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The European Union from Maastricht to Lisbon

Institutional and Legal Unity out of the Shadows

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ABSTRACT

The EU was originally established in the Treaty of Maastricht in 1992 as a formal legal construct not entailing legal unity with the pre-existing EC. Almost 20 years later the Treaty of Lisbon explicitly ordains legal unity, thus catching up with legal and institutional practices, social reality and the perception of citizens and third states. This paper analyses the development of the legal system of the EU from the theoretical perspective of the institutional theory of law. We defend the thesis that already in the Treaty of Maastricht and its legal system an international organization with a unitary but complex legal character was established and has been subsequently operationalized in the institutional legal practices of the Union. We highlight in particular the unitary nature or otherwise of the political executive, both 'frontstage' and 'backstage'. Here too there is a sense of the originally largely invisible becoming structurally more visible.

A. Institutional Sedimentation

The European Union is first and foremost a legal construct. As lawyers well know it was formally established in the Treaty of Maastricht that entered into force on 1 November 1993. Its aims were relatively modest: to associate two new sets of issue areas with the existing EC treaties (respectively CFSP and – at that time – CJHA[1]) without replacing the existing treaties as well as the more radical aim of creating an economic and monetary union. The two new sets of issue areas ('pillars') would exist side by side (with a few general overarching provisions). Lawyers and politicians were vehement that there would be little to no "contamination" over and across. A Europe of 'bits and pieces' loomed [2] but did not materialize in practice in the manner expected. Our conclusion in the first edition of this book more than ten years ago (1999) was that already only five years later the Union, in general terms, had evolved, as an international organisation, into a legal system with a clear unitary character overarching a lot of – and sometimes very different – 'layers' of cooperation and integration. This conclusion was based on an analysis of the Treaty framework as amended by the Treaty of Amsterdam and the legal practices of the institutions of the Union since the Treaty of Maastricht.

In the past ten or more years, the evolution of the European Union has gone further, more or less along the lines we originally 'discovered' after five years of treaty implementation and legal practices. More than fifteen years after the Treaty of Maastricht, the new Lisbon Treaty (2007) in Article 1 TEU ordains that the Union 'shall replace and succeed the European Community'. Article 1 TEU does not come out of the blue. It rather reflects institutional realities that had evolved and ripened to such an extent that the formal provisions of the Treaty of Lisbon caught up with 'living' and sedimentary practices. On the one hand, the unitary character of the Union seems to be reinforced in terms of, for instance, the partial 'depillarization' that has taken place as well as the application of 'general principles of the Community' to the whole legal framework of the Union. On the other hand,

[1] CFSP is the abbreviation for the 'Common Foreign and Security Policy' and is commonly known in shorthand as 'the second pillar' since the Treaty of Maastricht. The 'third pillar' was initially constituted by CJHA (Cooperation in Justice and Home Affairs) but after certain policy areas (in particular asylum and immigration) were moved to the 'first pillar' (EC) in the Treaty of Amsterdam on 1 May 1999, the third pillar was reduced to PJCC (Police and Judicial Cooperation in Criminal Matters). CJHA acts adopted before 1 May 1999 remained in force insofar as they were not replaced by new EC acts. On 1 December 2009 PJCC was subsumed within the EU as a whole; here too PJCC acts adopted before 1 December 2009 remain in force insofar as they are not replaced by new EU acts.
[2] DM Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review* 1, 17–69.

the trend of harbouring, within the outer shell of the Union, various autonomous and interlinked entities with their own specific roles and legal regimes has been continued. Rather than thinking in terms of 'layers' implying images of vertical and horizontal separation it may be more appropriate to think rather of a looser and less sharply defined 'marbling' effect.

Legal unity is in any event the order of the day and no longer 'in disguise'. The new Lisbon Treaty has the advantage that it in one fell swoop improves the systemic visibility and structural clarity of European integration processes. At the same time this catches up with social reality and the perception of citizens and third states already from the early days that the EU constitutes an organizational and legal unity.[3] The 'verdict' of both the Court of Justice in developing the 'living' constitution over time and the framers of inter alia the Treaty of Lisbon is that the legal system – and also the political system – of the European Union as such is developing as an institutional and legal unity. Such a unitary institutional legal system creates spaces for developing a variety of sub-legal systems not only within the Union itself, but also within the separate policy areas, a reality most recently consolidated in the Treaty of Lisbon.

We begin by outlining in some detail our theoretical starting point for the analysis of the development of the legal system of the European Union as such, namely the 'institutional theory of law' (paragraph 2). This institutional approach constitutes in our view still the best possible theoretical framework for analyzing a complex modern legal system such as that of the European Union. In applying the core concept of this theory, 'legal institution', to the Treaty on European Union, we defend the thesis that already in this Treaty and its legal system an international organization with a unitary but complex legal character was established in 1992. Whether this legal 'picture' presented by the provisions of the TEU itself, is in fact operationalised in the institutional legal practices of the Union in the context of CFSP, CJHA and PJCC, is the focus of paragraph 3. Finally we make some concluding observations on the nature and refinement of the 'marbling techniques' employed both in the Treaty provisions and in their (future) operationalization in practice.

[3] See further DM Curtin and IF Dekker, 'The EU as a 'Layered' International Organization: Institutional Unity in Disguise?' in P Craig and G De Burca (eds), *The Evolution of EU Law* (Oxford, 1999) 83–137, at 83.

B. The European Union as an international organisation

1. Understanding 'legal institutions'

(a) Legal institutions

Before entering into the legal analysis of the European Union as an international organisation one needs at least some understanding of the legal concept of international organisation and what kind of social phenomena can be qualified as such. The problem is that, as far as matters of theory go, the law of international organisations is still somewhat immature.[4] We therefore tried in the earlier version of our contribution to frame a theoretical approach grounded in a general legal approach: the institutional legal theory.[5] In order to account for the plurality of legal phenomena, this theory conceives of the legal system as a system of so-called 'legal institutions'. In other words, legal institutions are the 'building blocks' of legal systems and are not to be seen as synonymous with organisations (or organs thereof) but are characterised as distinct legal systems governing specific forms of social conduct within an overall legal system of which they derive their validity. Ruiter defines a legal institution as "... a regime of legal norms purporting to effectuate a legal practice that can be interpreted as resulting from a common belief that the regime is an existent unity."[6] The element of legal 'unity' has institutional and substantive aspects. The institutional aspects refer to the fact that a legal institution is a system of rules and competences that originate – in the sense of validity – exclusively from, in the end, a single legal source.[7] It indicates that such an institution can be dealt with as a legally valid and more or less autonomous element within the overall legal system. Secondly, the unity of a legal institution implies that its legal system has to be 'coherent', meaning that the different parts of the legal regime of the institution are connected by common basic legal concepts uniting

[4] J Klabbers, *An Introduction to International Institutional Law*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 3.

[5] See, also for further references: Curtin and Dekker (n 3 above) 83–136; IF Dekker and RA Wessel, 'Governance by International Organizations: Rethinking the Normative Force of International Decisions' in IF Dekker and WG Werner (eds), *Governance and International Legal Theory* (Leiden: Martinus Nijhoff, 2004) 215–236.

[6] DWP Ruiter, *Institutional Legal Facts. Legal Powers and Their Effects* (Deventer: Kluwer, 1993) 358.

[7] Legal institutions are to be distinguished from other systems of rules governing specific social action in the context of a comprehensive social order. See about thse approaches, among others, DC North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990); JG March and JP Olsen, *Rediscovering Institutions. The Organizational Basis of Politics* (London: MacMillan, 1989).

competing and sometimes even contradictory conceptions of such basic legal concepts used in the different sub-systems of the institution.[8]

Legal institutions, thus, refer to entities – subjects and objects – and to properties of these entities – qualities and status – and to connections between those entities. On the basis of these distinctions it is possible to develop logically a quite simple classification of seven legal institutions.[9] We will come back to some of them in relation to the phenomenon of international organisations. On this point it suffice to say that *if* the concept of international organisations can be conceived of as a legal institution the question would be which kind of human linguistic activity could obtain validity as part of the legal regime of that institution, and which legal 'facts' would therefore have to be taken seriously by the relevant legal community. According to the institutional legal theory, the legal 'facts' that can obtain legal validity within legal institutions are a far more shaded differentiation in acts than the classical distinction between duty-imposing and power-conferring rules. In this respect the theory presents a classification of (also) seven different categories.[10] In day-to-day language, such legal acts consist of (a) a declaration of a legal states of affairs; (b) a statement of purpose; (c) a command to perform; (d) a commitment to assume an obligation; (e) a recommendation of a course of conduct; (f) an assertion of a state of affairs; and (g) an expression of a state of mind. Examples of all of these norms and rules can be found in European Union law.[11] This approach makes it possible, regardless of the fact that the limits of the legal system are still defined by the criterion of validity, to account for a larger number of results stemming from human activity that qualify as legal acts. Besides legal obligations to follow a certain course of action, there are other elements of a legal regime – such as principles, inducements and purposes – which are also institutional legal realities

[8] See, in general on the concept of coherence in law, DWP Ruiter, *Legal Institutions* (The Hague: Kluwer:, 2001), 71–73; N MacCormick, 'Coherence in legal justification', in A Peczenik, L Lindahl and G van Roermund (eds), *Theory of Legal Science, Proceedings of the Conference on Legal Theory and Philosophy of Science* (Dordrecht: Reidel, 1984) 235– 251; TM Franck, *Fairness in International Law and Institutions* (London: Clarendon, 1997) 38–41; E Christodoulidis and R Dukes, 'On the Unity of European Labour Law', in S Prechal and B van Roermund (eds), *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford: Oxford University Press, 2008) 399– 403.
[9] See Ruiter (n 8 above) 102–115, who distinguishes the following legal institutions: *Legal persons* (subjects), *legal objects* (goods), *legal qualities* (property of subjects), *legal status* (property of objects), *personal legal relationships* (connection between subjects), *legal configurations* (connection between objects), and *objective legal relationships* (connection between subjects and objects).
[10] See Ruiter (n 6 above) 52–79, 90. Competence-conferring rules, which determine that rules of conduct are legally valid, are a special type of declarative legal acts.
[11] See Ruiter (n 6 above) 81–89; Dekker and Wessel (n 5 above) 225–226.

too and for that reason give rise to different expectations and different patterns of legitimisation of conduct.

(b) Legal institutions and legal practices

The concept of legal institutions does not refer to an existent entity, but to a presentation of a phenomenon that ought to be made true in the form of social practices. Thus, legal institutions have their counterparts in social reality, often referred to as 'real' institutions, which reveal themselves in the form of recurrent and enduring legal and other practices.[12] Or as Ruiter puts it: '… a legal institution is in the first instance a fiction that is subsequently realised by people believing in it and acting upon this belief. It follows i) that human beings must be able to visualise legal institutions and ii) that the existence of legal institutions must be conceivable as inherent in human behaviour.'[13] Of course, legal institutions – as 'ideal' entities – can be studied separately from their real counterparts. However, as Weinberger claims, legal institutions are in the end only relevant in relation to real institutions.[14] There is a direct relation between legal rules and powers - as objective thoughts - and social reality. Rules and powers comes to the fore in, for example, the fact that they exist in the realm of human consciousness, that they function as a motivational element in human behaviour, that they are related to the existence of social institutions, and that behaviour in conformity with or contrary to norms and rules gives rise to positive or negative social consequences.[15] Of course, a significant result of this view is that if one wants to analyze the meaning of positive law it is not enough to restrict this analysis to the content of valid enacted rules and competences, rather one must also examine whether these norms can be said to exist as social practices. However, Weinberger's theory at this point only partly solves the 'great' problem of legal positivism: the tension between the validity and efficacy of law. Weinberger's theory of action is one-sided, in the sense that it only explains the functional

[12] See O Weinberger, *Law, Institution and Legal Practice. Fundamental Problems of Legal Theory and Social Philosophy* (Dordrecht: Kluwer, 1991) 21–22; H Kenman, 'Approaches to the Analysis of Institutions' in B Steunenberg and F van Vught (eds), *Political Institutions and Public Policy* (Deventer: Kluwer, 1997) 3.

[13] DWP Ruiter, 'A Basic Classification of Legal Institutions' (1991) 10 *Ratio Iuris*,4, 363; Ruiter (n 8 above) 71– 99.

[14] Weinberger (n 12 above) 21–22: 'There does not appear to be a clearly drawn distinction which must not be infringed between normative institutions and institutions in the sense of structures and public utilities and both are functionally linked with each other. ... As complexes of norms the legal institutions are linked to an actual whole on the strength of their connection with an existing factual sphere or one being constituted by these norms and they are institutionalized as social practices.'

[15] See O Weinberger, 'The norm as thought and as reality' in N MacCormick and O Weinberger, *An Institutional Theory of Law* (Dordrecht: Reidel, 1986) 40–41.

relationship between legal institutions and social practices and not the other way around. Thus, the institutional theory of law does not solve, in a theoretical sense, the problem of how and which social practices can influence the meaning of valid legal norms and rules.

This – not insignificant – limitation inherent in the (institutional) legal theory does not impede its use for the purposes of our analysis of the European Union as a legal system as such. As far as the practice is concerned, our analysis is limited to the 'legal practices' that have evolved in the legal system of the Union. 'Legal practices' are forms of legal action that are – explicitly or implicitly – employed in order to make a legal system an operational entity.[16] It can be said that all the elements of the legal regime of a legal institution have their counterparts in a legal practice. In other words legal practices could, for example, consist of acts of cooperation and negotiation between the participants in a legal institution, adherence to general principles, the establishment of decision-making or executive organs, of procedures followed in order to ensure compliance with legal norms or in the appointment of agents for the implementation of certain regulations. Of course, such an analysis of legal practices cannot 'prove' the existence of a legal institution as a social institution. But developments in legal practices can be seen as *indicators* whether social reality is attuning to the legal institution and its regime.[17]

(c) Legal institutions and international organisations

An international organisation is a complex legal institution, in particularly as a result of the special relationships between the organisation and its Member States. The complexity is revealed by the fact that international organisations, in their legal set-up, have two 'faces'. They are, on the one hand, autonomous entities operating at the international and national level but, at the same time, they are for their legal birth and life, their existence, basically dependent on the consent of and cooperation between its members. This duality governs a lot of aspects of the legal regime of international organisations, such as their institutional structure, their decision-making processes, their functions and powers, and their responsibility and accountability

[16] Compare P Morton, *An Institutional Theory of Law* (Oxford: Clarendon, 1998) 38–43, 58– 66.

[17] It is obvious that the concept 'legal practices' employed for the purposes of our chapter is, in fact, *broader* than the one used by the traditional theory of international law. The latter concept is restricted to those legal practices that are relevant for the interpretation and application of mandatory norms and rules of conduct and competences to adopt such norms and rules. The broader concept of legal norms and rules which we employ brings together a much wider range of legal practices which are relevant in getting a 'real' picture of an institutional legal system.

In terms of institutional legal theory, these two 'faces' of international organisations can be identified as respectively an 'alliance' and as a 'legal person'.[18] An 'alliance' can be described as an enduring (multilateral) contractual legal relation between subjects – for example states – presenting a set of expectations about their reciprocal behaviour. In international law, such alliances are based on a treaty or some other international legal act between the 'participating' or, better 'contracting', parties and the obligations resulting from such 'contracts' have a multilateral, multi-sided character. This is only one side of the coin. International organisations have, at the same time, the institutional form of a 'legal person'. A 'legal person' is to be understood as an entity that has the capacity to act, through collective decision making, both internally and externally. Within an international organisation the original (multilateral) 'contractual' relationship between the state parties within the alliance is *supplemented* by a set of 'constitutional' relationships of each of the Member States with the established legal person. In order that the creation of a legal person takes place, the relationship between each of the Member States and the organisation has to have some basic content, in particular the right of the members to participate – through their representatives – in the decision making of the organs of the organisation and the duty of the Member States to respect the autonomy of the organisation through, *inter alia*, the recognition of their legal personality and their privileges and immunities. As a legal person, international organisations become subject of the international legal system implying in principle the right to be treated on a par with other international legal subjects, including the capacity to perform international legal acts as well as to be accountable and responsible for their behaviour.[19]

It is important to realize that with the creation of an international organisation the alliance between the Member States is *not* replaced by the legal person; in case a complete transformation from the alliance into a legal person would have taken place the result would be a different kind of entity, a (federal) state or an entity *sui generis*. Instead, an international organisation seems to be typically characterized by the two institutional legal forms – the alliance and the association – which exist legally side-by-side. The bottom-line is that – even

[18] DWP Ruiter, 'Types of Institutions as Pattern of Regulated Behaviour' (2004) 10 *Res Publica* 3, 207–231, at 214– 216.

[19] That is not to say that all international organisations will have automatically 'international legal personality', although being an international legal person this quality may be presumed. There is, of course, no such a presumption in case of a mere alliance, even if they are very influential in international relations ('G7' or 'G8'). Within alliances the state parties themselves are the decision-making entities and they are also themselves accountable for all the consequences of acts and omissions.

in the case of the most 'integrated' international organisations – the alliance of the Member States retains the power to change the constitutive instruments of the legal person and, in the end, can decide about its existence. This institutional legal structure explains to a great extent the complex legal nature of international organisations and some of the main legal issues, such as the legal status, the foundation and range of legal powers, the legal character of the acts, the decision-making processes and the division of the responsibility between the organisation and its members. To a large extent, this fundamental and inherent dual legal nature constantly threatens the unitary character of the Union, as will be illustrated in the next (sub-) sections.

2. The European Union as a legal institution

(a) Diverging visions

In our earlier version of this chapter we discussed quite extensively the question whether the European Union and its legal regime could be explained in legal institutional concepts other than that as an international organisation.[20] At that time, there was even a considerable reluctance, in particular in European legal circles, to acknowledge the European Union as a single legal entity, let alone an international organisation in its own right.[21] In the view of some – mainly German – legal scholars, the Union, consisting of the European Communities and the cooperation in second and third pillar, was at best only an alliance – or, in German, a *Staatenverbund* – without a separate legal status under international law. According to them, the Union as such did not possess any legal capacity, internally or externally, and had no organs. The European Council and the Council of Ministers were in the framework of the second and third pillars merely conferences of governments and their acts were no legal acts of the Union but multilateral agreements among governments. Also the description of the Union as a Greek temple – for many years a very popular metaphor for the Union – was basically (but often implicitly) picturing the Union as primarily an alliance.[22] Viewed from this perspective, the legal regime of the European Union brought beneath one (thin) roof the different forms of intergovernmental

[20] Curtin and Dekker (n 3 above) 83– 85, 93– 97.

[21] This was – and still is? – most clearly and consistently held by two German legal scholars, Koenig and Pechtstein. See C Koenig, M Pechstein, *Die Europäische Union* (Tubingen: Mohr Siebeck, 1995) and M Pechstein, C Koenig, *Die Europäische Union* (3rd edn., Tubingen: Mohr Siebeck, 2006).

[22] See, for example, U Everling, 'Reflections on the Structure of the European Union' (1992) 29 *Common Market Law Review* 6, 1053–1077, 1063; Curtin (n 2 above) 17-70; JHH Weiler, 'Neither Unity Nor Three Pillars, The Trinity Structure of the Treaty on European Union' in J Monar *et al* (eds), *The Maastricht Treaty on European Union, Legal Complexity and Political Dynamic* (European Interuniversity, 1993), 49– 62 and other sources cited in our chapter in first edition of this volume.

cooperation previously existing among the Member States of the Communities. On this understanding the Union's second pillar – the Common Foreign and Security Policy (CFSP) – was simply the continuation of the previously existing European Political Cooperation, which had started in the beginning of the seventies as a form of informal exchange of information and consultation on issues of foreign policy between the Member States and which was for the first time formally codified in the Single European Act.[23] The third pillar of the Union – under the heading of, first, Co-operation in the fields of Justice and Home Affairs (CJHA) and, later, Police and Judicial Co-operation in Criminal Matters (PJCC) – structured and put on a *treaty* basis the great variety of mainly intergovernmental fora in the field of home affairs and internal security existing at that time, such as, for example, the *Ad Hoc* Group on Immigration, TREVI, and the Group of Co-ordinators on the Free Movement of Persons.[24] The Union itself, it was held, only overarched the three pillars by stating some general objectives and principles and some final provisions but certainly not as a legal entity that had the capacity to act on its own. This approach, in our view, neglected already ten years ago, the essentially *double* institutional legal nature of the Union.

At that time, some authors took the opposite view, namely asserting that within the European Union a complete fusion has taken place between the European Communities and the second and third pillars, constituting a single organisation with legal personality and governed by one legal regime, including the legal Community principles of supremacy, direct applicability and direct effect.[25] Also this assertion was – and, according to us, still is – difficult to reconcile with the legal system of the Union and the legal practices followed by the institutions because it overstretches the single legal entity character of the Union. Although the unitary character of the legal system of the European Union was from the start already visible to some extent, and certainly has been strengthened over the course of the

[23] See M Holland (ed), *The Future of European Political Cooperation* (London: MacMillan, 1991); S Nutall, *European Political Cooperation* (Oxford: Clarendon, 1992).
[24] See, J de Zwaan, 'Institutional problems and free movement of persons. The legal and political framework for cooperation', in HG Schermers *et al* (eds), *Free Movement of Persons in Europe* (The Hague: Asser Institute, 1991), 335– 351.
[25] A von Bogdandy, M Nettesheim, 'Die Europäische Union: Ein einheitlicher Verband mit eigener Rechtsordnung' (1995) 30 *Europarecht* 1. 3–26; this article is also published in English: A von Bogdandy, M Nettesheim, `Ex Pluribus Unum: Fusion of the European Communities into the European Union', (1996) 2 *European Law Journal* 3, 267; A Von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organisation with a Single Legal System', (1999) 36 *Common Market Law Review* 3, 887.

past ten years, the two interrelated institutional forms of the Union's underlying legal nature are still in place.[26]

Our starting-point is, again, that the legal system of the European Union is most accurately analysed in terms of the institutional legal concept of an international organisation, as explained above.[27] In the remaining of this sub-section we will substantiate this contention by way of a succinct analysis of the constitutive treaties in relation to, first, the two different institutional legal forms of the European Union and, second, the extent of its unitary character. In section 3 we will take this analysis further by identifying the legal practices, as defined above, in particular with regard to the unitary and disunitary nature of the political executive, in the frontstage as well as the backstage of the European Union.

(b) An alliance *and* a legal person

The European Union is obviously based on a treaty that regulates the mutual legal relationships between the now twenty-seven Member States. As is stated in Article 1 of the Treaty on European Union (TEU): 'By this treaty, the HIGH CONTRACTING PARTIES establish among themselves a European Union'. According to the same article, the Union is founded on two treaties, namely the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) – the Treaties.[28] Also in other provisions the *alliance* character of

[26] This double institutional identity penetrates all parts of the Union, including the previous legal system of the EC. A good example is the comitology system, as explained, with abundant empirical evidence, by GJ Brandsma, *Backstage Europe, Comitology, accountability and democracy in the European Union* (Utrecht: Utrecht University Press, 2010).

[27] Compare the judgment of the German Constitutional Court on the Lisbon Treaty, delivered on June 30, 2009, in which the Court declared that the Lisbon Treaty is a treaty that improves, where necessary, the functioning of the European Union without changing its fundamental nature. According to the Court, the European Union
"is designed as an association of sovereign national states (*Staatenverbund*) to which sovereign powers are transferred. The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States, i.e. the citizens of the states, remain the subjects of democratic legitimisation. [...] The empowerment to transfer sovereign powers to the European Union or other intergovernmental institution permits a shift of political rule to international organisations. The empowerment to exercise supranational competences comes, however, from the Member States of such an institution. They therefore permanently remain the masters of the Treaties." *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] [Federal Constitutional Court] June 30, 2009, Docket Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/0, para. 229, 231; *available at* www.bundesverfassungsgericht.de/entscheidungen/. See further A Steinbach,'The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration', (2010) 11 *German Law Journal* 4, 367-390.

[28] See also Art. 1(2) TFEU. The TEU covers mainly 'constitutional' and organisational matters, as well as the provisions on the Union's external relations, the Common Foreign and Security Policy (CFSP), including the Common Security and Defence Policy (CSDP). The TFEU is, in fact an adjusted replica

the Union is revealed, such as in the principle of conferral of competences, which is underlined several times, including in the – new – provision stating that the competences not conferred upon the Union in the treaties remain with the Member States.[29] The TEU also prominently mentions the quite classic international law principle that the Union 'shall respect the equality of the Member States', 'their national identities', and 'their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.'[30] In some other respects the position of the Member States even seems to be strengthened, in particularly by the increased role and competences of the European Council, of course an *organ* of the Union but one still resembling in many respects a 'conference' of the governments of the Members. Not unimportant, the Member States remain the 'Herren der Vertrage' in that they are the parties who, ultimately, decide about the (important) changes of the Treaties, as laid down in the ordinary revision procedure.[31] This provision explicitly provides that such amendments can serve 'to reduce the competences conferred on the Union ...'.[32] Last but not least, the alliance character of the Union seems to be strengthened by the new provision on the right of every member to withdraw, at any moment, unilaterally from of the Union.[33]

It is – and to a certain extent was from the beginning – equally clear that the European Union is a *legal person* too. The Lisbon Treaty strengthens also this institutional form more rather than less, not only in its external aspects but also with regard to the internal ones. As to the *internal* structure, the European Union is in the amended TEU more strongly presented than before as one, single legal entity. It states that the Union shall replace and succeed the European Community. In this respect, the 'fusion thesis' – the integration of Union and the EC in one legal person – seems to be realized, at least, at treaty-level. The two treaties do not – as was the case in the pre Lisbon era – represent legal regimes of different legal entities. They rather constitute one legal entity: the Union. The distinction between the two treaties follows, very roughly, the logic of the distinction

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of the former Treaty establishing the European Community, and deals, apart from some important additional institutional provisions - for instance, Arts. 2-6 TFEU on the competences of the Union, Arts. 258-268, 340 TFEU on enforcement actions, preliminary rulings, review of legality and actions for damages, Arts. 288-292 TFEU on the categories and hierarchy of legal acts of the Union, and Art. 312 TFEU on the principles of budgetary planning - with the *policies* of the Union, including the former third pillar on police and judicial cooperation on criminal matters.

[29] Art. 4(1) TEU. See also Declarations nos. 18 and 24, both attached to the Lisbon Treaty, on the delimitation of competences of the Union respectively the international legal personality of the Union.

[30] Art. 4(2) TEU.

[31] Art. 48 TEU.

[32] Art. 48(2) TEU.

[33] Art. 50 TEU.

between 'primary' and 'secondary' rules, in that the TEU concerns 'constitutional', including institutional matters, whereas the TFEU covers the headlines of and the competences to develop the policies of the Union, although formally there is no ranking between them. This logic has led to the integration via the Lisbon Treaty of the substantive provisions of the former third pillar of the Union (PJCC), which have now been integrated in the 'Area of Freedom, Security and Justice' of the TFEU. A remarkable exception in this regard is the provisions on the former second pillar, the Common Foreign and Security Policy (CFSP), including the renewed and extended provisions on the Common Security and Defence Policy (CSDP). Not only the general and institutional provisions but also the substantive ones are (still) part of the TEU and are not, as far as policy matters are concerned, transferred to the TFEU.[34] This derogation from the general structure is probably still due to anxieties of some Member States for the 'communitarisation' of the high and sensitive political issues involved in this area. However, this situation is without prejudice to the view that the Union has to be seen as one legal person with regard to *all* policy areas within its jurisdiction, whether regulated in the TEU or the TFEU. The real exception to this situation is the result of the fact that the Lisbon Treaty does not touch upon the legal status of the European Atomic Energy Community, which thus seems to have preserved, albeit within the Union, its existence as a separate legal person.[35]

The Union as a legal person is further expressed by the legal fact – which was disputed until now – that the Union itself has organs with decision-making capacity.[36] The Lisbon Treaty explicitly states that the Union 'shall have an institutional framework', consisting of seven main institutions.[37] Beside the traditional five of the former European Communities – the European Parliament, the Council, the European Commission, the Court of Justice and the Court of Auditors – the main institutions now also includes the European Council and the European Central Bank. Through these institutions – and, of course, also through the extensive and complex structure of subsidiary organs and other bodies – the Union has the capacity to act *vis-à-vis* the Member States and its citizens. For the enactment of legal acts the European Union has at its disposal a rather wide range of types of 'legal instruments'. The triple set of instruments with legally binding force for the European Community – *regulations*, *directives* and *decisions* – become post-Lisbon the main legal

[34] An exception seems to be Article 222 TFEU on solidarity between the member states in case of a terrorist attack or emergency situation.
[35] See Protocol No. 2 annexed to the Treaty of Lisbon on amending the Treaty on establishing the European Atomic Energy Community.
[36] See Curtin and Dekker (n 3 above) 98.
[37] Art. 13 TEU

instruments of the Union.[38] New are the provisions in the Treaty on the Functioning of the European Union that these instruments can contain 'legislative acts', 'non-legislative acts of general application' or 'implementing acts', by which a certain hierarchy of Union's legal acts is introduced.[39] Beside the formal legal instruments, the organs of the European Union made and make use of a great variety of other, more informal legal instruments, some of them mentioned in the Treaties other developed in practice, such as advisory opinions, recommendations, strategies, declarations, resolutions, white papers and all kind of other reports.[40]

For the second and third pillar, there has always been a separate range of legal instruments, in particular *common strategies*, *common positions*, *joint actions, framework decisions, decisions and conventions*.[41] With the Lisbon Treaty entering into force most of these instruments are replaced by one umbrella legal instrument: the *decision*. This will be, from now on, the only legal instrument for the CFSP.[42] However, this amendment is partly cosmetic and has not altered the explicitly stated competence of the Union to take decisions on 'general guidelines', 'operational action' and 'the approach of the Union',[43] i.e. formulations which pre-Lisbon were used to describe common strategies, joint actions and common positions respectively and to a large extent are maintained in the new Treaty on European Union. However, a clear distinction with other EU policy areas is that Article 24(1) TEU excludes 'the adoption of legislative acts' for CFSP matters, which in turn excludes the use of the legislative procedures (the 'Community method').[44] Apart from the continued exclusion of the European Parliament and the Commission in the decision-making phase, as well as the almost complete exclusion of the jurisdiction of the Court, this distinction will probably cause a continuation of the ongoing discussion on the legal force of CFSP decisions.[45] The language used by the relevant Treaty provisions nonetheless suggests that

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[38] Art. 288 TFEU (Art. 249 EC).
[39] Arts. 289 and 291 TFEU. See further Chapter XXX of this volume.
[40] See See further, B de Witte, A Geelhoed and J Inghleram, 'Legal Instruments, Decision-Making and EU Finances' in PJG Kapteyn, AM McDonnell, KJM. Mortelmans and CWA Timmermans (eds), *The Law of the European Union and the European Communities* (The Hague: Kluwer, 2008) 273–419, 276; LAJ Senden, 'Soft Law and its Implication for Institutional Balance', 1 *Utrecht Law Review* 2, 2005, 79– 99.
[41] See Arts. 12-15 and 34 EU. The original provisions on the legal instruments of the second and third pillar were heavily criticed for their obscure and ill-defined wording and, on that ground, substantially amended by the Treaty of Amsterdam. See Dekker and Curtin (n 3 above) 99.
[42] Art. 25 TEU.
[43] See Arts. 26(1), 28(1) and 29 TEU.
[44] See Art. 289(1) TFEU.
[45] No interpretation could be expected from the Court of Justice given that Art. 46 EU explicitly excludes Title V from its jurisdiction, as confirmed by e.g. Case T-201/99 *Royal Olympic Cruises Ltd and others v Council and Commission* [2000] ECR II-4005; Case T-228/02 *Organisation des Modjahedines du*

those legal acts, once adopted, limit the freedom of Member States in their individual policies.[46] In particular, CFSP joint actions 'shall commit the Member States in the positions they adopt and in the conduct of their activity',[47] and with regard to CFSP common positions the Treaty on European Union stipulates that 'Member States shall ensure that their national policies conform to the common positions'.[48] The leally binding nature of these instruments can be further based on the 'loyalty' obligation, which with regard to the CFSP is certainly strengthened by the Lisbon Treaty.[49] Quite recently, the European Court of Justice also confirmed the binding nature of a common position in the *Segi case.*[50] Although the case primarily concerned the third pillar, it seems to be justified to transpose these findings to the field of the CFSP. After all, the common position in question could also be regarded as a CFSP decision since it was equally based on both a CFSP provision (Article 15 EU) and a PJCC provision (Article 34 EU). The *Segi* judgment, however, only partly helps in answering the question of the legal force of CFSP instruments, and in particular it does not settle the legal force of CFSP decisions in the national legal order of the Member States.

The Treaty on European Union provides, for the first time in the history of the Union, explicitly for the (international) legal personality of the Union.[51] As explained in the previous edition, the omission of such a provision did not prevent the Union, quite soon after its establishment, to act externally, even by entering into legal relations with regard to

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peuple d'Iran [2006] ECR II-04665 (para. 49); C-354/04 P *Gestoras Pro Amnistía and Others v Council* [2007] ECR I-1579 (para. 50). The situation is different only with regard to the largely similarly worded instruments of Title VI EU.

[46] See Chr Hillion and RA Wessel, 'Restraining External Competences of EU Member States under CFSP' in M Cremona and B de Witte (eds), *EU Foreign Relations Law, Constitutional Fundamentals* (Oxford : Hart Publishing 2008) 79–121, at 82–86. On CFSP joint actions specifically, see A Dashwood, 'The Law and Practice of CFSP Joint Actions' in M Cremona and B de Witte (eds), *EU Foreign Relations Law,Constitutional* Fundamentals (Oxford : Hart Publishing, 2008) 53–77; F Dehousse, 'Les caractéristiques fondamentales de la politique étrangère et de securité commune' in JV Louis and M Dony (eds), *Relations Extérieures : Commentaire J. Mégret: Le droit de la CE et de l'Union européenne* (Brussels: Institut d'Etudes Europénnes, (2005) 441–462, at 475; P Koutrakos, *EU international relations law* (Oxford: Hart Publishing, 2006) 399; L Münch, *Die gemeinsame Aktion als Mittel der Gemeinsamen Aussen- und Sicherheitspolitik*, (Berlin: Duncker & Humblot, 1997) 60.

[47] Art. 14(3) EU , and Art. 28(2) TEU.

[48] Art. 15 EU ,and Art. 29 TEU. In the same vein, EU Common Strategies, envisaged in Article 13 EU and Article 26 TEU, bind not only the EU institutions but also the member states. See De Witte, Geelhoed and Inghleram (n **50** above) 296.

[49] Art. 24 (3) TEU. See further *infra* section 2(c).

[50] See Case C-355/04 P, *Segi v.Council* [2007] ECR I-1657, para. 52: '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.'

[51] Art. 47 TEU. See also Declaration No. 24, attached to the TEU.

third parties.[52] For that reason it was already concluded at that time that there were strong arguments for at least the presumption of its international legal personality and it seems undisputed that the practice of the Union in the last ten years has turned the presumption into a legal fact. This was certainly the case after the Union – and not the European Community and/or the Member States – without further ado from 2003 onwards concluded treaties with non-Member States and other international organisations.[53] Thus, one could certainly conclude that the new provision is a codification of a legal practice. Following naturally from its personality, the TEU provides now, expressly, for a *general* competence of the European Union to conclude treaties with third parties – states and other international organisations – on all areas of Union's external action.[54] Thus, the Union's treaty-making capacity is equal in all areas and they will bind, also in CFSP-matters, the institutions and the Member States of the Union.[55]

With regard to the external representation of the Union, the Lisbon Treaty only to a certain extent draws the inference from the Union as a single legal entity. At least three agents of the organization will have a role to play in the Union's external affairs: the newly created position of President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy (High Representative), a function introduced by the Treaty of Amsterdam, and, from the early days, the President and other members of the Commission. According to the Treaties, these offices have several external task in representing the Union but the Treaties are for the greater part silent on the delimitation of the their respective responsibilities. This can cause in particular problems in the relation between the Council President and the High Representative. Both are genuine offices of the Union, elected or appointed by the European Council, for which a qualified majority will do, and have the capacity to represent the Union in the area of the CFSP.[56] Initially the then rotating president of the European Council had the lead in CFSP affairs, but the Lisbon

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[52] Curtin and Dekker (n 3 above) 105–106. See more extensive on this issue: RA Wessel, 'The International Legal Status of the European Union' (1997) 2 *European Foreign Affairs Review*, 109 –129; RA Wessel, 'Revisiting the International Legal Status of the EU', (2000) 5 *European Foreign Affairs Review* 4, 507–537.

[53] RA Wessel, 'The European Union as a Party to International Agreements: Shared Competences, Mixed Responsibilities', in A Dashwood and M Maresceau (eds), *Law and Practice of the EU External Relations – Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press, 2008) 145–180.

[54] Art. 37 TEU and – for the procedure for concluding international agreements – Art. 216 TFEU. Compare the former Art. 24 TEU on the treaty-making capacity of the EU on CFSP and PJCC matters.

[55] Art. 216(2) TFEU. This last addition was not included in the former Art. 24 TEU. Compare the former Art. 300(7) TEC regulating the legal force of treaties for institutions and Member States in relation to EC-matters.

[56] See Arts. 15(5) and 18(1)(2) TEU.

Treaty has certainly strengthened the position of the High Representative. She presides the most important decision-making institution on CFSP matters – the Foreign Affairs Council – and is one of the vice-presidents of the Commission.[57] In that capacity she shall conduct and put into effect the Union's common foreign and security policy.[58] The only reference to the delimitation of their respective tasks is to be found in the terms of a reference of the President providing that he has to ensure the external representation of the Union in the area of the CFSP 'without prejudice to the powers of the High Representative ...'.[59] Time will tell whether a further refinement of the allocation of tasks is needed.

(c) A legal unity?

The fact that the European Union, as an international organisation, displays two institutional 'faces', does not, as such, need to be an obstacle for the unitary character of its legal system. That holds true, in principle, for the formal and substantial sides of the unity of the legal system. As to the formal side, international organisations are generally based on *one* constituent treaty, which is also the legal basis for the further development of their legal system. The legal system of the European Union, however, was, from its birth on in 1992, based on two separate treaties raising the question as to the existence of one single legal system encompassing the different legal systems of the European Communities and the CFSP and CJHA/PJCC. As was pointed out in the previous edition, it could be argued that, although the separate status of the two constituent Treaties could not be denied, they formed basically one legal system because of the firm formal ties between them, in particular the prescription of *one* amendment procedure for both Treaties and *one* accession procedure for Union and the Communities.[60] The Lisbon Treaty has not changed this situation principally – the Union is still legally based on two different Treaties, from now on of explicitly equal value, bound together by the said ties[61] – but the ties between them are even stronger because of the replacement and succession of the European Community by the

[57] Art. 18(3)(4) TEU.
[58] Arts. 18(2), 24(1), 26(3) TEU.
[59] Art. Art. 15 (6) TEU.
[60] See further Curtin and Dekker (n 3 above) 97–98; DM Curtin and IF Dekker, 'The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity' in P Beaumont, C Lyons, N Walker (eds), *Convergence and Divergence in European Public Law* (Oxford: Hart Publishing, 2002) 59, 63– 64. See also Ch Hermann, 'Much Ado about Pluto? The Unity of the Legal Order of the European Union' Revisited' in M Cremona, B De Witte (eds), *EU Foreign Relations Law, Constitutional Fundamentals* (Oxford: Hart Publishing, 2008) 19, 36–37.
[61] Arts. 48, 49 TEU.

Union,[62] and the new provision that a Member State can only withdraw from the Union as such.[63] Also the in the literature much discussed issue of the demarcation between the different policy areas of the Union – in particular in pursuance of the Small Arms or ECOWACS judgment of the European Court of Justice[64] – has to be settled, post-Lisbon, in a far more balanced way.[65] The Treaty on European Union does not only stipulate that the implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the EU institutions in other EU policy areas, but also the other way round.[66]

A far more difficult question is whether or not the constituent Treaties in other respects are laying foundations for the unity of the legal system of the Union. Ten years ago we discerned, on the treaty level, some stimulating conditions for the development of the legal unity of the Union.[67] In particular the common objectives and general principles on which the Union as a whole was based – such as its assertion of 'identity on the international scene' and the underlining of the 'principle of consistency' as a leading guideline – which had to be further developed by its 'single institutional framework', in particular by the European Council and the Council of Ministers. However, we also determined a lack of coherence in the legal system as shaped by the Treaties, mainly due to the 'institutional imbalance' between the different legal sub-systems of the Union, in particular between the 'core' of the European Communities and the 'supplementary' policy areas of the CFSP and CJHA/PJCC.[68] The common objectives and basic principles of the Union at that time were not only quite generally formulated but were also poorly translated into the Union's organisational structures and legal capacities. Especially the Union's legal presence in the second and third pillar was still relatively 'weak' in relation to the position of the Member States.

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[62] Art. 1 TEU.
[63] Art. 50 TEU.
[64] Case C-91/05, *Commission v. Council*, Judgment of 20 May 2008.
[65] See A Dashwood, 'Article 47 TEU and the Relationship between First and Second Pillar Competences', in A Dashwood and M Maresceau (eds), *Law and Practice of the EU External Relations – Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press, 2008) 70-103; R.H. van Ooik, 'Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences', (2008) 4 *European Constitutional Law Review* 399-419; RA Wessel, 'The Dynamics of the European Union Legal order: An Incrasingly Coherent Framework of Action and Interpretation' (2009) 5 *European Constitutional Law Review* 1, 117–142, at 134 –141; B Van Vooren, 'EU-EC External Competences after the Small Arms Judgment' (2009) 14 *European Foreign Affairs Review* 1, 7–24; id., 'The Small Arms Judgement in a Age of Constitutional Turmoil'(2009) 14 *European Foreign Affairs Review* , 231-248; P Koutrakos, ' Legal Basis and Delimitation of Competence in EU External Realtions', in Cremona and De Witte (n 46 above) 171-198; Hermann (n 60 above) 27–33.
[66] Art. 40 TEU. Compare Art. 47 EU.
[67] Curtin and Dekker (n 3 above) 98–101.
[68] Curtin and Dekker (n 3 above) 101–103.

The question is whether or not the Lisbon Treaty has strengthened, on the level of the Treaties, the conditions for the development of the unity of the Union's legal regime as such – the horizontal legal unity – and of the unity of the relationship between the legal system of the Union and the national legal order of the Member States – the vertical legal unity. As to the *horizontal* legal unity, the least one can say is that through the amendments of the Lisbon Treaty the TEU expresses in a more encompassing and balanced way the values, objectives and general principles of the Union.[69] New is the statement of the common values on which the Union is founded: respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights – whereas the provisions on the elaboration of two of these values: respect for human rights and democracy – more firmly than before support the development of the unity of the legal system of the Union.[70] With regard to the *vertical* legal unity, the most important general provision concerns the principle of 'sincere cooperation' or 'loyalty', which the Lisbon Treaty – in more or less identical wording – has transferred from the EC Treaty to the TEU.[71] As we concluded elsewhere, this principle has evolved from a duty of cooperation on the part of the Member States to a multi-sided duty of loyalty and good faith in the vertical relationship between the Union and its Member States and also among the Member States themselves and among the Union institutions themselves.[72]

The conditions for legal unity are enhanced too by the straightforward provisions on the institutional framework, already referred to, which shall ensure, *inter alia*, the consistency of the Union's policies and actions.[73] This principle is confirmed in the TFEU, stating: 'The Union shall ensure consistency between its policies and activities, taking all of

[69] See A Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *European Law Journal* 2, 95–111.
[70] Arts. 2, 6-12 TEU.
[71] Art. 4(3) TEU: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' See also Art. 24(3) TEU: '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. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.'
[72] Curtin and Dekker (n 60 above) 69–71. See also the interesting analysis of the loyalty obligation given by Hillion and Wessel (n 46 above) 91– 96, 108–112, suggesting that the two principles of Art. 4(3) and 24(3) TEU are perhaps meant to operate differently.
[73] Art. 13(1) TEU.

its objectives into account and in accordance with the principle of conferral of powers.'[74] To reach that end, the Lisbon Treaty strengthened the Union's institutional framework on the whole, in particular the competences of the European Council – which now explicitly can take 'decisions' – the European Parliament and the Court of Justice. The different arrangements on enhanced cooperation of the former three pillars are under the new architecture brought together under one general provision in the TEU and one implementation arrangement in the TFEU.[75] Above all, the legal unity is enhanced by elimination of the separate status of the third pillar policies and actions, which now are merged with the provisions dealing with immigration, asylum and civil law under the heading of the 'Area of Freedom, Security and Justice'.[76] This is especially an improvement in view of the unity of the Union's legal system because the acts taken in the field of judicial and police cooperation in criminal matters will be, subject to several transitional provisions and exceptions, governed by the general rules regarding the Union's legal acts and the adoption procedures for those acts,[77] by the well-known principles relating to the effects of Union's legal acts in the legal orders of the Member States (direct applicability, direct effect and supremacy), as well as by the full jurisdiction of the European Court of Justice.[78]

In view of the unity of the Union's legal system, an improvement of the TEU is certainly also the more comprehensive presentation of the objectives relating to the international relations of the Union.[79] The objectives focus on *all* the areas of the Union's external action and in that sense diminish the sharpness of the dividing lines between the external political and security policy, on the one hand, and the international economic, financial and development policies on the other.[80] As far as the institutional framework is concerned, the 'up-grading' of the role of the High Representative of the Union for Foreign Affairs and Security Policy and especially her double position as president of the Foreign Affairs Council and vice-president of the Commission will enhance the possibilities for more coherence in the Union's external action. New is also that, in fulfilling her mandate, the High Representative will be assisted by a European External Action Service, consisting of officials

[74] Art. 7 TFEU.
[75] Art. 20 TEU and Arts. 326-334 TFEU.
[76] Title V TFEU.
[77] Arts. 288-299 TFEU. See for certain exceptions in this regard, Art. 76 TFEU (right of initiative of Member States), Arts. 86 (1), 87(3), 89 TFEU (adoption procedure), Arts. 82(3) and 83(3) TFEU (suspension procedure).
[78] See for an exception to the full jurisdiction of the Court Arts. 72 and 276 TFEU (maintenance of law and order and safeguarding of internal security).
[79] Arts. 3(5), 8, 21 TEU.
[80] See also Art. 212 TFEU requiring consistency of the Union's policies in the field of economic, financial and technical cooperation *and* development cooperation.

from the General Secretariat of the Council, the Commission and national diplomatic services of the Member States.[81] The unity of Union's external action will also be promoted by the general arrangement for the conclusion of treaties with third parties for, in principle, all fields of activity within the Union's competence.[82] Besides, the TEU maintains the 'footbridge' provision stipulating that the administrative and operational expenditure to which the implementation of the CFSP give rise in principle will be charged to the budget of the Union.[83]

However, as stated before, the legal reality is too that for the CFSP the Lisbon Treaty maintains a separate 'pillar' within the Union's legal system. Not without ground, the TEU provides that the CFSP 'is subject to specific rules and procedures'.[84] The most important distinct feature still lies in the fact that the authority to develop, define and implement the common foreign and security policies, including the 'the progressive framing of a common defence policy that might lead to a common defence',[85] is firmly vested with the European Council and the Council, acting unanimously, except where the Treaties provide otherwise.[86] The role of the European Parliament and the Commission in this area remains relatively marginal – also post-Lisbon.[87] The specific rules and procedures of the CFSP exclude the adoption of legislative acts, as well as the jurisdiction of the Court of Justice, except to monitor the demarcation of the Union's competences in this and in other area's,[88] and the review of the legality of Council decisions imposing restrictive measures on natural or legal persons.[89] Whether CFSP decisions are directly applicable in the legal orders of the Member States and, if so, whether they can have direct effect and can set aside conflicting national legal measures was and still is a controversial issue.[90] This silence of the TEU on this point as such does not necessarily imply an answer in the negative – clauses to that effect were also absent in regard to the acts of the European Communities. The wording of Declaration no. 17 concerning the primacy of Union law – annexed to the Final Act of the

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[81] Art. 27(3) TEU.
[82] Arts. 37 TEU and Arts. 216 and 218 TFEU. Art. 219 TFEU provides for a specific procedure for agreements concluded under the Economic and Monetary Union.
[83] Art. 41 TEU.
[84] Art. 24(1) TEU.
[85] Id.
[86] Id.
[87] Id. See , however, Art. 30(1) TEU (Commission) and Art. 36 (European Parliament). See also Curtin Dekker (1999), 98-100.
[88] Art. 24(1) jo. 40 TEU.
[89] Art. 24(1) TEU jo. Art. 275 TFEU.
[90] M Cremona, 'A Constitutional Basis for External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty', *EUI Working Paper* LAW No. 2006/30.

Lisbon conference – is not helping very much either because it only generally refers to the conditions laid down by the case law of the Court of Justice. Although the case law of the Court with regard to the relationship between non-Community law and the national law of the Member States is very scarce - and above all is related to the former third pillar - it seems to support our arguments, put forward elsewhere,[91] for the recognition, in principle, of the unity of the Union's legal system also in this respect. In particular, the Court, in answering the question whether the principle of consistent interpretation also applies to legal instruments of the third pillar, found that such instruments could have 'similar effects' as those provided for by the EC Treaty, and rejected the argument that the 'principle of loyalty' did not exist with regard to the non-Community areas of cooperation.[92] This kind of reasoning seems to imply at least the *presumption* of the direct applicability and the primacy of the TEU as such and CFSP decisions in the legal order of the Member States.

The unity of the Union's legal system seems to be still fragile at least as far as the CFSP is concerned. However, one has to remember that for a long time the existence of separate legal sub-systems within the European Communities and – later – the European Union were not at all a rare phenomenon. The European Community, for its part, even sheltered legal persons with their own legal regimes, such as the Investment Bank and the European Central Bank. The third pillar had, under its roof, EUROPOL (the European Law Enforcement Agency), EURODAC (A Community-wide information technology system for the comparison of the fingerprints of asylum seekers) and others. And the former and amended Treaties provide for several forms of 'flexibility', including the Euro-zone, and the forms of 'enhanced cooperation' which can be created by secondary legislation.[93] The existence of such legal sub-systems does not as such threaten the unity of the Union's legal system. Much depends on the extent to which the legal practices of the Union are governed by common EU concepts, objectives and principles, in particular the principles of unity and consistency (or coherency).[94] These principles derive their legal significance from a certain fragmentation of the legal regime of the Union and become more than simply fairly self-

[91] See Curtin and Dekker (n 60 above) 65–69.
[92] Case C-105/03 *Maria Pupino* [2005] ECR I-5285, para 36, 42. See also the conclusion drawn by AG Kokott in this case, in particular paras 32-33.
[93] See Art. 20 TEU and Arts. 326-334 TFEU. See further also, IF Dekker and RA Wessel , 'The European Union and the Concept of Flexibility: Proliferation of Legal Systems Within International Organisations' in NM Blokker and HG Schermers (eds), *Proliferation of International Organisations* (Deventer: Kluwer Law International, 2001) 381–414.
[94] The wording of the principle of consistency is not 'consistent' in the different language versions of the Treaty text. We follow the wording of the English version but in a meaning broader than only the absence of contradictions. See supra, accompanying text by footnote 8..

evident guidelines governing the correct interpretation of the Treaties in a coherent fashion. The principles require rather that the policies and decisions taken under the different sub-systems of the Union's legal regime are attuned to each other especially in overlapping areas. Not without reason the TEU emphasises particularly with regard to the external policy of the Union the obligation of the institutions and the Member States to take into account the principles of unity and consistency.[95]

Against the background of the legal unity, framed in the Treaties, we examine whether the legal practices of the European Union have strengthened the unitary character of the legal system of the Union as an international organization. In broadening the scope of our analysis in this fashion, we go further than existing literature on the subject and seek reinforcement for our overall thesis from the manner in which the Union legal order has been *operationalised* in practice.

[95] Art. 21(3) TEU: '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.' Art. 26(2) TEU: '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.'

C. Institutional legal practices of the European Union

(1) An evolving template of unity

In our original contribution published in 1999 we undertook a non-exhaustive analysis of the 'legal practices' of the EU. In doing so we stated that 'we have at times felt more like Sherlock Holmes and Dr. Watson - magnifying glasses in hand - looking behind the Treaty provisions to the actual decisions adopted and behind that again to the looser 'practices' of the institutions themselves which make the legal structure operational. All of this detective work has been to facilitate the piecing together of small fragments in order to produce a clearer picture, a core understanding, of complex and often hidden interactions.' It is important to recall that at that time we were exploring the real world legal and institutional realities of a novel entity (the EU) that had been formally framed, along with the intention of the framers, so as to have no 'contamination' between the separate pillars. On the contrary, what we found was that the evolving legal practices even in a very limited time frame (1993-1999) indicated that the legal system of the European Union as such was developing as an institutional unity. In line with our theoretical conception of unity as an overarching template of legal sub-systems and institutional sub-systems could continue to exist, within the three respective 'pillars'. In other words the existence of overall unity and specific differentiation were not contradictory but rather complementary phenomenona undergirded by an overall notion of for example loyalty, coherence, fundamental rights etc.[96]

In 1999 we distinguished three different levels of analysis. First and quite logically at that time we explored the fact whether despite the fact that the EU had not been explicitly conferred international legal personality, the legal practices of the Union even in a very initial time frame showed that in particular in its *external* relations with other subjects of international law, it could in fact already be classified as an international legal person. The trend in legal practices that we discerned more than a decade ago has now been expressly consolidated and confirmed in the textual provisions of the Treaty of Lisbon (as already referred to in paragraph 2 above). In addition we looked at elements of Council decisions and decision making and the manner in which the international representation occurs for 'evidence' of unitary practices. Our second initial level of analysis focused on the legal practices regarding

[96] See Curtin and Dekker (n 3 and n 60 above).

the *internal* structures of the Union, in particular its 'single' institutional structure. The question whether the institutions in their day-to-day operations in the field of CFSP and CJHA (at that time) functioned (within the limits set by the TEU) as organs of the legal person as a whole, the EU was answered affirmatively. Finally, we explored on selective basis legal practices with an impact on the legal protection of individuals in particular and discovered that the Court of Justice in particular had a primordial role in ensuring that certain core fundamental principles were applied in different contexts.

With the entry into force of the Treaty of Lisbon at the end of 2009 there is no longer any added value to exploring the contribution that the legal practices of the institutions in their external relations with other legal persons had made to the unity of the system as a whole, since this was now expressly a given and is described in paragraph 2 for the contribution made to the analysis of the EU as a unitary legal person. The other two levels of analysis remain pertinent but with some change of emphasis, given not only the changed constitutional context but also the extent to which certain subjects display differences, yet, at the same time, have a clear connection with a notion of overarching unity. Given the fact that the issue of the legal personality is now obsolete and that there is a separate chapter in the new volume on other aspects of external relations as well as specifically on human rights, we have decided to focus our discussion on the internal structure of the EU as revealing evidence of unitary framing and evolution, despite differences in policy areas.[97] We make no attempt to be comprehensive but highlight the unitary nature or otherwise of the political executive, both in its appearance of 'frontstage' actors as well as 'backstage' actors. With this topic there is a sense of the originally largely invisible becoming structurally more visible.

(2) Institutional unity of the executive power

One general theme that was discussed in our chapter in the first edition of this book is that certain "institutions" developed their own roles in the context of CFSP and CJHA and that despite the very different normative context (in terms of Treaty provisions) in which they operate, they have been influenced to a

[97] See also RA Wessel, 'The constitutional unity of the European Union: The increasing irrelevance of the pillar structure?' in J Wouters, L Verhey and P Kiiver (eds), *European Constitutionalism beyond the EU Constitution* (Antwerpen: Intersentia, 2009).

considerable extent by their functions, roles and practices in the context of the EC treaties. In other words we perceived already a decade ago a growing institutional 'unity' across the pillars, in particular in relation to the Council of Ministers, the Commission and the European Parliament. It is not possible to provide an update of the evolving roles of these three institutions, also the specific subject of other chapters in this book. Instead we now focus on our perception of the intensification in some respects of a trend towards institutional unity and limit our analysis more to the *executive* level of decision making. With the advent of the Treaty of Lisbon it is the reinforcement of the executive power of the EU that is most widespread and striking (although of course both the legislative power is reinforced as well as the judicial power, both the focus of other specific chapters). That executive power is not unitary in the sense that it 'belongs' to only one institution (e.g. the Commission in its own self-perception), but is spread across several existing institutions and new actors. We perceive thus both elements of increasing 'unity' and elements of 'disunity', a theme we will return to.

The two most important 'institutions' with regard to EU level executive power other than the Commission are: the European Council, recently described as 'the alpha and omega of executive power in the EU'[98] and the hierarchically inferior Council of Ministers, 'joined' and linked in concrete terms by the Council General Secretariat. The latter actor has incrementally acquired a more central role and a more influential position since the Treaty of Maastricht in particular. At the same time, the manner in which specific provisions of the Treaty of Lisbon are in the process of being implemented reveal the rationalization and centrality of its unique position, in particular as the key link in the coordination chain, among other actors and across all the various policy areas. At the same time it is not only a story of heightened coordination but also of some fragmentation existing side-by-side with the creation of more quasi-autonomous 'satellites' (agencies, new entities such as the EEAS, see below) with their own distinct roles and functions, especially in the field of foreign policy. This could arguably be seen as evidence of 'disunity', at the very least of fragmentation. On the other hand, the steady reinforcement over the years of other

[98] D Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution* (Oxford: Oxford University Press, 2009), 70. CHECK,

'backstage' actors, such as Coreper,[99] provide the backbone that enables the Council to function as an institution, aided and abetted by often very powerful, (quasi) autonomous committees such as the Political and Security Committee. [100]

(a) The Frontstage: the European Council and its President

The 'ever mighty' European Council is authoritatively considered as the top level 'leader' of the European Union as such.[101] It has seen its executive powers consolidated and even expanded in processes of incremental institutionalization, first in layers of legal and institutional practices and most recently in formal treaty provisions in the Lisbon Treaty. The key – and general – agenda-setting role of the European Council is evident from Article 15 (1) TEU in its Lisbon version: it 'shall provide the Union with the necessary impetus for its development and define the general political guidelines thereof.' Agenda setting is of course a crucial stage in the policy process for any political system. [102] But the European Council can also act as type of 'court of appeal' in certain specified – and limited – circumstances (for example that a Member State has breached the core values of the EU).103 And it takes (or will take) absolutely key decisions concerning the EU and its Member States outside of the legislative procedure as such.[104] In addition, through the medium of its conclusions of its summits, it steers the other decision-making institutions and more or less tells them what to do and where the priorities lie.[105]

These activities relate now to the full spectrum of EU activities. In a sense here we have an institution with an absolutely leading role, also in terms of treaty provisions, which sees its role further 'normalised' and expanded in the formal

[99] See further J de Zwaan, *The Permanent Representatives Committee: Its role in European Union Decision-Making* (Amsterdam: Elsevier, 1995). See too D Bostock, 'COREPER revisited' (2002) 40 *Journal of Common Market Studies* 2, 215–234.
[100] See A Juncos and Chr Reynolds, 'The Political and Security Committee: Governing in the Shadow' (2007) 12 European Foreign Affairs Review 2, 127–147. See too, E Regelsberger, ,'The EU as an Actor in Foreign and Security Policy: Some Key Features of CFSP in an Historical Perspective', (2007) 5 *CFSP Forum* 4, 1–8.
[101] Editorial Comments, 'An ever mighty European Council- Some recent institutional developments' (2009) 46 *Common Market Law Review* 5 , 1383–1393.
[102] See further B Guy Peters, 'Agenda-Setting in the European Community' (1994) 1 *Journal of European Public Policy* 1, 9–26.
[103] See Art 7(2) TEU.
[104] See, for example, Art 7 TEU.
[105] For a clear recent example see Presidency Conclusions, Brussels European Council Summit, 11 and 12 December 2008, available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf>. See further, J Werts, *The European Council* (London: John Harper Publishing, 2008).

provisions of the Lisbon Treaty across the spectrum of EU activities. Indeed, in the ruling by the German *Bundesverfassungsgericht* on the compatibility of the provisions of the Lisbon Treaty with the German Constitution, it held that the revision procedure under Article 48 (6) TEU 'opens up to the European Council a broad scope of action for amendments of primary law'.[106] Moreover, numerous specific provisions of the Lisbon Treaty give the European Council the power to take by consensus, unanimity or qualified majority voting decisions of a 'quasi-constitutional' or 'high political' nature, both on substance and procedure.[107] These decisions post-Lisbon apply to genuinely horizontal issues (composition, rotation, appointment etc to various other institutions as well as external relations and the core values of the EU) as well as in more specific policy fields (e.g. in relation to a common defence policy and in the field of the integrated and normalized Area of Freedom, Security and Justice).

Since the entry into force of the Lisbon Treaty, a number of implementation 'practices' point to the further increase of the powers of the European Council, thus further altering the 'traditional' institutional balance foreseen by the Treaties (and guarded by the Court) until now. The European Council, the instant it became a formal EU wide 'institution' (the day the Lisbon Treaty entered into force, 1 December 2009), adopted its own rules of procedure.[108] This regulates as one might expect the manner in which it adopts its 'decisions', where they are published (Official Journal, just like all other institutions), how and in what composition it votes, the fact that its meetings are not held in public (Article 4(3)) etc. Nothing is formally said about access to information or access to the minutes of its meetings etc. However, on its new own web page[109] under 'European Council meetings' there is a separate section on 'documents submitted to the European Council' with various – clickable – documents listed and in any event the annotated draft agenda (via the Council Register of documents). In its rules of procedure (Article 8), provision is made for the drawing up of draft minutes of each European Council meeting (prepared by the General Secretariat of the Council within 15 days), containing a

[106] See the judgment of the Second Senate of the *Bundesverfassungsgericht* of 30 June 2009. (n 27 above) para. 311.
[107] See for chapter and verse Editorial Comments (n 101 above) note 37.
[108] European Council Decision of 1 December 2009 adopting its own rules of procedure (2009/882/EU), OJ L 315/51 (2 December 2009).
[109] http://www.european-council.europa.eu/home-page.aspx?lang=en

(limited) amount of information rather than a verbatim account of the meetings. In any event it is not yet clear if these 'thin' minutes will be made public (via the Council Register of documents or the European Council website itself). The manner in which the European Council exercises its functions in public and subject to the general EU-wide principle of the greatest possible access to information, will have to emerge in practice. In any event it seems that there is *prima facie* no reason why the fact that its decisions are explicitly said to be 'non-legislative' removes it in any way from the general obligation to be transparent in its functioning and activities, as applied to all other institutions and organs of the EU.

In one of the very first 'conclusions' issued by the European Council post-Lisbon,[110] it has agreed to a new EU-wide assessment function for itself to 'once a year, make an overall assessment of progress achieved' on the new European strategy of jobs and growth, including a strong external dimension. The President of the European Council is specifically given the task to establish, in cooperation with the Commission, a special task force 'to reach the objective of an improved crisis resolution framework and better budgetary discipline, exploring all options to reinforce the legal framework.' In this way we see how the European Council leads in a manner that also maps the road to formal legal change.

In terms of democratic accountability, the rules of procedure, in line with the Lisbon Treaty, provide explicitly that the President of the European Council shall 'represent' the European Council before the European Parliament and present a report to the latter (Article 15). There was already an evolving relationship between the European Council and the European Parliament prior to the entry into force of the Lisbon Treaty.[111] Time will tell how the European Parliament in particular will try and steer what is now a formal and legally prescribed relationship with the European Council as a formal EU institution (also subject to the budgetary regime of the EU and its financial provisions). For Van Rompuy it is indeed much more important than for the previous semi-annual rotating Presidency to have a good working relationship with the European Parliament.[112] The sessions of the European Parliament with the President will become a repeated game in political science terms,

[110] Conclusions of the European Council of 25 and 26 March 2010, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/113591.pdf
[111] See for example, D Thym 'Beyond Parliament's Reach? The Role of the European Parliament in the CFSP' (2006) 11 *European Affairs Review* 1, 109–127.
[112] B Crum and JE Fossum, 'The multi-level parliamentary field, a framework for theorizing representative democracy in the EU' (2009) 1 *European Political Science Review* 2, 249–271.

increasing the power of soft sanctions. A negative judgment by the European Parliament in the future will have more consequences for the (semi-) permanent President than for the current rotating Presidencies who are above all the heads of government in one particular Member State.[113] The expectation is that the tendency of the Presidency (and the future European Council President) to be more forthcoming in rendering account will continue and become more institutionalized. The European Parliament can in any event be expected to deepen its constitutional agenda setting in this regard, as it has done very successfully in the past with regard to the Commission and as it is beginning to do with its legislative partner, the Council of Ministers, across a greatly enhanced number of policy fields. The European Council's political accountability as a single institution at the level of the political system of the EU may be expected to evolve in an enhanced fashion in the coming years.[114]

(b) The Backstage: the Council Secretariat General and autonomous satellite(s)

In our original contribution we emphasized the pivotal role of the Council in the field of CFSP and CJHA, as it then was. Evidence of the indivisibility of the Council as an institution was provided by certain cross-'pillar' practices. In CFSP a cross-'pillar' jurisdiction was already present in the post-Maastricht period where the General Council, for example, decides on any measure of external policy irrespective of its legal basis in either CFSP or CJHA. Another possible example of the indivisibility of the Council lay with the evolving decision-making and other roles of the Secretariat General of the Council, but at the time we wrote our first version the major institutional innovations that took place in 1999 had not yet occurred. Since then the 'success' of the Council Secretariat has been quite marked, continuing over the years and with it now operating as a type of parallel administration to that of the Commission. At the same time it is a somewhat 'janus-faced' actor: a highly distinct one, harbouring within its outer shell different – highly secretive – enclaves of defence and military cooperation. These 'new Eurocrats' socialize differently and may have different role conceptions to the original public 'Eurocrats'.[115] The example

[113] See too, M Van de Steeg, 'The European Council's evolving political accountability' in M Bovens, DM Curtin and P 't Hart (eds), *The real world of EU accountability: What Deficit?* (Oxford: Oxford University Press, 2010) 117-149.
[114] See too, Van de Steeg, (n 113 above).
[115] See further KP Geuijen *et al*, *The New Eurocrats: National civil servants in EU policy-making*

of the autonomous blacklisting of individuals and the role of the Council/Secretariat General therein provides further examples of the indivisibility of the Council across different policy areas and pillars prior to the entry into force of the Treaty of Lisbon.[116]

In terms of formal legal provision the Council General Secretariat was not mentioned in the founding treaties and was only formally introduced in a Treaty article (alongside with COREPER) in the Maastricht Treaty in 1992. Article 151 of the then EEC Treaty (now Article 167 TFEU) provided the initial indirect legal basis for the Secretariat General but said very little other than that the Council would be assisted by a General Secretariat under the direction of the Secretary General. But the General Secretariat has however always been referred to, albeit in cursory fashion, in the Councils own internal rules of procedure, and the changes over the years made to these internal rules reflect the gradually growing significance the Secretariat has had for the operation of the Council over the years.[117] The fact, however, that this institution was initially set up without a clear set of formal rules governing its activities meant that the foundation was laid for 'unwritten rules, existing practices and bureaucratic reflexes to fill the normative vacuum.'[118] In other words, the formal legal rules traditionally tell little about the manner this institution has evolved in practice or its significance on a day-to-day basis across a wide range of policy fields. For example, the relative autonomy with which the Council Secretariat exercises its functions in recent years is illustrated by the fact that a member of the General Secretariat actually holds the chair of a number of preparatory bodies of the Council (including the Security Committee and a number of Working Parties).[119]

The Council Secretariat has had a valuable role to play in supporting the Presidency of the day in organizing the work. All Presidencies rely – in different ways - on the Council Secretariat to advise them on procedures, to draw up minutes and other reports of meetings and for functions such as arranging the production, translation and circulation of Council documents. These are its standard tasks also

(Amsterdam: Amsterdam University Press, 2008).

[116] C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: the Case of Individual Sanctions* (Oxford: Oxford University Press, 2010) 107–110, 376.

[117] See further T Christiansen and SMRL Vanhoonacker, 'At a critical juncture? Change and continuity in the institutional development of the Council Secretariat' (2008) 31 *West European Politics* 4, 751–770.

[118] Ibid.

[119] See list included in the latest list of Council preparatory bodies (January 2009), available at <http://register.consilium.europa.eu/pdf/en/09/st05/st05433.en09.pdf>, 13 (Annex II).

within the context of EC activities. The central role of the Council in the context of CFSP decision-making implies a stronger role for the Council Secretariat. The Council Secretariat basically fills the political absence of the European Commission in the field of CFSP. [120] According to one author, 'there is a process of informal importation in the second pillar of the *Community method* and an almost mimetic reproduction of the role played by the Commission in the first pillar, which the Commission refuses to play in the second pillar, disapproving of its 'intergovernmental structure'.[121] Post-Lisbon the new High Representative 'imports' to some extent the Commission into CFSP.

The tasks of the Secretariat include agenda setting, policy formulation and implementation, especially in the fields of internal and external security. In addition, various external secretariats were effectively integrated into the Council Secretariat: that of the European Political Cooperation (EPC), of the Schengen Convention and of the West European Union (WEU) – with a resulting considerable expansion of tasks and responsibilities. The growth was not only in terms of the numbers of staff working in the Council Secretariat (external staffs largely ingested), but also resulted in much greater diversity than hitherto in terms of the sectoral policies covered and expertise provided.

Whereas within the framework of the EC the Commission would perform logistical tasks (with regard to the management of data bases and "implement" Action Plans etc) via its budgetary role and its power of initiative with regard to follow-up (legislative) action, these are tasks that are performed traditionally by the Council Secretariat in the framework of CFSP and CJHA (and later PJCC) activity. Specifically in the field of EU foreign policy there may even be some 'bureaucratic rivalry' between the Commission Secretariat and the Council Secretariat for the structural reason that the Council Secretariat challenges the Commission's political and informational role in the context of foreign policy.[122]

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[120] See further in detail, H.Dijkstra, 'The Council Secretariat's Role in the Common Foreign and Security Policy' (2008) 13 *European Foreign Affairs Review* 2, 149–166.

[121] See, M.Mangenot, 'The invention and transformation of a governmental *body:* The Council Secretariat' in M.Mangenot and J.Rowell (eds), *A political sociology of the European Union. Reassessing constructivism* (Machester: Manchester University Press, 2010, forthcoming), 12 (author's emphasis).

[122] See further, H.Dijkstra, 'Commission versus Council Secretariat: an analysis of bureaucratic rivalry in European foreign policy', (2009) 14 *European Foreign Affairs Review*, 3, 431–450.

The executive type tasks of the General Secretariat are particularly striking with what used to be termed European Security and Defence Policy (hereafter ESDP; post-Lisbon it is called 'the Common Security and Defence Policy'). The governance structure of ESDP was established during the Nice European Council[123] and has become operational through a range of civilian, military and civil-military crisis management instruments and missions. The Secretariat plays an important and influential role in the preparation and implementation of civilian and military missions.[124] It draws up background documents and draft joint actions. Once the Member States have agreed upon the launching of a civilian or military operation, it prepares an operational plan, in cooperation with the Commission and the Presidency. Also during missions it fulfils certain implementing tasks. Through the so-called Athena mechanism, for instance, it administers the financing of the common costs of military operations.[125]

The role of the Council Secretariat is frequently underestimated if not completely ignored (by lawyers in any event). Besides its traditional supporting role there is an emerging political function.[126] This relatively new role began with the creation of the position of the High Representative and the Policy Unit and the fact that they have a voice of their own in order to do their own agenda setting. This more political role is accentuated with the implementation of the Lisbon Treaty, even though there is more counter-balance with the Commission than hitherto, both in certain aspects of CFSP and with regard to PJCC that is subsumed within the Union as a whole. At the same time, the fact that the new High Representative of the Union for Foreign Affairs and Security Policy is simultaneously to be a Vice President of the Commission, will profoundly impact both on the architecture of the Commission and of the Council/European Council.

The relevant changes brought about by the Treaty of Lisbon include not only the altered and widened 'ordinary legislative procedure' in terms of policy and issue areas, but also the range of non-legislative powers of the Council in one or other of its

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[123] See in general, S Duke and S Vanhoonacker, 'Administrative governance in CFSP: Development and practice' (2006) 11 *European Foreign Affairs Review* 2, 163–182.
[124] See further, in detail, Dijkstra (n 120 above).
[125] See, A Missiroli, 'Euros for ESDP: Financing EU Operations', *Occasional Paper 45* (Paris: EU Institute for Security Studies, 2003).
[126] Duke and Vanhoonacker (n 123 above).

permutations. In addition, the Treaty of Lisbon mentions explicitly the General Secretariat of the Council twice: first with regard to providing support for the Council of Ministers and second with regard to providing support for the European Council.[127] This exercise of formal 'catch-up' with what has long been reality in practice does not necessarily give an adequate picture of the manner in which bit by bit and often quite invisibly the position and tasks, and ultimately influence, of the General Secretariat have incrementally increased. At the same time it is also very much tied into the increase or alteration in the powers and practices of the Council itself as well as all its supporting instances and of course, increasingly, that of the European Council. The latter support role has been strengthened and consolidated by virtue of the further institutionalization of the European Council itself and in particular it's new quasi-permanent President. This means, in practice, that post-Lisbon the Council Secretariat will 'service' *three* different Presidencies: the normal rotating Council President among the Member States (linked to the troika groups of three Member States)[128], the President of the Foreign Affairs Council (the High Representative of the Union for Foreign Affairs and Security Policy) and the President of the European Council. This means that there will *de facto* be an important role for the Council Secretariat as the common denominator among these various actors and (Council) Presidencies also in coordinating foreign policy with other policy areas. This power of coordination that has to some extent been present from earlier days[129] and sounds quite 'soft', has in fact been the backbone that has enabled the Council Secretariat to evolve into an 'autonomous administration'.[130] In addition, the fact is that the Council Presidency will still have some role in the management of external representation and a role is given too in this regard to the President of the European Council alongside that of the High Representative. For the former two actors the Council Secretariat will continue to play a coordinating and supportive role in spite of the creation of the EEAS (see further below).

The partial integration of CFSP in both the Council/European Council post-Lisbon as well as newly in the Commission has its own novelties and complications. One result has been to hive off much of the foreign policy that up until now had been

[127] See Art 240 (2) (ex 207 EC) and 235 (4) TFEU, respectively.
[128] See, Declaration No.9 of the Lisbon Treaty: declaration on Article 16(9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council.
[129] See Mangenot (n 121 above).
[130] *Ibid*.

dealt with by the Council Secretariat (including the staff of most of DG E, the Policy Unit, EUMS (The European Union Military Staff), CPCC (Civilian Planning and Conduct Capability) and JCS (Joint Situation Centre) and to put it in a quasi-autonomous new *European External Action Service* in accordance with Article 27(3) TEU. This represents the 'normalization' of the activities of the Council Secretariat (with foreign and security policy largely taken away from it)[131] in the sense that tasks originally acquired with regard to this exceptional and marginal policy area have now moved to the hard core of EU policy making. In addition, a reinforcement has taken place of the role of the High Representative within the body of the Commission (with the line of political accountability to the European Parliament and not to the Member States).

The establishment of the EEAS clearly represents a significant step in EU foreign policy cooperation and has been likened to a foreign ministry of the Union.[132] This new institution [133]once adopted will be physically located in the Commission, but it appears from the draft Council Decision that the Member States as such potentially are meant to have a significant role. It is explicitly stated in the draft Council Decision of 25 March 2010 that the EEAS is 'a functionally autonomous body of the Union under the authority of the High Representative'. [134] With the establishment of the EEAS outside the Council Secretariat and with an important representation of Commission officials, the Member States will create a body with the potential of becoming a powerful and influential actor in European foreign policy.[135] Officials in the EEAS will come from the Commission, the Council Secretariat and the national diplomatic services of the Member States.

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[131] See Mangenot (n 121 above).
[132] See L Rayner, *The EU Foreign Ministry and Union Embassies* (London: Foreign Policy Centre, 2005).
[133] Formally the EEAS will not be an institution of the EU in the strict legal sense but its establishment will lead to its operationalisation in 'living' practice in the form of rules and procedures. In this looser sense it can be considered as the construction of a new institution, see further March and Olsen (n 7 above).
[134] Proposal for a Council Decision of 25 March 2010 establishing the organisation and functioning of the European External Action Service, found at http://eeas.europa.eu/docs/eeas_draft_decision_250310_en.pdf , 2.
[135] See S Vanhoonacker and N Reslow, 'The European External Action Service: Living Forwards by Understanding Backwards' (2010) 15 *European Foreign Affairs Review* 1, 1–18, at 14.

When discussing control over the new EEAS an important consideration is the manner of financing of the service. The draft Council Decision taken on the initiative of the High Representative is unequivocal: the operational costs for the EEAS are to be financed by a new budget line in the Union budget.[136] This choice gives the European Parliament an important means of influence and also of forcing the hand of the EEAS in the future in terms of giving some accountability for its actions directly to the European Parliament itself. This is due to the fact that any amendment of the Financial Regulation takes place after the entry into force of the Lisbon Treaty via the 'ordinary legislative procedure' a full role for the European Parliament in this legislative amendment procedure. This is a space to be watched. We have seen how the European Parliament flexed its muscles with regard to the appointment of the Commission in February 2010 by insisting on a new inter-institutional agreement between the Commission and the European Parliament as to their ongoing relations, including several provisions that go far beyond the formal provisions of the Lisbon Treaty.[137] It has done the same with regard to getting more of a grip on quasi – independent agencies (regulatory and otherwise).[138] This is the manner that the European Parliament has successfully and pro-actively pursued its own constitutional agenda over the years, getting more of a grip over various actors by using the power of the purse, the classic instrument for parliaments generally.

The new EEAS is deliberately being constructed as a 'functionally autonomous body of the Union under the authority of the High Representative'.[139] At the same time it is embedded in a much broader vision and practice of institutional unity. First, the EEAS will also support those satellite bodies that will newly fall under the authority of the High Representative (viz. the European Defence Agency, the European Union Satellite Centre, the European Union Institute for

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[136] See too, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as regards, the European external action service, COM (2010) 85 final, 24 March 2010.

[137] Framework Agreement on relations between the European Parliament and the Commission of 9 February 2010, to be found at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0009&language=EN.

[138] See further, M Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices* (Delft: Eburon, 2010).

[139] Proposal for a Council Decision of 25 March 2010 establishing the organisation and functioning of the European External Action Service, found at http://eeas.europa.eu/docs/eeas_draft_decision_250310_en.pdf , 2.

Security Studies and the European Security and Defence College). Second, the EEAS is to be treated as an 'institution' within the meaning of the Staff Regulations. Third, the EEAS is to be treated as an 'institution' within the meaning of the Financial Regulation. The latter qualification, as we have seen, gives the European Parliament an equal opportunity to force both initially and on an annual basis (by explicitly reviewing the administrative expenditure of the EEAS) the EEAS to account to it in a manner that the European Parliament wishes. This can potentially develop much further than the simple obligation to submit a 'report' on the functioning of the EEAS in 2012. Finally, the EEAS will be subject to the general rules of the EU on security, protection of classified information and access to documents.

D. Conclusion

Our conclusion ten years ago was that the European Union, in general terms, has evolved, as an international organisation, into a legal system with a unitary character overarching a lot of – and sometimes very different – 'layers' of cooperation and integration. At that time this unitary character was to a large extent hidden behind a complex pillar structure and could only be brought into the light on the basis of an analysis of the treaty implementation and legal practices. Ever since, the legal unity of the Union has clearly come out of its shadows and has gained a far more solid and durable basis in its founding Treaties. The fact that the Union is still best to be qualified as an international organisation does not deprive its framework rules of a unitary character. On the contrary, subsequent amendments of the Treaties culminating in the Lisbon Treaty have made more visible then ever before the unity of the organisation in its constitutional architecture of a single international legal person that, at the same time, is based on a firm alliance of the Member States.

These Treaty-level developments were, to a large extent, the result of the ever-increasing legal practices in the field of the common foreign and security policy and the cooperation in the field of justice and home affairs, later reduced to police and judicial cooperation. By these legal practices not only new legal regimes were developed but they also largely contributed to the reforming of the European Union of a mainly socio-economic organisation into a general one, more clearly dominated by political overtones. In that sense the Union has become a general political international organisation with important functions in almost every field of public

life. And this development has not stopped with the entry into force of the Treaty of Lisbon. What has emerged already quite clearly in the manner that the Treaty of Lisbon is being implemented with regard to institutions and 'satellite' bodies is that the construction of new tasks for new actors is taking place within a vision of overall institutional unity (the 'single institutional framework' as it was already put back the Treaty of Maastricht). One example is the *de facto* coordination role that the administrative 'backbone' of the Council will play in the future with regard to the various different 'Presidencies' as well as their respective external representation tasks.

Although it is clear that the influence of the legal practices in the second and third pillar can hardly be underestimated it is equally clear that the evolution of the Union has not, as was feared in times of its establishment, in general undermined the separate, 'supranational' status of the legal system of the entity formerly known as the European Community. As we expected ten years ago, the Union has proven to be capable of integrating in its overarching legal structure sub-systems containing in certain respects more far reaching principles and rules. In the context of that panorama it is not so surprising that Union law also harbors numerous possibilities for institutional variation but that that fact does not deprive the legal instruments of their character of belonging to a Union legal and political system. The European Union can still be categorized as a highly complex entity with diverse fragments but this complex structure of fragments – more reminiscent now of the capricious design of marble than of the old-fashioned Russian doll of a decade ago - exists within an overall institutional structure and legal and political systems. This remains the case even after the entry into force of the Treaty of Lisbon.