

Common Foreign and Security Policy and the EU's external action objectives: an analysis of Article 21 of the Treaty on the European Union

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Boundaries within EU policies – Common Foreign and Security Policy – EU external relations – Management of boundaries – Institutional interpretation – External action objectives – Linking policies to objectives – Restrictive measures – Area of Freedom Security and Justice – Securitisation of migration – Energy policy – Development – Multilateral diplomacy – Global strategy

INTRODUCTION

The law of European Union diplomacy is not unitary. Entering into alliances, concluding trade deals, and nominating ambassadors are examples of activities traditionally seen as part of the undivided craft of diplomacy. Not so for the EU, whose external relations law draws a peculiar distinction. On one hand there is the general Union competence to engage in 'external action';¹ on the other, there is the distinctive competence to conduct a Common Foreign and Security Policy (CFSP), which is 'subject to specific rules and procedures'.² The differences in objectives, scope, and nature between the external relation competences is not

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¹Mostly regulated in Part Five of TFEU. This encompasses a number of competences but will be referred to, collectively, in the rest of this article as the 'TFEU competence'.

²Art. 24 TEU. CFSP decision-making mostly follows the unanimity rule in the Council. The Parliament plays hardly any role and the adoption of legislative acts is excluded. On the 'distinctiveness' of CFSP see R.A. Wessel, *The European Union's Foreign and Security Policy. A Legal Institutional Perspective* (Kluwer Law 1999); more recently Opinion of AG Wahl in ECJ 19 July 2016, ECLI:EU:C:2016:212, *H v Council of the European Union*, paras. 38 and 45, and other works mentioned throughout the article.

specified in the Treaties and defies easy categorisation. There is only an unhelpful definition of CFSP: it shall cover 'all areas of foreign policy and all questions relating to the Union's security'.³ The other competences are never defined as a whole.⁴ This article analyses whether EU institutions have used the general objectives of Union external action listed in Article 21(2) Treaty on the European Union (TEU) to pursue CFSP, or to pursue other external relations policies.

Previous research has taken issue with this peculiar distinction in EU external relations law. Professor Alan Dashwood labelled it the 'bipolarity of EU external action',⁵ while Professor Wessel has maintained that the distinction is not as prominent as has been represented – for example in political speech – and that it is in any case fading away.⁶ The existence and retention of the split in EU law derives from historical developments, but institutional practice would seem to prove it arbitrary, or obsolete. Cooperation on foreign policy, although not part of the original Treaties establishing the European Community, developed informally in the 1970s and 1980s.⁷ It was later brought under EU law,⁸ retaining, however, its distinctive character.⁹

As a result of the split in external relations law, it is difficult to identify the correct procedure for the adoption of an act.¹⁰ The correctness of this procedure is

³Art. 24 TEU, emphasis added.

⁴They are defined *singulatim*, one by one. The phrase 'external action' is used in Chapter 1 of Title V TEU and in Part V of the TFEU to list all external relations competences including CFSP. Art. 2 TFEU divides all EU competences into five categories: exclusive; shared; coordinating and supporting; coordinating and supplementing; and CFSP.

⁵A. Dashwood, 'The Continuing Bipolarity of EU External Action', in I. Govaere et al. (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Nijhoff 2013) p. 1.

⁶R.A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation', 1 *EuConst* (2009) p. 117; R.A. Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy', 2 *European Papers: A Journal on Law and Integration* (2016) p. 439

⁷Among many: T. Bickerton, *European Integration. From Nation States to Member States* (Oxford University Press 2013).

⁸J. Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) 72.

⁹P.J. Cardwell, 'On "Ring-Fencing" the Common Foreign and Security Policy in the Legal Order of the European Union', 64(4) *Northern Ireland Legal Quarterly* (2015) p. 443–463

¹⁰The literature is extensive: see e.g. I. Govaere 'Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon', 13 *Cambridge Yearbook of European Legal Studies* (2011) p. 87 at p. 112; B. Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil', 14(2) *European Foreign Affairs Review* (2009) p. 231; P. Van Elsuwege, 'The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty', in M. Cremona and A. Thies (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014); G. Butler, 'Pinpointing the Appropriate Legal Basis for External Action', 6(2) *European Journal of Risk Regulation* (2015) p. 323

key to EU constitutional architecture, given the ‘non-affectation’ clause of Article 40 TEU which establishes that CFSP and TFEU competences ‘are to be equally protected against each other’.¹¹ But in the absence of precise boundaries, it is moot whether essential and diverse foreign policy activities – e.g. the prosecution of suspected terrorists, the conclusion of agreements on energy security, or the fight against immigrant smugglers – should be conducted under CFSP or under other competences.

This article analyses EU institutional management – with special focus on the Council and the Court – of the interaction between CFSP and other external action competences, by mapping out how institutions have linked any given external relations policy to one of the objectives of Article 21(2) TEU, both in decision-making and in the case law subsequent to the entry into force of the Lisbon Treaty.¹² In doing so, it also provides a legal perspective on the Union’s activity with regard to the most important foreign policy items on its agenda since 2009, such as the Arab uprisings, the armed conflict in Ukraine, or the Paris Agreement on climate change.

The starting point of the analysis is the duty to choose a ‘legal basis’, i.e. an article of the Treaties that EU institutions must use when adopting a measure. The choice of legal basis depends on ‘the aim and content of the measure’, as established by the case law of the Court (‘centre of gravity test’).¹³ However, as far as the ‘aim’ is concerned, no distinction is made between CFSP and other external action objectives: they are all listed under Article 21(2) TEU, letters (a)–(h), in a chapter containing ‘general provisions on the Union’s external action’.¹⁴ EU acts do not refer specifically to any of the letters of Article 21(2), but generally employ wording similar or even identical to the applicable provision. Moreover, as far as ‘content’ is concerned, in practice it is often impossible to determine what the prevalent aim is of a foreign policy measure or of an international treaty.¹⁵

¹¹ A. Dashwood, ‘Article 47 TEU and the relationship between first and second pillar competences’, in A. Dashwood and M. Maresceau, *Law and Practice of EU External Relations* (Cambridge University Press 2008) p. 100. See also AG Bot Opinion in ECJ 19 July 2012, Case C-130/10, *European Parliament v Council* ECLI:EU:C:2012:50 para. 9 and AG Bot Opinion in ECJ 24 June 2014, Case C-658/11, *European Parliament v Council* ECLI:EU:C:2014:41, para. 86; H. Merket, *The EU Security-Development Nexus: Bridging the Legal Divide* (Brill 2016) p. 264.

¹² The present analysis is ‘static’ in the sense that it does not discuss trends or possible future variations in institutional behaviour. Moreover, it is not a quantitative treatment of institutional behaviour. These may be avenues for future research.

¹³ On which, see the discussion in below and n. 22.

¹⁴ They are also scattered throughout the Treaties: Article 8 TEU specifies the objective on the EU in its neighbourhood; specific articles in the TFEU refer to other policies.

¹⁵ For example, see the case of the EU Association Agreement with Ukraine discussed below.

This article is structured to mirror the list of eight objectives for EU external action contained in Article 21(2) TEU. It considers whether each objective has been used to adopt CFSP decisions, TFEU acts, or both. This way, it is also possible to explore how institutions have concretely chosen to distinguish between CFSP on the one hand, and other areas of decision-making with CFSP implications on the other: neighbourhood policy, migration, fight against terrorism, common commercial policy, judicial cooperation, energy and climate diplomacy.

While acknowledging the historical reasons that account for the genesis of the split, this article defends the thesis that the distinction between CFSP and other areas of external action is neither semantically nor practically tenable. Semantically untenable since if CFSP covers 'all areas of foreign policy'¹⁶ there should be no other areas of foreign policy left, making the TFEU competences redundant. The argument that the Treaties distinguish between 'foreign policy' and 'external action' is hardly persuasive: these are perfect synonyms and the Treaties seem to use the phrases interchangeably.¹⁷ A possible solution would be to try to redefine the scope of CFSP, narrow it down, so as to encompass only the purely political and security aspects of foreign policy.¹⁸ In diplomatic practice, however, there is no distinction between 'political' and 'non-political' international relations,¹⁹ as the article shows with particular reference to the conflation of CFSP and the Area of Freedom, Security and Justice.

NATURE OF THE OBJECTIVES OF ARTICLE 21(2) TEU

Article 21(2) TEU reads:

'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

¹⁶Art. 24 TEU.

¹⁷Considering that the institutional figure who conducts CFSP is called the High Representative for the Union Foreign Affairs and Security Policy (Art. 18 TEU), the phrases foreign policy, foreign affairs, external action, or international relations are used interchangeably in this article.

¹⁸According to Dashwood, CFSP consists of the 'political, security and defence aspects' of foreign policy: Dashwood, *supra* n. 5, p. 3.

¹⁹If it is even possible to define what is 'political'. If taken to the extreme, the argument leads to the conclusion that the presence of a political element in all areas must imply that all EU internal competences are the same. However, arbitrary distinctions matter 'less' in internal competences: it is in the external sphere that, due to the 'third country' element, mistakes are harder to correct.

- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters; and
- (h) promote an international system based on stronger multilateral cooperation and good global governance.'

This was an innovation introduced by the Lisbon Treaty in clarification of the previous texts which foresaw specific CFSP objectives.²⁰ All external action objectives were deliberately brought under the umbrella of Article 21 TEU to enhance the coherence and consistency of EU external relations.²¹

For this reason, it can remain moot whether certain objectives of Article 21(2) relate exclusively to CFSP. Arguably, the most logical outcome of the introduction of the general objectives in Article 21(2) may be precisely that all objectives can be linked to all policies; this is indeed a finding of this contribution. However, with a view to fostering legal certainty and simplifying procedures, Advocates General and scholars have attempted to rationalise this uncertainty by proposing that the objectives be classified. Advocate General Bot has for example taken the view that objectives (a)–(c) should be 'assigned to' CFSP²²; this is supported by the fact that those are CFSP-specific objectives that had already appeared in the previous version of the Treaty on the European Union (in Article 11). In his Opinion in a later case, however, the same Advocate General also included letter (h) as a CFSP objective.²³ Professor Eeckhout instead regards only letter (c) as being undoubtedly a CFSP objective – and regards (d)–(g) as decidedly TFEU competences, with (a), (b) and (h) being of a cross-sectoral nature.²⁴ Professor Van

²⁰ R. Gosalbo-Bono, 'Some Reflections on the CFSP Legal Order', 43 *Common Market Law Review* (2006) p. 337

²¹ B. Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil', 14(2) *European Foreign Affairs Review* (2009) p. 245

²² AG's Opinion in Case C-130/10, *supra* n. 11, para. 63. Similarly, see Larik, *supra* n 8, p. 215.

²³ AG's Opinion in Case C-658/11, *supra* n. 11, para. 87.

²⁴ P. Eeckhout, *EU External Relations Law* (Oxford University Press 2013) p. 169.

Elsuwege has suggested that letters (a) through (c) imply that CFSP rules must be followed.²⁵ Finally, Professor Koutrakos excludes the economic and social objectives in Article 21(2) from being covered by CFSP.²⁶ As detailed in the rest of this article, the Court has not conclusively determined which if any of the eight objectives listed in Article 21(2) TEU fall under CFSP. Since EU acts usually do not make any reference to a specific letter of Article 21(2) TEU, the Court generally applies the traditional 'centre of gravity' test to decide the correct legal basis of an act on a case by case basis.²⁷

As shown below, even though acts do not usually refer to specific letters directly, institutions have used the wording of letters (a), (b), (c), (d), (g) and (h) for CFSP measures, whereas all the objectives have been used for TFEU measures. While all eight objectives are equally important on paper, it is here submitted that letter (a), which reads 'safeguard its values, fundamental interests, security, independence and integrity', should be considered hierarchically superior. This is because all Union action²⁸ must be carried out to safeguard its values, interests, security, independence and integrity. Security, integrity, and independence are indeed existential requirements without which the conferral of a competence by the Member States for the attainment of a common objective (Article 1 TEU), and therefore the functioning of the EU itself, would not be possible. As far as values and interests are concerned, clearly the EU does not pursue either external or internal policies that go against its fundamental interests.²⁹

The other objectives of Union external action are essentially aspects of the general clause of letter (a); strictly speaking, the others are redundant. This is especially the case since the text of (a) is vague enough to ensure flexibility

²⁵ P. Van Elsuwege, 'EU external action after the collapse of the pillar structure: in search of a new balance between delimitation and consistency', 47 *CMLR* (2010) p. 987 at p. 1006.

²⁶ P. Koutrakos, *EU International Relations Law* (Hart 2015) p. 420.

²⁷ See e.g. ECJ 14 June 2016, Case C-263/14, *Parliament v Council* ECLI:EU:C:2016:435, para. 44. On the problems of this test, Van Elsuwege, *supra* n. 25, p. 1004; and P. Koutrakos, *The Common Security and Defence Policy* (Oxford University Press 2013) p. 242. The Court has held that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other, see paras. 17-21 of ECJ 11 June 1991, Case-300/89, *Commission v Council* ('Titanium dioxide') [1991] ECR I-2867; see also ECJ 19 July 2012, Case C-130/10, *European Parliament v Council* ECLI:EU:C:2012:472, para. 45. AG Mengozzi in ECJ 20 May 2008, Case C-91/05, *Commission v Council ECOWAS* ECLI:EU:C:2008:288, para. 176 excluded recourse to a dual legal basis implying two different voting rules. The opposite conclusion was reached by AG Bot at paras. 33 and 39 of his Opinion in C-658/11. In its grand chamber judgment, as well as in Case C-263/14, *supra* n. 27, the Court did not decide directly on the points raised by the AG; therefore it has still not yet been explicitly ruled out whether it is possible to adopt a decision on a substantive dual legal basis.

²⁸ Including internal competences.

²⁹ For this reason, Art. 7 TEU establishes a system for ensuring Member State compliance with EU fundamental values.

yet sufficiently concrete to be meaningful; the generic terms ‘values’ and ‘security’ are further defined in Articles 2 and 42(1) TEU;³⁰ integrity should be considered to be a factual determination and only relatively debatable; ‘independence’ and ‘fundamental interests’ are open-ended provisions which can be adapted over time to conform to varying political scenarios and the vagaries of public opinion.

ARTICLE 21(2)(a)

‘(a) safeguard its values, fundamental interests, security, independence and integrity;’

Article 21(2)(a) is an all-encompassing clause that covers all other objectives of the Union’s external action. However, institutions do not treat it as a general clause, nor as hierarchically superior. Most authors agree that the wording of letter (a) may be used for CFSP measures³¹ – and indeed since CFSP comprises security and defence (this is one of the few things we know for sure) it is hard to see how safeguarding the Union’s security, independence, and integrity would not be part of that policy.

The wording of letter (a) is nonetheless used for TFEU competences. In the *Front Polisario* case,³² the applicants challenged the validity of a Common Commercial Policy Council Decision to conclude an agreement between the EU and Morocco insofar as, they submitted, the agreement applied to the disputed territory of Western Sahara.³³ In one of their pleas, the applicants relied on Article 21(2) TEU and submitted that the agreement was contrary to the Union’s values because the EU would have disregarded, in concluding the Treaty, UN resolutions and international law.

³⁰ Security is further defined in Art. 43(1). J. Schmidt, ‘Common Foreign and Security Policy and European Security and Defence Policy after Lisbon: Old Problems Solved?’, 5 *Croatian Yearbook of European Law and Policy* (2009) p. 240.

³¹ Eeckhout, *supra* n. 24, p. 169; Van Elsuwege, *supra* n. 25, p. 1006; Koutrakos, *supra* n. 26, p. 420.

³² ECJ 13 March 2014, Case C-512/12, *Front Polisario v Council* ECLI:EU:T:2015:953.

³³ Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

The General Court, though, had no qualms about linking diplomatic 'economic relations' to the values of Article 21(2)(a) TEU. Rejecting the applicant's plea, it stated that

'According to the case-law, the EU institutions enjoy a wide discretion in the field of external economic relations which covers the agreement (...). Consequently, it cannot be accepted that it follows from the "values on which the European Union is based", or the provisions relied on by the Front Polisario in the present plea [*inter quas* Article 21(2)], that the conclusion by the Council of an agreement with a third State which may be applied in a disputed territory is, in all cases, prohibited'.³⁴

Moreover, issues of 'energy security' (steadiness of supply and acquisition from safe and sustainable sources) are managed using a TFEU legal basis (Article 194(2) TFEU).³⁵ An example is the 'Gas Security' Regulation, whose aim, in light of EU dependence on import in this sector, is to improve the Union's response to supply shortages.³⁶ While the EU pursues the security of its gas supply by decreasing dependence on third countries, thereby increasing its independence,³⁷ the issues are never treated as a CFSP competence. For example, since 2009 only three of the nineteen non-binding agreements mentioning energy that have been concluded by the EU with third countries were signed or co-signed by the High Representative for the Union Foreign Affairs and Security Policy.³⁸

ARTICLE 21(2)(b)

'(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;'

³⁴ Para. 165. The final outcome of the case was nonetheless the annulment of the agreement insofar as it extended to Western Sahara, but on appeal the Court of Justice reversed the judgment because it found that the agreement did not apply to Western Sahara.

³⁵ Following the European Commission's adoption in February 2015 of a 'Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy', a new Gas Regulation was proposed in 2016 (Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No. 994/2010).

³⁶ Regulation 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, 5th Recital.

³⁷ The European Union Energy Security Strategy of 2014 warns that '[t]he most pressing energy security of supply issue is the strong dependence from a single external supplier'.

³⁸ The data are from B. Van Vooren and R. Wessel, *EU External Relations Law* (Oxford University Press 2014) for instruments up to 2014; the data after that date were calculated by the author.

Cases that involve support for democracy in non-EU countries that have been decided by the General Court in the context of the review of restrictive measures can help to illustrate that the Court and the Council agree that the wording of Article 21(2)(b) is a CFSP objective.³⁹

In *Al Matri*,⁴⁰ the applicant had challenged restrictive measures adopted by the Council. In reaction to the political turmoil in Tunisia and with the aim of supporting democracy in that country, in the spring of 2011 the EU imposed sanction on individuals

‘responsible for misappropriation of Tunisian State funds and who are thus depriving the Tunisian people of the benefits of the sustainable development of their economy and society and undermining the development of democracy in the country’.⁴¹

One of the applicant’s legal pleas had been that he lacked the criteria to be included on the list of people subject to the sanction. The Court instead held that the Council had been precise in formulating the criteria, i.e. persons responsible for the ‘misappropriation of Tunisian State funds’ (Article 1 Decision 2011/72). The General Court also noted that the wording of that provision was ‘perfectly consistent with the Council’s objectives’. It was evident from the recitals in the preamble to Decision 2011/72, the Court went on to state,

‘that that decision is intended to support the efforts of the Tunisian people to establish a “stable democracy”, while helping them to enjoy the “benefits of the sustainable development of their economy and society. Such objectives, which are among those referred to in Article 21(2)(b) and (d) TEU, are designed to be achieved by a freezing of assets the scope of which is, as in this instance, restricted to those responsible” for misappropriation of “Tunisian State funds” and their associates, that is to say, to the persons whose actions are liable to have jeopardised the proper functioning of Tunisian public institutions and bodies linked to them’ (paragraph 46).⁴²

*Ben Ali*⁴³ was another case stemming from the measures contested in *Al Matri* and adopted against individuals suspected of money laundering in view of the

³⁹ See also GC 10 October 2014, Case T-720/14, *Rotenberg* ECLI:EU:T:2016:689 para. 176; and C-658/11 AG Opinion para. 119.

⁴⁰ GC 28 May 2013, Case T-200/11, *Al Matri* ECLI:EU:T:2013:275.

⁴¹ Second recital of Decision 2011/72/CFSP, with a similar formulation in Art. 1 thereof.

⁴² See also, in the same context, GC 28 May 2013, Case T-187/11, *Trabelsi* ECLI:EU:T:2013:273 para. 80; GC 30 June 2016, Case T-224/14, *CW* ECLI:EU:T:2016:375 para. 69 and GC 5 October 2017, Case T-165/15, *Mabrouk* ECLI:EU:T:2017:694 para. 64.

⁴³ GC 2 April 2014, Case T-133/12, *Ben Ali* ECLI:EU:T:2014:176.

'situation in Tunisia'. Again, the General Court held that the measures were compatible with the objectives of letters (b) and (d) insofar as the sanctions were aimed at supporting Tunisian democracy and were targeted at individuals being prosecuted by the Tunisian authorities (paragraph 62).

In *Tomana*,⁴⁴ the applicants had challenged the competence of the Council to adopt, on a CFSP legal basis, Decisions 2011/101 and 2012/97 against persons who were engaged in activities seriously undermining democracy, respect for human rights and the rule of law in Zimbabwe. The applicants acknowledged that supporting democracy, the rule of law and human rights (in addition to combating terrorism) were CFSP objectives but took issue with the Council and Commission competence to legislate criminal or civil law. The applicants submitted that those institutions enjoyed limited competence in that field – as set out in Articles 82 TFEU through 86 TFEU. Therefore, given the non-affectation clause of Article 40 TEU, in their submission

'neither the Council nor the Commission has competence to use the Common Foreign and Security Policy in order to impose a freezing of funds or a travel ban on individuals simply on the basis that they are alleged to have been involved in the past in crimes or serious misconduct'. (paragraph 90)

The General Court found that

'it is clear from a reading of Article 21 TEU in conjunction with Article 29 TEU (...), that the adoption of measures intended to advance, in the rest of the world and, consequently, in Zimbabwe, democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, may be the subject of a decision based on Article 29 TEU', (paragraph 93)

and referred to paragraph 46 of *Al Matri*. Advocate General Bot's Opinion in Case C-658/11 arguably puts a finer point on the argument: CFSP, in particular Common Security and Defence Policy, may 'also contribute to the fight against other forms of crime [other than terrorism]'.⁴⁵

The case law on restrictive measures adopted to foster the rule of law in Ukraine remains in line with previous jurisprudence. In *Yanukovych*, the applicant had argued that the CFSP sanction imposed upon him did not actually serve to pursue its declared CFSP objective because it had not been proved that the applicant had undermined democracy, the rule of law or human rights in Ukraine. The Court confirmed the validity of the CFSP after scrutinising the compatibility of the act

⁴⁴ GC 22 April 2015, Case T-190/12, *Tomana* ECLI:EU:T:2015:222.

⁴⁵ Para. 103.

with the ‘objectives of the CFSP stated in Article 21(2)(b) TEU’ – thereby acknowledging that the wording of letter (b) could be a CFSP objective.⁴⁶ The link between Article 21(2)(b) and CFSP was upheld in *Yvanyushchenko*,⁴⁷ in which the Court stated that the objectives of CFSP ‘are defined, in particular, in Article 21(2) (b) TEU’ (paragraph 68). The same wording was used in *Klymenko*,⁴⁸ in which the General Court additionally provided a non-exhaustive list of principles and standards which may fall within the concept of ‘the rule of law’. Those principles

‘include the principles of legality, legal certainty and the prohibition of arbitrary exercise of power by the executive, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law.’

In *Ipatau*, the General Court added guarantees of fair and independent elections to the list.⁴⁹ All these principles, therefore, can be pursued validly through CFSP acts: for example, restrictive measures may be implemented to target individuals who have put any of the aforementioned aspects of the rule of law in peril.⁵⁰

Finally, in a plea before the Court in Case C-263/14 (discussed further below), the Council had argued that an international agreement whose sole purpose was the promotion of the rule of law and respect for human rights indeed pursued exclusively CFSP aims.⁵¹

Institutions have interpreted the requirement of Article 21(2)(b) to mean that it does not matter where in the world democracy, the rule of law, and human rights are being fostered: the EU is still pursuing its CFSP regardless of location. This approach is perfectly in line with the wording of the TEU, which does not place any regional limitations on the overall objective of EU external action. The objective of Article 21(2)(b) TEU is valid everywhere in the world. Indeed, as a matter of logic and consistency these objectives are also valid *within* the EU: Article 2 TEU states that the EU is founded on ‘the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ etcetera.

The only meaningful alternative interpretation would have been to circumscribe these values to the EU and its immediate neighbours. While Article 21(2)(b) is not limited in regional scope, the EU also has a specific foreign policy objective for its environs: Article 8(1) TEU.

⁴⁶ GC 19 July 2017, Case T-348/14, *Yanukovych* ECLI:EU:T:2016:508 para. 88.

⁴⁷ GC 8 November 2017, Case T-246/15, *Yvanyushchenko* ECLI:EU:T:2017:789.

⁴⁸ GC 8 November 2017, Case T-245/15, *Klymenko* para. 69.

⁴⁹ GC 23 September 2014, Case T-646/11 *Ipatau* ECLI:EU:T:2014:800.

⁵⁰ Other cases which reached the same conclusion are GC 7 July 2017, Case T-215/15 *Azarov* ECLI:EU:T:2017:479 para. 83; GC 27 July 2017, Case T-221/15, *Arbuzov* ECLI:EU:T:2017:478 para. 103.

⁵¹ Case C-263/14, *supra* n. 27, para. 36.

ARTICLE 21(2)(c)

'(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;'

Article 21(2)(c) has been used many times by the Council explicitly to establish sanctions against the Islamic State and Al Qaeda,⁵² as well as for other instruments aimed at terrorism.

In Case C-130/10,⁵³ the European Parliament had challenged the Council's adoption of a Regulation imposing sanctions against persons associated with Al Qaeda and the Taliban. The Regulation was adopted under a CFSP legal basis, but the Parliament submitted that it should have been adopted under Article 75, the area of freedom, security and justice. Following the *Kadi* judgments,⁵⁴ the Court held that terrorism constituted a threat to international peace and security and therefore could be fought with CFSP measures – thus implying that the wording of letter (c) could be a CFSP objective. The same position was expressed by the Court in *Rosneft*, a case brought by a Russian company against measures imposed by the EU in light of the confrontation in Ukraine.⁵⁵ In a consistent line of jurisprudence, the Court has acknowledged that the EU could adopt CFSP measures

'designed to protect essential European Union security interests and to maintain peace and international security, in accordance with the specified objective, under the first subparagraph of Article 21(1) and Article 21(2)(c) TEU, of the Union's external action'.⁵⁶

⁵² Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, 8th recital.

⁵³ Case C-130/10, *supra* n. 27.

⁵⁴ ECJ 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi* ECLI:EU:C:2008:461; ECJ 18 July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* ECLI:EU:C:2013:518 para. 103; *Kadi II* (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P) ECLI:EU:C:2013:176 AG Opinion paras. 73-74.

⁵⁵ *Rosneft* challenged the validity of certain provisions of Council Decision 2014/512/CFSP of 31 July 2014, concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229/13) and of Council Regulation (UE) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229/1).

⁵⁶ Para. 112. See also GC 11 January 2017, Case T-255/15, *Almaz Antey v Council* ECLI:EU:T:2017:25 para. 99; GC, Case T-262/15 *Kiselev* ECLI:EU:T:2017:392 paras. 58 and 81; *Rotenberg*, *supra* n. 39, para. 176.

But terrorism, under EU law, can be fought with CFSP and area of freedom, security and justice measures. Examples of the latter are the Passenger Name Record Directive for the prevention, detection, investigation and prosecution of terrorism, which provides for the transfer and processing of passenger data of flights to or from outside the EU,⁵⁷ and the traceability of money transfers regulation, which sets rules on information regarding providers and recipients of funds in order to prevent, detect, and investigate terrorism financing.⁵⁸

What, then, is the criterion for distinguishing between the area of freedom, security and justice and CFSP? It is worth taking a closer look at the Opinion of Advocate General Bot in Case C-130/10: acknowledging that Article 21(2)(c) is a CFSP objective, he suggested that the fight against terrorism could be a CFSP competence.⁵⁹ The Advocate General admitted that the relationship between Article 75 TFEU and CFSP is one of complementarity in the fight against terrorism, and suggested a precise criterion to delimit the two competences: it is CFSP if the EU is acting pursuant to a decision of the UN Security Council⁶⁰ or if it aids third states in combatting terrorism in *their* territory.⁶¹ Both criteria, however, have their flaws. The mere fact that the EU is acting pursuant to a Security Council decision cannot in itself determine the nature of an EU competence, absent any rule about it in the Treaties. Moreover, the difference between the area of freedom, security and justice and CFSP in the fight against terrorism does not lie in the distinction between internal and external security. Advocate General Bot himself wrote:

‘I refuse to subscribe to the Council’s view that the delimitation of the respective spheres of application of Articles 75 TFEU and 215(2) TFEU should be based on a distinction between “internal” terrorists, “external” terrorists and “international” terrorists. Such a categorisation is contrary to the very nature of terrorism, which, by attacking common values and the very foundations of the rule of law, affects the entire international community, irrespective of the geographical scale of the threat’.

In other words, the distinction between ‘internal’ and ‘external’ terrorism would run counter to common sense.

⁵⁷ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

⁵⁸ Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No. 1781/2006.

⁵⁹ See below.

⁶⁰ See also AG’s Opinion in Case C-658/11, *supra* n. 11, para. 114.

⁶¹ AG’s Opinion in Case C-130/10, *supra* n. 11, para. 81.

In the judgment on the conclusion of a Treaty with Tanzania involving the interaction of CFSP with the area of freedom, security and justice, the European Court of Justice confirmed that actions aimed at preserving international peace and security fell within CFSP.⁶² The case, however, warrants further analysis.

The Agreement between the EU and Tanzania established the conditions of transfer to Tanzania of suspected pirates captured by the EU-led naval force. The European Parliament challenged the fact that the Council had concluded the Treaty on a CFSP legal basis. In the Parliament's submission, the Agreement did not relate exclusively to CFSP; it had a twofold purpose in that it also touched upon the fields of judicial cooperation in criminal matters and police cooperation – or in other words, the area of freedom, security and justice. Accordingly, it could not be adopted on a substantive CFSP legal basis. The Council responded that the Agreement had been concluded in connection with a military crisis management operation (known as Operation Atalanta) that had been taken up pursuant to a UN Security Council resolution and that it did not concern the area of freedom, security and justice; it had as its sole aim the promotion of the rule of law and respect for human rights. The Court held that the fact that certain provisions of the Agreement, taken individually, had a certain affinity with the area of freedom, security and justice, was not in itself sufficient to determine the appropriate legal basis. The aim of the Agreement, the Court found, was to establish a mechanism that was an essential element in the effective realisation of the objectives of Operation Atalanta, in particular since it strengthened, in a lasting way, international cooperation with respect to preventing acts of piracy (paragraph 49). The aim of Operation Atalanta, and therefore of the Agreement intimately linked to it, was to preserve international peace and security: the pursuit of this objective led the Court to conclude that the Agreement could be adopted by a CFSP decision (paragraph 54).

The areas of Freedom, Security and Justice and Common Foreign and Security Policy have, as the names imply, one common element: protecting security. This leaves a few questions unanswered, not to mention uncertainty about the nature of the EU's competence to conduct migration policy. Even though Case C-263/14 concerned the area of freedom, security and justice in general and not migration in particular, Advocate General Kokott suggested the following criterion for distinguishing CFSP from the area of freedom, security and justice, which may be extrapolated to cover migration: measures fall under CFSP if they are characterised as strengthening extra-EU security (the 'international security' of Article 21(2)(c)); but are otherwise adopted on the TFEU legal basis of the Area of Freedom, Security and Justice for matters of *internal* security or cooperation

⁶² Case C-263/14, *supra* n. 27.

within the Union.⁶³ The Court did not explicitly endorse this reasoning, but did follow the Advocate General in the outcome of the decision. The Court's avoidance of pronouncing on a definitive criterion for solving the issue of the boundaries between CFSP and the area of freedom, security and justice guarantees a degree of flexibility that may be diplomatically useful, but, given the current state of EU external relations law, is detrimental to legal certainty.

In any case, Advocate General Kokott's distinction does not stand the test of institutional practice: cooperation on security within Union borders has also been pursued in regulating migration matters by CFSP acts.

Graham Butler has analysed how CFSP has been stretched to encompass rules on migration.⁶⁴ The Union has used CFSP to prevent individuals from entering its territory, for instance in the case of EU actions against Libya⁶⁵ and Ukraine:⁶⁶ the enacted sanctions banned certain individuals from travelling to the EU. The same author also noted that the EU response to the migration crisis has encompassed both CFSP and non-CFSP measures.⁶⁷

In the aforementioned cases – sanctions and military missions – CFSP was used to monitor who enters the Union because the objective and focus of the legal act was the pursuit of international security, not internal security – or so Advocate General Kokott's reasoning would demand. This explanation is, however, unconvincing. First, why would the seizure of vessels used for smuggling people in their attempt to reach an EU Member State not be a matter of EU internal

⁶³ As the Council and the Kingdom of Sweden very rightly state, the crucial factor is that the relevant rules in Articles 82 TFEU and 87 TFEU deal only with cooperation *within the Union*. This can be seen, on the one hand, from a glance at the wording of the two provisions, but, on the other, it also follows from the concept of the area of freedom, security and justice, to the creation of which they contribute. It is the *Union* that provides *its citizens* with such an area and it is the *Union* that *constitutes* that area (Article 67(1) TFEU), with the emphasis on an area *without internal frontiers* (Article 3(2) TEU and 67(2) TFEU). By contrast, the contested decision — or the disputed agreement which it approves — does not regulate judicial or police cooperation within the Union. Nor does it affect or alter such cooperation in accordance with the last variant of Article 216(1) TFEU. Rather, contrary to the claim made by the Parliament and the Commission, the Member States' power to prosecute international crimes like piracy is completely unaffected by the agreement. The sole subject of the agreement is cooperation with the authorities of Tanzania, a third State, and then only if the authorities of the Member States do not take on the prosecution themselves': AG's Opinion in Case C-263/14, paras. 63-64 (emphasis in the original).

⁶⁴ G. Butler, 'Forcing the law to overlap? EU foreign policy and other EU external relations in times of crisis', in E. Kuźelewska et al. (eds.), *Irregular Migration as a Challenge for Democracy* (Intersentia 2018).

⁶⁵ 2011/137/CFSP.

⁶⁶ 2014/145/CFSP.

⁶⁷ Butler, *supra* n. 64. An example of a CFSP decision was Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR Med) OJ L 122/31, establishing Operation Sophia.

security?⁶⁸ Second, even if it were taken for granted that no matter of internal security was involved, EU institutions have been inconsistent in the use of the competences to pursue this objective. Although certain measures on migration have been based on CFSP, the border agency Frontex as well as the European Common Asylum System have instead been adopted on an area of freedom, security and justice legal basis.

Phenomenologically, there is no difference between intercepting people at sea under CFSP and doing it under the TFEU:⁶⁹ it certainly makes no difference to the persons being rescued. The differences lie exclusively in the procedure for the adoption of the act and other legal technicalities. But the distinction between CFSP and the area of freedom, security and justice is barely identifiable and cannot be rationalised and defined by a sound legal principle. In particular, while the issue of boundaries between CFSP and other external action competences is a recurrent one, the conflation of CFSP and the area of freedom, security and justice is clearer.

ARTICLE 21(2)(d)

‘(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;’

In *Al Matri*, the General Court found that the EU decision to support the efforts of the Tunisian people to establish a ‘stable democracy’ while helping them to enjoy the ‘benefits of the sustainable development of their economy and society’ fell under Article 21(2)(d) (as well as Article 21(2)(b), as pointed out above).⁷⁰

In *Ezz*,⁷¹ the General Court agreed that a Council Decision establishing sanctions against certain Egyptian individuals had involved Articles 21(2)(b) and (d) and was therefore ‘fully based on CFSP’ (paragraph 44). The objectives of that decisions were twofold: first,

‘to support the peaceful and orderly transition to a civilian and democratic government in Egypt based on the rule of law, with full respect for human rights and fundamental freedoms’

⁶⁸ Arts. 1(1) and 2(2) Council Decision (CFSP) 2015/778, *supra* n. 67. Applying the rationale proposed by AG Bot in the Opinion in Case C-658/11, *supra* n. 11, para. 112, this is an area of freedom, security and justice competence.

⁶⁹ Staying on the distinction between the area of freedom, security and justice and CFSP: ‘Of course, the distinction is not always clear as it is true that the development of a form of crime in a certain region may pose a threat to both the internal security of the Union and the stability of the region concerned’: AG’s Opinion in Case C-658/11, *supra* n. 11, para. 113.

⁷⁰ Para. 46.

⁷¹ GC 27 February 2014, Case T-256/11, *Ezz* ECLI:EU:T:2014:93.

and, second, to support ‘efforts to create an economy which enhances social cohesion and promotes growth’.⁷²

Al Matri and *Ezz* are quoted as precedents in other cases of the General Court involving similar issues, such as *Klyuyev*⁷³ and *Yanukovych*.⁷⁴

It would appear, therefore, that the wording of Article 21(2)(d) is also a CFSP objective. It is not all that farfetched to link the eradication of poverty to international security, and therefore to EU security and defence policy.

TFEU competences, however, use similar wording. Chapter One of Title Three of the TFEU provisions on Union external action is entirely dedicated to development cooperation – the ultimate objective of which is akin to letter (d): ‘Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty’ (Article 208(1) TFEU). Development cooperation, as Professor Koutrakos has noted, had featured prominently in the (former) EU Security Strategy of 2003,⁷⁵ as do sustainable development goals in the 2016 Global Strategy.⁷⁶ Moreover, there is a TFEU-based financing mechanism for CSDP missions: the Instrument contributing to Stability and Peace,⁷⁷ previously known as the Instrument for Stability, which provides short and mid-term assistance for conflict prevention, crisis response and peace building actions around the world. Its Article 5 falls under the remit of the European Commission Department for International Cooperation and Development – EuropeAid. Activities linked to crisis management (Article 3) and peace building (Article 4) are managed by the service for Foreign Policy Instruments, thus implementing the CFSP budget.⁷⁸

The ‘centre of gravity’ test might be the appropriate criterion for managing the interaction between CFSP and development cooperation, as can be inferred from the *Framework Agreement with the Philippines* case⁷⁹ – although the issue there involved the delimitation of development cooperation and the area of freedom, security and justice. In that case, the Court specified that Union action in development cooperation ‘is not limited to measures directly aimed at the

⁷²This point of the General Court was confirmed for procedural reasons on appeal in ECJ 5 March 2015, Case C-220/14, *Ezz v Council* ECLI:EU:C:2015:147, paras. 43–44.

⁷³GC 21 February 2018, Case T-731/15, *Klyuyev v Council* ECLI:EU:T:2018:90, para. 85.

⁷⁴*Yanukovych*, *supra* n. 46, para. 95.

⁷⁵Koutrakos, *supra* n. 27, p. 212.

⁷⁶Shared Vision, Common Action: A Global Strategy for the European Union’s Foreign and Security Policy. The word ‘development’ appears 67 times in the 48 pages of text.

⁷⁷Regulation (EU) No. 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace.

⁷⁸European Parliament, ‘Financing of CSDP missions and operations’ available at <[www.europarl.europa.eu/RegData/etudes/ATAG/2016/577958/EPRS_ATA\(2016\)577958_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/577958/EPRS_ATA(2016)577958_EN.pdf)> visited 23 July 2018.

⁷⁹ECJ 11 June 2014, Case C-377/12, *Commission v Council* ECLI:EU:C:2014:1903.

eradication of poverty, but also pursues the objectives referred to in Article 21(2) TEU, such as the objective, set out in Article 21(2)(d), of fostering the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' (paragraph 37). The Court decided nonetheless that

'even if a measure contributes to the economic and social development of developing countries, it does not fall within development cooperation policy if it has as its main purpose the implementation of another policy'. (paragraph 44)

Moreover – and this is not an external action competence according to the Treaty – Articles 198-203 TFEU authorise the EU to conclude agreements with overseas territories. The purpose of these association agreements 'shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole' (Article 198 TFEU).⁸⁰

ARTICLE 21(2)(e)

'(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;'

While the wording of Article 21(2)(e) has not been used for purely CFSP acts, it has certainly been used to conclude Treaties that bear significant political and security implications. A recent dramatic case was the renegotiation in 2014 of the association agreement concluded with Ukraine.⁸¹ In that case, economic integration was used instrumentally to pursue political dialogue.⁸² The inherently dual legal nature of the Association Agreement also emerged from the legal bases of the act. In addition to Article 217 TFEU (association agreements), these included Article 31 TEU and 37 TEU (both of which are CFSP legal bases).⁸³

The further aims of the association are, *inter alia*,

'to promote, preserve and strengthen peace and stability in the regional and international dimensions in accordance with the principles of the United Nations

⁸⁰ See, e.g. Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union.

⁸¹ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part of 21 March 2014 OJ L161/3.

⁸² See e.g. 6th recital of the Agreement.

⁸³ See also Art. 7 of the Agreement.

Charter, and of the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the objectives of the Charter of Paris for a New Europe of 1990' [i.e. Article 21(2)(c)] and 'to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area' [i.e. Article 21(2)(e)].

Article 21(2)(e) is therefore used to implement Common Commercial Policy, one objective of which is contribution to

'the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers' (Article 206 TFEU).

The example of the association agreement with Ukraine raises the question of whether it is at all possible to tell the two objectives apart.⁸⁴ That question becomes even more fraught with meaning given the subsequent developments in Ukraine. Even though it might still be too soon to apportion blame and draw up the historical balance, the political atmosphere in which the association agreement was negotiated later degenerated into tension between the EU and Russia and an armed conflict in Eastern Ukraine. The situation in fact posed a threat to, and then breached, international security. As a matter of law, it was tackled by the CFSP.⁸⁵

Procurement in the field of defence and security, which had traditionally been a domain of the Member States, has been regulated by directive since 2009.⁸⁶ Article 46 TFEU nonetheless importantly states that:

'any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material' – albeit no distortion of competition shall ensue regarding products not intended for military purposes.

⁸⁴The Council conclusions adopted on the day it adopted the negotiating directives for the agreement in January 2007 would suggest otherwise: 'The Council and the Commission declare that [...] through this Agreement, the European Union aims to build an increasingly close relationship with Ukraine, aimed at gradual economic integration and deepening of political cooperation'.

⁸⁵See above the mention of Rosneft and CFSP measures adopted by the EU.

⁸⁶Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, on which see M. Blauburger and M. Weiss, "If you can't beat me, join me!" How the Commission pushed and pulled member states into legislating defence procurement', 20(8) *Journal of European Public Policy* (2013) p. 1120.

More generally, the link between free trade and international security is a central tenet of both neo-liberalism and contemporary world politics.⁸⁷ Cobden is credited with saying that 'Free trade is God's diplomacy. There is no other certain way of uniting people in the bonds of peace'.⁸⁸

Another example of the interaction between CFSP and Common Commercial Policy is the regulation of trade in dual-use goods, i.e. products capable of being used for military as well as civilian purposes. In two classic 1995 decisions, *Werner*⁸⁹ and *Leifer*,⁹⁰ the Court established that national measures restricting the export of dual-use goods must be compatible with the rules of the common commercial policy.⁹¹ Specifically, in *Werner* the Court stated that

'a measure (...) whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives'.

The EU later repealed⁹² the previous dual-use goods control system, which had been based on both TFEU and CFSP instruments.⁹³ And it did so in the firm conviction that, respecting the Court's reasoning, no CFSP measure could regulate these goods.⁹⁴ To date, the EU export control regime is governed by Regulation 2009/428/EC (with subsequent amendments adopted on a Common Commercial Policy legal basis). However, Professor Dashwood is right in arguing that the Court's jurisprudence is not conclusive of the fact the Union enjoys an exclusive Common Commercial Policy competence to regulate the trade in dual-use goods: the cases at issue have instead simply restated that a Member State must respect the Common Commercial Policy even when it intends to further its CFSP aims.⁹⁵ This is yet another instance of the problem of fragmented EU diplomacy: the case law, subsequent scholarly comments, and EU institutional practice merely bear witness to the fact that although foreign policy is in practice indivisible, it is

⁸⁷ T. Paine, *Common Sense*, 1st edn (1776). See also *Front Polisario*, discussed under Art. 21(2)(a).

⁸⁸ Quoted in D. Tussie, 'Trade Diplomacy' in A.F. Cooper, J. Heine, R. Thakur (eds.), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press 2013).

⁸⁹ ECJ 19 October 1995, Case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v Germany* [1995] ECR I-3189.

⁹⁰ ECJ 17 October 1995, Case C-83/94, *Criminal Proceedings against Peter Leifer and Others* [1995] ECR I-3231.

⁹¹ A. Dashwood, 'Dual-use Goods: (Mis)Understanding Werner and Leifer', in D. Arnall et al. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008).

⁹² Regulation 1334/2000.

⁹³ More precisely, on the CFSP and the Treaty on the European Community.

⁹⁴ Dashwood, *supra* n. 91, p. 357.

⁹⁵ *Ibid.*, p. 358.

carried out by various interrelated diplomatic means, some military, some economic, etc.

ARTICLE 21(2)(f)

‘(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;’

This letter as well is amenable to the pursuit of both TFEU and ‘security’ objectives.

The Paris Agreement was ratified by the EU pursuant to Article 192(1) TFEU,⁹⁶ which refers to the objectives of Article 191 TFEU such as ‘preserving, protecting and improving the quality of the environment and (...) prudent and rational utilisation of natural resources’.

However, energy policy is of course also pursued by means of CFSP acts: the most outstanding example is probably the series of measures adopted pursuant to the ‘nuclear deal’ with Iran.⁹⁷ As mentioned under Article 21(2)(a), energy policy is subject to underlying geopolitical security concerns regarding EU energy dependence. A recent example of the fact that diplomacy is essentially a concerted endeavour is the newly launched Alliance for the Sahel, an initiative open to EU Member States for the assistance of countries in that African region. In the Strategy for Sahel, which was drafted by the European External Action Service (a body established pursuant to CFSP),⁹⁸ the alliance has four inextricably linked objectives related to development and conflict resolution, politics, security, and the struggle against extremism. The fight against change is listed under ‘development and conflict resolution’.⁹⁹

ARTICLE 21(2)(g)

‘(g) assist populations, countries and regions confronting natural or man-made disasters;’

⁹⁶Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change.

⁹⁷E.g. Council Decision (CFSP) 2015/1336 of 31 July 2015 amending decision 2010/413/CFSP concerning restrictive measures against Iran.

⁹⁸Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service, OJ L 201/30.

⁹⁹European Union External Action Service, ‘Strategy for Security and Development in the Sahel’, available at <eeas.europa.eu/sites/eeas/files/strategy_for_security_and_development_in_the_sahel_en_0.pdf> visited 23 July 2018.

Article 222 TFEU is a 'solidarity clause' which provides that if a Member State is

'the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities'.

Even though the clause is in the TFEU,¹⁰⁰ and is similar to Article 196 TFEU, there are grounds for considering it in relation to CFSP competence.¹⁰¹

The Council Decision implementing Article 222 was adopted under the TFEU,¹⁰² but at the initiative of a joint proposal presented by the High Representative and the Commission;¹⁰³ the Council decides in accordance with Article 31(1) TEU – in other words, a CFSP legal basis – whenever a decision has defence implications. The Council Decision refers, in its 5th recital, to the structures developed under the Common Security and Defence Policy as instruments developed pursuant to the solidarity clause.¹⁰⁴ Therefore, even though the solidarity clause is, matter-of-factly, a TFEU competence, its nature is 'hybrid': once again an instance in which rationalisation of the CFSP/TFEU distinction is hardly possible.

EU law also offers a 'purely' CFSP alternative in the spirit of Article 21(2)(g), the 'mutual defence' clause of Article 42(7):

'If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power'.

¹⁰⁰The competence to adopt measures for civil protection was created for and assigned to the Community in the Treaty of Maastricht: S. Villani, 'The EU Civil Protection Mechanism: instrument of response in the event of a disaster', 26 *Revista Universitaria Europea* (2017) p. 121 at p. 127.

¹⁰¹GC 30 September 2015, Case T-450/12 *Anagnostakis v Commission* ECLI:EU:T:2015:739, para. 60; ECJ 12 November 2015, Case C-493/13 P, *Elitaliana v EULEX Kosovo* ECLI:EU:C:2014:2416, AG Opinion, para. 17; AG Bot's Opinion in Case C-130/10, *supra* n. 11, para. 65. For details, see L. Lonardo, 'Integration in European Defence: Some Legal Considerations', 2(3) *European Papers* (2017) p. 887 at p. 895.

¹⁰²So is the Civil Protection Mechanism, established and implemented on Art. 196 TFEU. Decision 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism and Council implementing Decision 2014/762/EU; and the previously mentioned Instrument contributing to Stability and Peace.

¹⁰³'Joint proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause' presented, pursuant to Art. 222(3) TFEU, on 21 December 2012 by the High Representative of the EU for Foreign Affairs and Security Policy and the European Commission.

¹⁰⁴Council Decision 2014/415/EU of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause. However, the Council Decision does not provide a general framework for dealing with actions having military defence implications, because the joint proposal excluded 'defence implications'.

The distinction between Articles 42(7) and 222 TFEU is not a purely political choice that Member States can make at their own discretion.¹⁰⁵ The solidarity obligations are not limited to those stemming from matters of mutual defence. The obligations entail prevention, protection, and assistance in the event such a case should present itself. Moreover, it is debatable whether Article 222 TFEU could also be used to suppress social unrest (whereas this would certainly not be the case for Article 42(7) TEU).¹⁰⁶

ARTICLE 21(2)(h)

‘(h) promote an international system based on stronger multilateral cooperation and good global governance.’

Article 21(2)(h) sums up the previous objectives and additionally suggests a *modality* of diplomacy to go alongside them. The European Global Strategy drafted by the European External Action Service and presented by the High Representative in June 2016, despite not being a binding CFSP act, embraces this language: European priorities ‘are best served in an international system based on rules and on multilateralism’.¹⁰⁷

However, it is the system of treaties, agreements, and cooperation established by the EU under both TFEU and CFSP competences, even more so than the non-binding declarations of the institutions, that really serves to pursue this objective. The EU works closely with NATO,¹⁰⁸ has agreements for cooperation on security and defence with other countries,¹⁰⁹ has developed a network of economic and political association with all its geographical neighbours, and either it or the collective Member States are party to all major UN international treaties.

CONCLUSION

The distinction drawn in EU law between CFSP and other TFEU competences does not reflect the reality of international relations and diplomatic practice.

¹⁰⁵ Lonardo, *supra* n. 101, p. 895.

¹⁰⁶ S. Myrdal and M. Rhinard, ‘The European Union’s Solidarity Clause: Empty Letter or Effective Tool?’, 2 *Ui, Swedish Institute of International Affairs Occasional Papers* (2010) p. 17.

¹⁰⁷ European Global Strategy, *supra* n. 76, p. 4.

¹⁰⁸ See e.g. the EU-NATO Joint Declaration of 8 July 2016.

¹⁰⁹ E.g. Council Decision 2011/318/CFSP of 31 March 2011 on the signing and conclusion of the Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations (L143 1).

This article has argued that, given the arbitrariness of the distinction, the drafters of the Treaties more or less wittingly compelled EU institutions to adopt behaviour that is awkward, uselessly complicated, and at times incoherent. There were both practical and historical reasons for the distinction: CFSP law was, at its genesis, little more than a codification of the informal negotiations that took place in the decades before the Treaty of Maastricht between some or all Member State heads of state and government. The retention of the CFSP's legal distinctiveness might be a response to the Member State's need to maintain power 'when it matters': foreign policy is a domain at the core of state functions. But, as the rationale of Article 21(2) TEU suggests and the analysis of institutional behaviour has shown, there are no objectives exclusive to CFSP. All objectives specified under the eight letters of Article 21(2) have been used to pursue non-CFSP competences. Yet the same eight letters could have been CFSP objectives: as has been shown, there is a credible link between each of them and political or defence matters. While this is consistent with the desire to enhance the coherence of Union external actions, it also adds to the difficulty in delimitating the scope of CFSP.

The issue of boundaries is by no means specific to EU external relations law; it is a recurrent feature of the EU legal system and has featured prominently in the delimitation of Union and Member State tasks. The Court has for decades set the boundaries of EU competences, doing so in internal market cases¹¹⁰ as well as for external relations competences.¹¹¹ The same issue comes up in the definition of institutional power in a domain involving delicate economic and social choices – the Economic and Monetary Union.¹¹² Nonetheless, the impact of the issue of boundaries is equally profound in the domain of Union external action. The problems encountered in EU attempts to manage the distinction are manifold and are quite possibly a hindrance to EU diplomacy.¹¹³ As a matter of efficiency, EU institution and Member State actions would cause them less uncertainty if they could be sure that their actions were not at risk of judicial review and thus lengthy proceedings with an uncertain outcome. As a matter of constitutional law, the EU is compelled by the duty to ensure the consistency of its actions (Article 13 TEU) and in particular in its (broadly defined) foreign policy: the obligation is spelt out several times, in Articles 16(6), 18(4), 21(1), and 26 TEU. Finally, there is an underlying philosophical issue. EU law is in this case at a far remove from reality.

¹¹⁰C. Barnard, *The Substantive Law of the EU* (Oxford University Press 2013) p. 67 on the boundaries between Art. 110 TFEU and other Treaty provisions.

¹¹¹See e.g. A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (Sweet and Maxwell 2000).

¹¹²T. Tridimas, 'Banking Union: An Unfinished Story of Federalization', Conclusions of the XXVII FIDE Congress (2016).

¹¹³It would go beyond the scope of this article to discuss the separate issue of whether the EU imposes greater legal constraints on its foreign policy than do other federations or states.

This, however, is not necessarily a problem: law can be arbitrary, and does not always need to reflect practice. But in this case, it is even worse: the law strives here to impose a distinction that no longer makes any practical sense and therefore unnecessarily complicates the work of diplomats. Commentators and institutional actors alike have gone to great lengths to discover patterns in the case law that would solve this dilemma. This article has instead advanced the thesis that it would be useless – perhaps even counterproductive – to rationalise the distinction between CFSP and TFEU competences.

The current article therefore does not find it necessary to propose a criterion for the navigation of this ‘self-inflicted’¹¹⁴ EU eccentricity. Even though it has not particularly been advocated here, there is, in theory, an easy way out: abolish the distinction. This would require a Treaty amendment and a major restructuring of the EU’s constitutional architecture. Ironically, this is in practice exactly what happens at European Council meetings: items are not categorised as falling under CFSP or TFEU competences or given any other legal label for that matter: they are referred to by their ‘real life’ names. It is the European Council that ‘sets out the strategic interests and objectives of the Union in external relations’ (Article 22 TEU), elaborating on those of Article 21(2) TEU.¹¹⁵ Once again, it is the institution at the apex of Union foreign policy whose practices show that abolishing the distinction would result in smoother diplomacy.



¹¹⁴This is not meant to deny the historical and political reality faced by Member States for the retention of a CFSP, but only to reflect on the arbitrariness thereof.

¹¹⁵See also ECJ, 26 November 2015, Case C-660/13, *Council v Commission (Swiss Financial Contribution)* ECLI:EU:C:2015:787 AG Opinion, para. 106.