Article 21(3) TEU. Second, any of these competences must all pursue the objectives listed in Article 21(2) TEU. Third, where Article 22(1) TEU states that ‘the European Council shall identify the strategic interests and objectives of the Union’, Article 205 TFEU is yet another confirmation that this EU institution is given the principal role in ensuring over-arching coherence across all EU external policies.

In three competence-specific articles we also find obligations to maintain coherence. In Article 208(1) TFEU concerning development policy there is an obligation that it pursue ‘the principles and objectives of the Union’s external action’ (e.g., an obligation of horizontal coherence with Articles 3(5) TEU and 21(2) TEU), and a vertical obligation of coherence stating that ‘the Union’s development cooperation policy and that of the Member States complement and reinforce each other.’ In Article 212 TFEU concerning economic, financial and technical cooperation with third countries we find similar obligations: one of horizontal coherence but this time with EU development policy, and one of vertical coherence with Member States’ respective policies. Finally Article 214 TFEU concerning humanitarian aid, is formulated in similar terms: a general reference to the EU’s principles and objectives in external relations, and the need

for EU measures and those of Member States to ‘complement and reinforce each other’. This is thus a reciprocal obligation of substantive, positive, policy coherence.

Across all these articles, Article 21(3) TEU is the most prominent as it renders coherence into a general and legally binding obligation of EU external relations applicable to all external *and* internal policies of the EU. Notably, since the Lisbon Treaty, these obligations fall within the jurisdiction of the Court of Justice. This is not insignificant: the Lisbon Treaty has set up a carefully crafted legal regime governing EU external action, whereby vertically and horizontally operating legal principles interact towards a common purpose. The main point here is that resistance against CFSP norms may easily result in resisting other elements of the Union’s external action.

### 3 THE LEGAL NATURE OF CFSP OBLIGATIONS

In relation to the question of what it is that Member States are supposed to comply with (and perhaps wish to resist), this section will address three different questions: (1) In what way can we see CFSP as producing ‘legal facts’ that need to be taken into account by the EU community?; (2) What is the legal nature of the procedural CFSP obligations?; and (3) What does the treaty tell us about the legal nature of CFSP norms?

#### 3.1 CFSP NORMS AS LEGAL FACTS

CFSP norms are easily categorized under the heading of soft law. Thus, in their contribution to this special journal, Saurugger and Terpan argue that ‘CFSP is a policy area where most of the norms can be considered soft law’.<sup>18</sup> But also more in general, most EU lawyers would maintain that – in particular because of the (perceived) absence of the two key characteristics of EU law: primacy and direct effect – CFSP belongs to a different world. Indeed, in the early days CFSP, if considered ‘legal’ at all, would not be part of ‘Community law’.<sup>19</sup> Obviously, the Lisbon Treaty made an end to the European Community and all policy areas are now part of the EU. The question of whether this changed the nature of CFSP has been debated in literature, but the overall conclusion seems to be that the Lisbon

<sup>18</sup> Saurugger & Terpan, *supra* n. 2. Yet, see also the claim by Fabien Terpan that ‘The common actions and positions adopted within the framework of the CFSP are meant to be legally binding acts [...]’; F. Terpan, *Soft Law in the European Union – The Changing Nature of EU Law*, 21 *European Law Journal* 1, 68–96 (2015).

<sup>19</sup> See on the legal development of CFSP, A. Sari, *Between Legalisation and Organisational Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy*, in Cardwell, *supra* n. 11, 59–95; see for an assessment of early views on the legal nature of CFSP, Wessel, *supra* n. 3, Ch. 1.

Treaty did not make an end to the separate position of CFSP,<sup>20</sup> also since Article 24(1) TEU provides that ‘The common foreign and security policy is subject to specific rules and procedures’.

Yet, specific rules and procedures or a different role for the Court do not per se place the CFSP procedures and norms outside the legal world; and references to soft *law* at least relate to a legal dimension of the norms. Moreover, institutional legal theory (ILT) has taught us that it makes sense to use a wide concept of legal norms including not only mandatory legal norms, but all institutional facts – as distinguished from brute, physical facts – which are the case by virtue of legal rules.<sup>21</sup> In this wide interpretation, a legal instrument commits a legal community in case the norms – institutional facts – it brings to expression constitute valid elements of the legal system regulating that community. ILT aims to classify legal acts and to reveal that the distinction between binding and non-binding may be less helpful in determining what belongs to the legal order. Basically, ILT has drawn our attention to the idea that legal norms may take different shapes and forms and that they are always brought into existence for a specific purpose. It is the context that defines their effect, whether the norm is ‘mandatory’ or merely declaratory.

Legal acts are seen as specific ‘speech acts’, as developed in the work of Searle and Vanderveken.<sup>22</sup> It goes beyond the scope of this contribution to describe speech act theory in detail, but in order to be able to follow its claims, one has to accept that language (in a specific context) can change reality. The verbal presentations of facts enjoy validity in the institutionalized normative system of a community. We can make this more concrete by classifying the possible legal acts that would follow the speech acts.<sup>23</sup> Examples can easily be found of all of them in most legal systems. The classification reveals the rich variety of possible legal acts (perhaps going beyond the hard/soft law dichotomy) and will help us to regard CFSP as being part of the Union’s legal system. In fact, probably no one is likely to deny the legal nature of all of these types of acts, seven categories of which were defined by Ruiter:<sup>24</sup>

*Declarative legal acts:* ‘By this Treaty, the High Contracting Parties establish among themselves a European Union’ (Article 1 TEU).

<sup>20</sup> See for instance P. Van Elsuwege, *EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency*, 47 *Com. Mkt. L. Rev.*, 987–1019 (2010); D. Thym, *The Intergovernmental Constitution of the EU’s Foreign, Security & Defence Executive*, *EuConst*, 453 (2011).

<sup>21</sup> See D.W.P. Ruiter, *Institutional Legal Facts: Legal Powers and Their Effects* (Kluwer Academic Publishers, 1993).

<sup>22</sup> J. Searle & D. Vanderveken, *Foundations of Illocutionary Logic* (Cambridge University Press, 1985).

<sup>23</sup> An application of ILT to law-making can also be found in D.W.P. Ruiter & R.A. Wessel, *The Legal Nature of Informal International Law: A Legal Theoretical Exercise*, in *Informal International Lawmaking*, 162–184 (ed. J. Pauwelyn, R.A. Wessel & J. Wouters, Oxford University Press, 2012).

<sup>24</sup> Ruiter, *supra* n. 21. Examples were included by the present author.

*Self-obligating (or 'commissive') legal acts:* 'The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area' (Article 24(3) TEU).

*Purposive legal acts:* 'Resolved to implement a common foreign and security policy including the progressive framing of a common defence policy' (Preamble of the Treaty on European Union.)

*Imperative legal acts:* 'The High Representative shall represent the Union for matters relating to the CFSP. 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' (Article 27(2) Treaty on European Union.)

*Hortatory legal acts:* 'The EU calls upon all States and actors in the region to ensure immediate, safe and unrestricted access to the crash site of MH17, to allow resumption of the investigation and the repatriation of the remains and belongings of the victims still present at the site.' (Council Conclusions on Ukraine, 15 August 2014).<sup>25</sup>

*Expressive legal acts:* 'The European Union expresses its grave concern by the situation unfolding in Libya. We strongly condemn the violence and use of force against civilians and deplore the repression against peaceful demonstrators which has resulted in the deaths of hundreds of civilians.' (Declaration by the High Representative Catherine Ashton on behalf of the EU on Libya, 23 February 2011.)

*Assertive legal acts:* 'We take note of the fact that the European Union is ready to play an active role in the bilateral or regional talks.' (Article 2.4 Concluding Document on the Stability Pact in Europe, annexed to Council Decision 94/367/CFSP).

It is important to acknowledge that the legal nature of all these types of presentations is defined by the context in which they are uttered. This context is the EU in which CFSP norms are connected to other norms and – as we have seen – cannot be approached in isolation. At the same time the distinction between 'binding' and 'non-binding' law is less relevant. Whenever the EU 'takes note' of something, or 'expresses' its views, these 'utterances' may not be mandatory in the sense that they commit Member States to take action, but they are believed to form part of the whole set of norms; or, indeed, of the EU legal order in which they cannot be ignored and should form part of the assessment of what it is that Member States should comply with. They are, in Ruiter's terms, 'legal facts'. And,

<sup>25</sup> Note that hortatory acts are mainly to be found in EU Declarations and Council Conclusions directed towards third states.

as we will see below – and perhaps contrary to popular belief – most CFSP treaty norms are phrased in an ‘imperative’ manner (as for instance indicated by the frequent use of the word ‘shall’).

### 3.2 PROCEDURAL OBLIGATIONS

Another myth relates to the CFSP procedural obligations, which are often also described as ‘non-binding’. While they indeed give occasional leeway to the Member States, most obligations reveal quite some precision and concreteness and would in fact fall in the category of ‘imperative legal acts’. The systematic cooperation referred to in the list of CFSP means in Article 25 TEU is to be established in accordance with Article 32, which contains the actual procedural obligations which in fact hardly leave any freedom to the Member States. In principle, the scope of issues to which the systematic cooperation applies is not subject to any limitation regarding time or space: ‘Member States shall inform and consult one another within the European Council and Council on any matter of foreign and security policy ...’. Admittedly, Article 32 adds the words ‘*of general interest*’. The European Council has not provided a strict definition of ‘general interest’ in Article 32. Nevertheless, it can be asserted that the Member States are indeed *obliged* to inform and consult one another. Through the information and consultation obligation the Member States ordered themselves to use it as one of the means to attain the CFSP objectives in Article 11. The procedures stipulated in Article 32 only reflect the methods by which the Member States implement CFSP. Moreover, the content of the norm does not provide any other conditions apart from the condition that the issue should be of general interest; which at least amounts to an obligation by Member States who wish to argue that a specific case is not of general interest (in which case it could indeed be rightfully kept out of CFSP).

There are no reasons to assume that the notion of consultation as used in Article 32 deviates from these general definitions, which leads us to conclude that the EU Member States are to refrain from making national positions on CFSP issues of general interest public before they have discussed these positions in the framework of the CFSP cooperation. This would also be in line with the general duty of sincere cooperation (Article 4(3) TEU) which applies to all policy areas.

Informing and consulting one another should take place ‘within the European Council and the Council’. Keeping in mind the requirement of *systematic* cooperation, this should not be interpreted as only within those institutions. Cooperation within the preparatory organs (Political and Security Committee, COREPER, and working parties), as well as bilateral and multilateral consultations are equally covered by this obligation. In fact, it is in these bodies that the actual

systematic cooperation takes place. A second reason not to limit the cooperation to meetings of the Member States in the Council, may be found in Article 34. According to this provision, Member States shall coordinate their action in international organizations and at international conferences as well. Even when not all Member States are represented in an international organization or an international conference, the ones that do participate are to keep the absent states informed of any matter of common interest.

The procedural obligations underline the notion of CFSP as a Union policy, that is made by the Union's key decision-making institution (the Council). The treaty lays down strict rules and procedures that could only be qualified as 'soft' when the absence of legal enforcement measures is taken as the main criterion.

### 3.3 THE BINDING NATURE OF CFSP PROVISIONS

Most prominently and frequently, however, the 'intergovernmental' nature of CFSP is being related to the legal nature of the norms produced in that area. As noted above, somehow 'intergovernmentalism' is often connected to the absence of binding norms. While we already pointed to the possibility of taking a more nuanced approach to the legal nature of norms, the Treaties are in fact quite clear about the binding nature of CFSP norms. On the one hand 'legislative acts' are excluded in the area of CFSP (Article 24(1) TEU). Yet, as may also be derived from our analysis above, this does not deprive the CFSP acts of their legal nature.<sup>26</sup> The mandatory force of CFSP Decisions can clearly be derived from Article 28(2) TEU: 'Decisions referred to in paragraph 1 shall commit the Member States in the positions they adopt and in the conduct of their activity.' Hence, CFSP Decisions Actions, once adopted, limit the freedom of Member States in their individual policies. Member States are not allowed to adopt positions or otherwise to act contrary to the Decisions. They have committed themselves to adapting their national policies to the agreed Decisions. It is tempting to make comparisons with EU Regulations, which also demand the unconditional obedience of Member States once they are adopted. But, the Treaty text alone does not support reading the CFSP Decisions along the same lines as the instruments used in Article 288 TFEU – in particular where the addressees of the obligations or the direct applicability are concerned. A comparison with the legal instrument of 'Directives' equally reveals glaring differences, for example regarding the implementation period of Directives.

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<sup>26</sup> In fact, the legal nature of other (regulatory or delegated) acts has also never been questioned. See on the different types of EU acts, J. Bast, *New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law*, 49 *Com. Mkt. L. Rev.* 3, 885–928 (2012).

Yet, even before Lisbon, the Court underlined the committing nature of CFSP norms. A first step in that regard was already taken in the *Segi* case in 2007, when the Court for the first time confirmed the binding nature of Common Positions: ‘A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular to ensure fulfilment of their obligations under European Union law.’<sup>27</sup> Post-Lisbon, with regard to CFSP this duty of good faith is clearly laid down in Article 24 TEU: ‘The Member States shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area.’

The nature of Article 29 Decisions as concrete norms of conduct demanding a certain unconditional behaviour from the Member States, is underlined by the strict ways in which exceptions are allowed. A first possibility to depart from adopted Joint Actions is offered by Article 28(1), which is similar to, but at the same time clearly departs from, the *rebus sic stantibus* rule as presented in Article 62 of the Vienna Convention on the Law of Treaties.<sup>28</sup> Article 28(1) provides that even if the original circumstances constitute an essential basis of the consent of the parties to be bound, or the effect of the change is radically to transform the extent of obligations still to be performed, Member States may not invoke the change in circumstances as a ground for not living up to the particular Decision. In that sense the CFSP provision cannot be regarded as a *clausula rebus sic stantibus*. Instead, it is provided that: ‘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.’ Hence, even a change in circumstances may not be invoked by the Member State as a reason to neglect the adopted Decision. It is up to the Council to decide on possible modifications. Pending the decision of the Council, no deviations from the Decision are allowed.

The idea that CFSP Decisions, which are adopted by the Council, can only be modified or terminated by that institution, is furthermore emphasized by the subsequent paragraphs of Article 28. Paragraph 3 reveals the rule that:

<sup>27</sup> Case C-355/04 P, *Segi and Others v. Council*, [2007] ECR I-01657, para. 52. While the case primarily concerned the (former) area of police and judicial cooperation in criminal matters (PJCC), a transposition to CFSP seems legitimate as the Common Position in question could also be regarded a CFSP decision since it was equally based on both PJCC and CFSP.

<sup>28</sup> Vienna Convention on the Law of Treaties, Art. 62, paras 1(a) and (b). The criteria to justifiably invoke this provision include: the fundamental change of circumstances was not foreseen by the parties and (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

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 prior information shall not apply to measures which are merely a national transposition of Council decisions.

The *rationale* behind this provision is obvious: it creates a procedure to identify potential conflicting national policies at an early stage. The procedure is in the interest of the Member States themselves; it prevents the adoption of national policies which, because of a conflict with a CFSP Decision, would run the risk of being in violation of Article 28(2) TEU ('Decisions [...] shall commit the Member States in the positions they adopt and in the conduct of their activity.').

On the one hand Member States are not obliged to refer national implementation measures to the Council. On the other hand, when they have major difficulties in implementing a CFSP Decision, paragraph 5 stipulates that these should be referred to the Council, which shall discuss them and seek appropriate solutions. The inviolability of adopted Joint Actions is underlined by the rule, formulated in the last sentence of paragraph 5, that '[s]uch solutions shall not run counter to the objectives of the decision [...] or impair its effectiveness'. While the wording of paragraph 5 is in general quite clear, the question emerges why this procedure is related to 'major' difficulties only. What if a Member State encounters problems with the implementation of a minor part of the Decision only? Obviously, there would be no obligation to refer the case to the Council. On the other hand, we have seen that a Decision commits the Member States; there is no ground for reading paragraph 2 as 'Decisions Actions commit the Member States to the largest possible extent'. This, together with the loyalty obligation discussed above, leads to the conclusion that the discretion offered to the Member States to decide whether or not their implementation problems need to be brought to the attention of the Council, is limited. In case of any controversies concerning this issue, it seems to be up to the Council, to seek an appropriate solution.

Does it follow from the fact that CFSP Decisions are binding that Member States may *never* avoid the obligations laid down in the Decision in question? The CFSP provisions in fact include one quite explicit exception (Article 28(4)): 'In cases of imperative need arising from changes in the situation and failing a review of the Council decision as referred to in paragraph 1, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of that decision.' In this case '[t]he Member State concerned shall inform the Council immediately of any such measures'. While this provision again comes close to the *rebus sic stantibus*-rule in Article 62 of the Vienna Convention on the law of treaties, the criteria to be met are strict: (1) there must be a case of *imperative*

*need*; (2) the situation must have been changed; (3) the Council has not (yet) come up with a decision to solve the matter; (4) measures will have to be *necessary*; and (5) must be taken as a *matter of urgency*; (6) the general objectives of the Decision should be taken into consideration; and (7) the Council shall be immediately informed.

This leads to the conclusion that, whenever actual CFSP *Decisions* are adopted, these are to be considered ‘binding acts’. In fact, this may form a reason for the limited number of actual CFSP decisions adopted, in comparison with legal instruments adopted in other policy areas of the EU. Resistance may very well be triggered by the committing nature of these decisions. Admittedly, the different decision-making procedure (absence of an initiating role of the Commission, general absence of QMV to adopt original CFSP decisions) certainly plays a role. Yet, we know that even in cases where QMV is allowed for, voting hardly takes place; and at the same time CFSP decisions can almost never rely on twenty-eight actual votes in favour.

## 4 THE ROLE OF COURTS IN RELATION TO CFSP

### 4.1 THE COURT OF JUSTICE OF THE EU

The above analysis underlines that the variety of CFSP norms extends beyond a simple hard/soft dichotomy. Indeed, as argued in the Introduction to this special issue, we can discover norms that are hard in their bindingness but soft in the way they can be enforced by courts.<sup>29</sup> The question raised in the present section is whether we can find norms that *can* be legally enforced (hard/hard norms in the classification offered by Saurugger and Terpan).

A preliminary question is why Member States would resist any CFSP norm – hard or soft – when possibilities for scrutiny by the Court of Justice are largely excluded by the treaty provisions anyway (Cf. Articles 24(1) TEU and Article 275 TFEU). The reason for this exclusion is that most Member States argued that foreign policy be shield from what some perceived to be ‘judicial activism’. The role of the Court in relation to CFSP has been subject to legal analysis over the years,<sup>30</sup> yet the impact of the changes by the Lisbon treaty have only partly been

<sup>29</sup> Saurugger & Terpan, *supra* n. 2.

<sup>30</sup> S. Griller, *The Court of Justice and the Common Foreign and Security Policy*, in *Court of Justice of the European Union - Cour de Justice de l'Union Européenne, The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, 675–692 (ed. A. Rosas, E. Levits & Y. Bot, T.M.C. Asser Press, 2013); G. De Baere & P. Koutrakos, *The Interactions between the Legislature and the Judiciary in EU External Relations*, in *The Judiciary, the Legislature and the EU Internal Market*, 243–273 (ed. P. Syrpis, Cambridge University Press, 2012); L. Saltinty , *Jurisdiction of the European Court of Justice over issues*

recognized in literature. A clear exception is Hillion, who convincingly argued that the view that the Court is not competent at all in the area of CFSP can no longer be upheld.<sup>31</sup> He sees three areas in which the Lisbon treaty has created a competence for the Court in relation to CFSP: ‘First, it has made it possible for the Court, albeit within limits, to *exercise judicial control* with regard to certain CFSP acts, thus abolishing the policy’s conventional immunity from judicial supervision. Second, it has recalibrated the Court’s role in *patrolling the borders* between EU (external) competences based on the TFEU and the CFSP, turning it into the guarantor of the latter’s integrity. Third, the Treaty has generalized the Court’s capacity to *enforce the principles underpinning the Union’s legal order*.’

The claim in the present contribution is that this role of the Court should not come unexpected, given the intertwinement of CFSP and other external Union policies – in particular through the principle of consistency referred to above. This would also explain the major change initiated by the Lisbon Treaty: no longer is the Court’s role explicitly excluded in relation to CFSP; rather the general rule seems to be that the Court is competent unless its role is excluded in a specific situation.<sup>32</sup>

This leads to a role for the Court in relation to CFSP in different situations:<sup>33</sup>

- Restrictive measures taken on the basis of CFSP acts against natural or legal persons, which fall under the scrutiny of the Court (Article 24(1) TEU jo. Articles 275 and 263 TFEU). Restrictive measure are not further defined and one may wonder to which extend they could also cover actions against individuals beyond sanctions. Although it generally held that this possibility is limited to a procedure for annulment, it has been argued that nothing seems to restrict the available procedures to Article 263(4) TEU.<sup>34</sup> This would open the possibility (or even the necessity, in case of a plea for illegality) for preliminary questions raised by a national court during domestic proceedings. Hillion added that not limiting the judicial control by the Court to direct actions, would be consistent with the Court’s own notion that there needs to be a ‘complete system of judicial remedies’.<sup>35</sup>

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*relations to the Common Foreign and Security Policy under the Lisbon Treaty*, Jurisprudence 119, 261 (2010); A. Hinarejos, *Judicial Control in the European Union – Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press, 2009).

<sup>31</sup> Hillion, *supra* n. 4.

<sup>32</sup> Hinarejos, *supra* n. 31, 150.

<sup>33</sup> See more extensively and for many case law references Hillion, *supra*, n. 5.

<sup>34</sup> See e.g.: T. Tridimas, *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?*, in *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Vol. 1, Constitutional and Public Law. External Relations, 128 (ed. T. Tridimas & P. Nebbia, Hart Publishing, 2004); G. De Baere, *Constitutional Principles of EU External Relations*, 190 (Oxford University Press, 2008).

<sup>35</sup> Hillion, *supra* n. 4.

And, keeping in mind the constitutional unity of the legal order, not allowing for broad mandate for the Court would discriminate between individuals that are subject to CFSP restrictive measure and those subject to economic and/or financial measures (the latter being able to challenge their position in all possible ways on the basis of Article 215 TFEU).<sup>36</sup> Indeed, on the basis of Article 275 TFEU fundamental rights apply equally to CFSP and *Kadi* revealed that that fundamental rights are to be respected in relation to restrictive measures.<sup>37</sup> In fact, it is undisputed in EU law that domestic courts form part the EU's overall judicial system,<sup>38</sup> and 'As a result, national Courts can be expected to step in if and when the Court of Justice's jurisdiction is restricted or prevented',<sup>39</sup> opening up the possibility or even the need for preliminary questions. Interestingly enough, the Court itself does not wish to give a final say on the scope of its jurisdiction. In particular, in relation to a review of the legality of restrictive measures against natural or legal persons the Court recently kept its options open: '[T]he Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions.'<sup>40</sup>

- Unlike its predecessor (Article 47 TEU), current Article 40 TEU calls for a balanced choice for either a CFSP or another legal basis of decisions (e.g., trade or development cooperation). No longer foresees the article in a 'Community first' principle; CFSP has been placed on the same footing as other policies. In other words: the treaty not only aims to prevent an intrusion from CFSP in other areas, but also vice versa.<sup>41</sup> Conflicts on this issue can be brought before the Court (Articles 275(2) and 24(1) TEU). However, given the fact that Article 40 no longer provides a conflict-solving rule, the question of its relevance has come up. In the 2012 case C-130/10 *European Parliament v. Council* the Court was given a first chance to develop an approach towards the function of Article 40.<sup>42</sup> Being confronted with the question of the appropriate legal basis for 'restrictive

<sup>36</sup> *Ibid.*

<sup>37</sup> See, Joined Cases C402/05 P and C415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I635, and judgment of 18 Jul. 2013 in Cases C-584/10P, C-593/10 and C-595/10P *Commission, Council, United Kingdom v. Kadi ('Kadi II')*, as well as AG Bot's Opinion (19 Mar. 2013).

<sup>38</sup> Cf. Art. 19(1) TEU as well as Opinion 1/09, ECLI:EU:C:2011:123.

<sup>39</sup> See Hillion, *supra* n. 4, who also refers to Cases C50/00 P *Unión de Pequeños Agricultores v. Council* [2002] ECR I6677, and C583/11 P *Inuit Tapiriit Kanatami et al.* (3 Oct. 2013, nyr).

<sup>40</sup> Opinion 2/13 of the Court of 18 Dec. 2014, *Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454, at para. 251 (nyr).

<sup>41</sup> Cf. also P. Eeckhout, *EU External Relations Law*, 498 (Oxford University Press, 2011).

<sup>42</sup> Case C-130/10 *Parliament v. Council*, ECLI:EU:C:2012:472.

measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban’,<sup>43</sup> the Court held that Article 215 TFEU (following a previous CFSP decisions) rather than Article 75 TFEU (in the Area of Freedom, Security and Justice – AFSJ) was the correct choice, despite the limited role of the European Parliament in relation to the CFSP/Article 215 procedure. The context of peace and security proved to be decisive for the Court’s conclusion. The Court did not shy away from referring to CFSP provisions as well and seemed to focus on the distinction between internal policies and external action.<sup>44</sup> Recently, the Court had a chance to revisit the issue in the Mauritius case.<sup>45</sup> Here the Court chose context over content and argued that the EU-Mauritius Agreement, concluded in the framework of operation Atalanta, was rightfully based within CFSP. Yet, this does not limit’s the application of procedural EU rules and principles. In the words of Peers:

the Court’s ruling means that any CFSP measure can be litigated before it, as long as the legal arguments relate to a procedural rule falling outside the scope of the CFSP provisions of the Treaty (Title V of the TEU). For instance, it arguably means that the Court would have the power to rule on the compatibility of proposed CFSP treaties with EU law, since that jurisdiction is conferred by Article 218 TFEU and not expressly ruled out by Article 275. But such disputes might often include arguments about the substance of the measure concerned (for instance, whether it would breach the EU’s human rights obligations), and it could be awkward to distinguish between procedural and substantive issues in practice.<sup>46</sup>

- International agreements in the area of CFSP are concluded on the basis of Article 218 TFEU, despite some specific procedural rules, and no exception is made in relation to legality control by the Court.<sup>47</sup> It has further been noted – and in a way conformed by the Mauritius case – that Article 218(11) does not seem to exclude EU agreements that relate ‘exclusively or

<sup>43</sup> Council Regulation (EU) No. 1286/2009 of 22 December 2009 amending Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, OJEU L 346/42 (2010).

<sup>44</sup> Cf. Hillion, *supra* n. 4, who also notes that this ‘is one of, if not the first time that the all-encompassing character of the CFSP is evoked in the case law’.

<sup>45</sup> Case C-658/11, *European Parliament v. Council (Mauritius Agreement)*, ECLI:EU:C:2014:2025. See C. Matera & R.A. Wessel, *Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements – Case C-658/11, European Parliament v. Council (Mauritius Agreement)*, *Revista de Derecho Comunitario Europeo*, 1047–1064 (2014).

<sup>46</sup> S. Peers, *The CJEU Ensures Basic Democratic and Judicial Accountability of the EU’s Foreign Policy*, *EU Law Analysis*, 24 Jun. 2014, at: <<http://eulawanalysis.blogspot.nl/2014/06/the-cjeu-ensures-basic-democratic-and.html>>.

<sup>47</sup> De Baere, *supra* n. 35, 190; see also Tridimas, *supra* n. 35.

principally' to the CFSP from the Court's scrutiny.<sup>48</sup> In the end, all international agreements (whether not, wholly or partly) CFSP agreements, are agreements for which the Union as such is internationally formally responsible. It would therefore be difficult to maintain the view that the Court could not scrutinize CFSP international agreements or CFSP parts in agreements. In any case, the Article 40 TEU situations could by itself already cause a need for the Court to assess international agreements in their entirety. In the recent Case C-658/11 on the EU-Mauritius Agreement, the Court underlined its jurisdiction in relation to CFSP-related agreements where the EP's right to be informed is concerned.

- Where the Court in the *Mauritius*-case argued that the simple fact that there is a CFSP relation does not deprive Parliament from its constitutional prerogatives, in another recent case it had already argued that a CFSP link could not form a reason to deny an individual the right to bring a case. Without being able to go to the heart of the matter, in *H. v. Council and Commission* – a case brought by a staff member of the EU Police Mission in Bosnia and Herzegovina (EUPM) – it held that:

[...] it should be ensured that [the] institutions do not evade any review by the Courts of the European Union in respect of purely administrative decisions which are taken in relation to staff management within the EUPM, which would be clearly separable from the 'political' measures taken as part of the CFSP. Where such a decision adversely affects the person to whom it is addressed and significantly alters that person's legal position, it cannot be acceptable in a European Union based on the rule of law that such a decision escape any judicial review [...].

Overall, the Lisbon Treaty thus seems to have strengthened the Court's role as a Constitutional Court, allowing it to enforce the fundamental EU principles across the board.<sup>49</sup> The Treaties do not provide reasons to exclude CFSP from this holistic approach, simply because it finds its basis in another treaty. The obvious question is whether Article 24(1) TEU does not simply provide an exhaustive list of the powers of the Court in relation to CFSP? After all, the text of that provision is quite clear:

<sup>48</sup> Hillion, *supra* n. 4; as well as Eeckhout, *supra* n. 42, 498.

<sup>49</sup> Cf. D. M. Curtin & I. F. Dekker, *The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of the Shadows*, in *The Evolution of EU Law*, 2nd ed., 155–186 at 170 (ed. P. Craig & G. de Búrca, Oxford University Press, 2011). This is not to say that the Court did not have this role prior to the Lisbon Treaty; see for instance D. M. Curtin & R. A. Wessel, *Rechtseenheid van de Europese Unie? De rol van het Hof van Justitie als constitutionele rechter*, SEW Tijdschrift voor Europees en economisch recht, 371–378 (2008); as well as D. M. Curtin & R. H. van Ooik, *Een Hof van Justitie van de Europese Unie?*, Sociaal-economische Wetgeving : Tijdschrift voor Europees en Economisch Recht, 24–38 (1999).

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

Taking into account our analysis above, the answer seems to be that it remains difficult to see a role for the Court in pure CFSP situations, in which the context of other EU external relations is absent. The most obvious lack of judicial control is apparent when competences and decision-making procedures *within* the CFSP legal order are at stake. This means, for instance, that neither the Commission, nor the European Parliament can commence a procedure before the Court in cases where the Council has ignored their rights and competences in CFSP decision-making procedures in a situation where CFSP as a legal basis is not disputed. This brings about a situation in which the interpretation and implementation of the CFSP provisions (including the procedures to be followed) is left entirely to the Council (or perhaps worse: to individual Member States). Remembering their preference for ‘intergovernmental’ cooperation where CFSP is concerned, it may be understandable that Member States at the time of the negotiations had the strong desire to prevent a body of ‘CFSP law’ coming into being by way of judicial activism on the part of the European Court of Justice, but it is less understandable that they were also reluctant to allow for judicial control of the *procedural* arrangements they explicitly agreed upon (although it is acknowledged that it may be difficult to unlink procedures and content).

At the same time, given the dynamics of the Lisbon approach to consolidating the EU’s external relations, it will be increasingly difficult to deny a link with other policies, allowing the Court to take CFSP-dimensions along in its assessment of those policies.

#### 4.2 A ROLE FOR DOMESTIC COURTS?

Given that in this special issue resistance is primarily analysed at the domestic level, the question is whether the legal nature of CFSP norms – as discussed above – would allow individuals or affected companies to invoke these norms in domestic proceedings. Recently this question was addressed briefly by Advocate General Kokott in her View on Opinion 2/13 (the accession of the EU to the European Convention on Human Rights). She somewhat cryptically argued:

[T]he very wide interpretation of the jurisdiction of the Courts of the EU which it proposes is just not necessary for the purpose of ensuring effective legal protection for individuals in the CFSP. This is because the – entirely accurate – assertion that neither the Member States nor the EU institutions can avoid a review of the question whether the measures adopted by them are in conformity with the Treaties as the basic constitutional

charter does not necessarily always have to lead to the conclusion that the Courts of the EU have jurisdiction.<sup>50</sup>

The reason is that ‘national courts or tribunals have, and will retain, jurisdiction.’<sup>51</sup> Yet, what about the two notions that are often said to differentiate CFSP norms from other EU norms: primacy and direct effect.<sup>52</sup> The question of primacy and direct effect of CFSP norms is far from new. Earlier, it has been contended that these principles cannot be said to be completely alien to the CFSP legal order:

As regards to the principle of direct effect, the practice has started, especially in the EU’s fight against terrorism, to insert unconditional obligations in common positions which relate to physical and legal persons as opposed to governments. [...] As regards the principle of primacy, joint actions and common positions are legally binding upon Member States which are under a duty to abide by them ‘actively’ and ‘unreservedly’ ....<sup>53</sup>

At the same time Declaration No. 17 on primacy explicitly refers to both the TFEU and the TEU: ‘[...] in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.’ Obviously, one could argue that there is not so much case law in the area of CFSP; yet this could also be seen as a reference to the *Segi* case (below) in which the Court had already claimed the Union – wide application of primacy.<sup>54</sup>

Indeed, both the legal nature and the normative content of CFSP decisions may form an obligation for Member States to allow for direct effect and primacy in their national legal order in specific cases. This would also be in line with the general demand laid down in Article 19(1) TEU that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. Once individuals are confronted with rights or obligations on the basis of CFSP decisions that are ‘sufficiently clear and unconditional’ it may become difficult for national courts to simply ignore an important EU decision simply because its status has not been regulated in as much detail as some other EU instruments. Effective legal protection includes the protection of fundamental

<sup>50</sup> Opinion 2/13, *supra* n. 41. View of Advocate General Kokott, ECLI:EU:C:2014:2475, para. 95. For an academic appraisal see, *inter alia*, A. Łazowski & R.A. Wessel, *When Caveats turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, German Law Journal (2015) (forthcoming).

<sup>51</sup> *Ibid.*, para. 96.

<sup>52</sup> According to the first principle a Court would need to set aside a national rule in case of a conflict with an EU norm; on the basis of the second principle EU norms can in principle be invoked in domestic proceedings.

<sup>53</sup> R. Gosalbo Bono, *Some Reflections on the CFSP Legal Order*, 43 *Com. Mkt. L. Rev.* 2, 337–394 at 378 (2006).

<sup>54</sup> In a similar vein: Case C-105/03, *Pupino*, [2005] ECR I-05285.

rights,<sup>55</sup> which (as underlined by Article 6(3) TEU) ‘shall constitute general principles of the Union’s law’.

As Member States are under a clear obligation to implement CFSP decisions (see above), conflicts may indeed arise between those obligations and individual interests. While this could be a pure CFSP situation (for instance related to the implementation of an arms embargo which would affect an arms producer), the situation could also occur when a CFSP decision is closely connected to a non-CFSP norm (e.g., in relation to other restrictive measures). Furthermore, national Courts may be confronted with a (*Foto-Frost*<sup>56</sup>) duty to refrain from invalidating EU decisions. This implies that it is not up to a national Court to simply set aside any EU decision. Indeed, the only possibility they may have – apart from simply applying the CFSP-norm – is to refer the case to the ECJ in a preliminary procedure.<sup>57</sup> In this respect, the above-mentioned *Segi* judgment is again quite revealing. The relevant question according to the Court is whether or not the decision produces legal effects in relation to third parties (individuals or entities). In this case the two organizations were placed on a list with terrorist organizations which was annexed to Common Position 2001/931/CFSP which led the Court to conclude that this particular Common Position had produced legal effects in relation to the two organizations. The Court continued:

a national court hearing a dispute which indirectly raises the issue of the validity or interpretation of a common position [...] and which has serious doubt whether that common position is really intended to produce legal effects in relation to third parties, would be able [...] to ask the Court to give a preliminary ruling.<sup>58</sup>

One could argue that this reasoning should also be maintained when a decision would have a single CFSP legal basis. After all, the bottom-line in the Courts reasoning seems to be the question whether it produces legal effects in relation to individuals. Finally, there are no *a priori* reasons to exclude a role for domestic courts in cases where damages are suffered in relation to CFSP situations, in which case domestic Courts could even be under a (*Francovich*<sup>59</sup>) duty to deal with the possible state liability as a result of not implementing a decision correctly.

<sup>55</sup> Including the right to access to justice. See also C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009).

<sup>56</sup> Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, [1987] ECR, 04199.

<sup>57</sup> See also R. H. van Ooik, *Cross-Pillar Litigation before the ECJ: Demarcation of Community and Union Competences*, *EuConst*, 399–419, 405–406 (2008) who even pre-Lisbon explicitly includes CFSP acts in his analysis.

<sup>58</sup> *Segi*, *supra* n. 28, paras 54–55.

<sup>59</sup> Case 6/90, *Francovich v. Italy*, [1991] ECR I-5370. The case concerned a situation where the Court held that Member States could be liable to pay compensation to individuals who suffered a loss by reason of the Member State’s failure to transpose an EU directive into national law.

## 5 CONCLUSION: RESISTING LEGAL FACTS?

This contribution argued that research on resistance to CFSP norms should take their legal nature into account, and particularly acknowledge the changes brought about by the Lisbon Treaty, which not only integrated CFSP into the overall external relations framework, but also nuanced the absence of judicial supervision. In fact, it was held that without any legally binding nature of CFSP norms, there would be less of a point in resisting the norms in the first place (compare the classification in the Introduction to this special issue: in a legal sense there is no obligation nor enforcement in the case of non-legal norms). Possible resistance can perhaps also be explained by accepting that through the establishment of CFSP, Member States have created an EU policy which was not only intentionally created as containing binding elements, but which has also further developed on the basis of closer connections with other parts of the EU's external action. Indeed, it is not *either* 'nature' or 'nurture', it is both. The procedural obligations and the description of the legally binding nature of CFSP Decisions have been in the treaties from the outset. The 'nurture' element relates to the fact that the coming of age of CFSP took place in an EU family in which its isolation was not only not tolerated, but also not intended.

The 'soft' nature of CFSP is frequently related to the absence of a role of the Court of the EU and to the impossibility for domestic courts to engage in CFSP issues. There should be no doubt that this element is part and parcel of the nature of CFSP. Yet, as we have seen, the Lisbon Treaty to some extent changed this, allowing CFSP to become a policy area that started to show similarities to other EU policy areas. While resistance to extra-national foreign policy initiatives could easily be explained by 'the traditional notion of foreign policy as one of the central tasks, prerogatives and even *raison d'être* of sovereign states',<sup>60</sup> we have seen resistance or sheer non-compliance in many other areas of the EU.

As institutional legal theory has taught us, the distinction between binding and non-binding norms may perhaps not be too helpful. CFSP norms intend to restrain or influence Member States in their behaviour and to create legal facts that can also be relied upon by third parties. Post-Lisbon it has become more difficult to isolate CFSP from other external policies, which will continue to have an impact on the interpretation of the CFSP norms and on the possibilities for Member States to resist them.

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<sup>60</sup> Keukeleire & Delreux, *supra* n. 1, 23.