# COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Common Market Law Review is published bimonthly.
Subscription prices 2015 [Volume 52, 6 issues] including postage and handling:
Print subscription prices: EUR 802/USD 1134/GBP 572
Online subscription prices: EUR 758/USD 1075/GBP 544
This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at sales@kluwerlaw.com.
Periodicals postage paid at Rahway, N.J. USPS no. 663–170.
U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.
Published by Kluwer Law International, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

Printed on acid-free paper.
Securing the Institutional Balance in the Procedure for Concluding International Agreements: European Parliament v. Council (Pirate Transfer Agreement with Mauritius)


1. Introduction

The Treaty of Lisbon fundamentally revised the legal framework of the EU’s external action. One of the most important innovations was certainly the introduction of a single procedure for negotiating and concluding international agreements in Article 218 TFEU. Nevertheless, the procedural requirements differ depending upon the subject of the agreement. In particular, agreements relating to the common foreign and security policy (CFSP) require a special treatment, reflecting the specific position of the latter in the EU legal order.

For agreements relating exclusively or principally to the CFSP, the High Representative – and not the Commission – has a right of initiative and plays a key role in the negotiations. Article 218(6) TFEU further provides that the European Parliament has no right of consent nor a right to be consulted where agreements relate exclusively to the CFSP. Yet, Article 218(10) TFEU foresees that “the European Parliament shall be immediately and fully informed at all stages of the procedure” without making any reference to the subject of the agreement.

It was written in the stars that this new procedural code would lead to inter-institutional litigation before the Court of Justice. Whereas the dual


2. This special position is reflected in Arts. 24 and 40 TEU.

3. Art. 218(3) TFEU.

function of the High Representative, acting as Vice-President within the Commission and head of the CFSP within the Council, decreases the likelihood that the Commission will initiate court cases against the Council in order to safeguard TFEU competences from CFSP influences; this role is increasingly picked up by the European Parliament. The latter gained significant external competences, except within the area of CFSP where its powers remain fairly limited. It is, therefore, no surprise that the Parliament is concerned about the exact scope of the CFSP and its relation to other external policies. After a first dispute with the Council concerning the legal basis for the adoption of restrictive measures against individuals or non-state entities, the Parliament now contested the procedure for the conclusion of an international agreement in the field of CFSP. In particular, it sought the Court’s clarification regarding the precise meaning of “exclusive CFSP agreements”, whose conclusion is excluded from any parliamentary intervention under Article 218(6) TFEU. In addition, the Parliament claimed that its right to be “immediately and fully informed at all stages of the procedure” as guaranteed under Article 218(10) TFEU applies to all agreements concluded by the EU, including those falling within the CFSP.

2. Factual and legal background

At the end of 2008, the EU launched its Naval Force (EU NAVFOR) Operation Atalanta to fight piracy off the coast of Somalia. The operation is part of the Union’s Common Security and Defence Policy (CSDP) – prior to the Treaty of Lisbon called European Security and Defence Policy (ESDP) – and builds upon a number of UN Security Council resolutions calling for international action to repress acts of piracy and armed robbery in the region. In this context, the EU concluded a number of agreements

5. Nevertheless, it is remarkable that the Commission intervened in Case C-658/11 on the side of the European Parliament.
7. Art. 36 TEU.
10. See, for the broader context, Erkelens, “Institutional and Legal Aspects of the EU’s Judicial Policy to Fighting Piracy Off the Coast of Somalia”; (2014) CLEER Working Papers
concerning the transfer of suspects of piracy.\textsuperscript{11} According to the Parliament, the Pirate Transfer Agreement with Mauritius\textsuperscript{12} did not relate exclusively to the CFSP but is also linked to judicial cooperation in criminal matters, police cooperation and development cooperation. To defend its prerogatives, the Parliament addressed the ECJ with a request for the annulment of Council Decision 2011/640 CFSP of 12 July 2011, which had been adopted on the legal basis of Articles 37 TEU and 218(5) and (6) TFEU. In addition, the Parliament argued that the Council had violated its duty of information during the procedure, given that the text of the contested decision and of the EU-Mauritius Agreement were sent more than three months after the adoption of that decision and the signing of the agreement, and 17 days after their publication in the Official Journal of the European Union.

Significantly, the European Parliament did not challenge the choice of the substantive legal basis (Art. 37 TEU) for the adoption of Council Decision 2011/640 CFSP. This provision allows the Union to conclude international agreements in the field of CFSP. Even though the Parliament claimed that the EU-Mauritius Agreement also pursued aims related to other EU policies than the CFSP, it accepted that those were only incidental to the main objective of preserving international peace and security.\textsuperscript{13} Hence, the dispute entirely focused on the procedural requirements for the conclusion of CFSP agreements under Article 218 TFEU.

In essence, two contradictory views on the interpretation of Article 218(6) TFEU were at stake. According to the Parliament, supported by the Commission, this provision establishes a general rule that the conclusion of an international agreement by the Council must be preceded by either the consent or the consultation of the Parliament. Only in the exceptional situation that an agreement is exclusively related to the CFSP, can the Council proceed without any involvement of the Parliament. It was argued that the exception should be interpreted narrowly and as soon as an agreement relates to any other policy of the Union, the Parliament should have a formal role in the procedure for concluding that agreement.\textsuperscript{14} To support its argument, the Parliament pointed at the different formulation of Article 218(3) TFEU, which refers to

2014/4; Koutrakos and Skordas (Eds.), The Law and Practice of Piracy at Sea. European and International Perspectives (Hart, 2014).


12. The official title is “Agreement between the EU and Mauritius on the conditions of transfer of suspected pirates and associated seized property from the EU-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer”.


agreements relating “exclusively or principally” to the CFSP and Article 218(6) TFEU, which only mentions exclusive CFSP agreements. From this distinction, it drew the conclusion that where agreements “relate only principally” to the CFSP and include incidental measures relating also to other policies, the Council cannot conclude them without first having involved the Parliament.\textsuperscript{15} Contrary to this textual interpretation, the Council and all intervening Member States claimed that the notion “exclusively” under Article 218(6) TFEU must be understood in light of the substantive legal basis of an agreement. In other words, when the decision for concluding an agreement is solely based on a provision falling within the CFSP, there is no procedural requirement to involve the Parliament. Any other interpretation was deemed to upset the institutional balance laid down by the Treaties and as guaranteed under Article 40 TEU.\textsuperscript{16} The latter provision ensures that the application of the Union’s competences and procedures in the field of CFSP do not affect other EU competences and procedures and \textit{vice versa}.

With regard to the duty of information, expressed in Article 218(10) TFEU, the Council contested the Court’s jurisdiction to rule on the legality of a CFSP agreement in light of Article 24(1) TEU and Article 275 TFEU.\textsuperscript{17} Anyhow, it maintained that there had been no violation of Article 218(10) TFEU. “Albeit slightly longer than usual,” the time needed to inform the Parliament was considered to be “still reasonable, taking into account also the fact that this period included the summer break.”\textsuperscript{18} The Parliament, on the other hand, found the delay unacceptable and argued that the Court’s jurisdiction is only excluded with respect to specific provisions on the CFSP in Chapter 2 of Title V of the EU Treaty but not in relation to Article 218(10) TFEU.\textsuperscript{19}

3. **Opinion of Advocate General Bot**

For Advocate General Bot, the question about the applicable procedure for the conclusion of an international agreement cannot be disconnected from the preliminary question of the choice of the substantive legal basis for the adoption of the agreement.\textsuperscript{20} Both aspects are inherently connected with each

\textsuperscript{15} Judgment, para 37.
\textsuperscript{16} Judgment, para 42.
\textsuperscript{17} Both Art. 24(1) TEU and Art. 275 TFEU state that the Court shall have no jurisdiction with regard to the provisions of the CFSP, with the exception of its jurisdiction to monitor compliance with the mutual non-affectation clause of Art. 40 TEU and to review the legality of CFSP decisions providing for restrictive measures against natural or legal persons.
\textsuperscript{18} Judgment, para 67.
\textsuperscript{19} Judgment, para 68.
\textsuperscript{20} Opinion, para 19.
other, given that the legal basis of a measure determines the procedures to be followed in adopting that measure. The Parliament’s isolated and textual interpretation of the procedural requirements of Article 218 TFEU can, therefore, not be accepted. Moreover, the Parliament’s approach has far-reaching practical consequences which would, in view of the Advocate General, be “contrary to the wish of the authors of the treaties.”

Taking into account the duty of consistency between the EU’s various policies and the existence of cross-cutting external relations objectives, an agreement concluded in the field of the CFSP almost necessarily also relates to other Union policies, at least indirectly. Hence, following the Parliament’s suggestions would undermine the procedural specificities of the CFSP, which involves, amongst others, limited possibilities for parliamentary intervention. In this context, the Advocate General recalled that the Lisbon Treaty did not aim to abolish or merge the different Union policies nor did it intend to nullify their procedural particularities.

The difference in wording between Article 218(3) and Article 218(6) TFEU does not affect his conclusions, since the two provisions cover two distinct stages of the procedure relating to international agreements. Moreover, Article 218(6) TFEU is based upon a parallelism between the procedure for adopting measures internally and externally. According to the Advocate General, it would, therefore, be “contrary to the letter and the spirit of that provision to confer on the Parliament greater powers for the adoption of a decision concerning the signing and the conclusion of an international agreement than it enjoys for the adoption of an internal measure which has no such object.” This parallelism between the internal and external powers reflects the institutional balance established by the Treaty of Lisbon, which envisages “a limited role for the Parliament in defining and implementing the CFSP, whether through unilateral measures or international agreements.”

Proceeding from this contextual analysis of Article 218(6) TFEU, the Advocate General turned to the question whether or not Article 37 TEU is the appropriate – and sole – substantive legal basis of the contested decision. In line with the established case law, this involved a traditional centre of gravity test. For this purpose, the Advocate General not only referred to the aim and content of the contested decision and the EU-Mauritius Pirate Transfer Agreement but also to the broader context of the UN Security Council
resolutions and Operation Atalanta. This led him to the conclusion that the Agreement is part of a broader strategy against piracy and, in essence, an implementing measure of Operation Atalanta as established under Joint Action 2008/851/CFSP. This, in turn, “constitutes a strong indication that [the agreement] is connected with the CFSP.

The Pirate Transfer Agreement is regarded as an essential element for the proper implementation and effectiveness of the military operation established by the Joint Action. Even though transferring and prosecuting suspects of piracy are not military activities, they are considered to be “intrinsically linked” to Operation Atalanta. Both the Agreement and the Joint Action are, therefore, considered to fall within the scope of the CFSP. Their aim is to fight piracy off the coast of Somalia, which represents a threat to international security and stability as recognized in the relevant UN Security Council resolutions. The Advocate General specifically referred to Article 21(2)(a) to (c) and (h) TEU in order to justify this conclusion. Even though those provisions constitute horizontal objectives of the EU’s external action, they are in view of the Advocate General “traditionally assigned to the CFSP”. Such a reference to past practice is deemed necessary in order to deal with the absence of specific CFSP objectives in the Treaties, on the one hand, while facing a necessity to define the boundaries between the CFSP and the other policies, on the other.

Building upon this broad, contextual conception of the CFSP, the Advocate General concluded that Council Decision 2011/640 was correctly based on Article 37 TEU. This provision allows for the conclusion of international agreements in all areas of the CFSP, including in the field of the Common Security and Defence Policy (CSDP). For the Advocate General, it was crystal clear that “as the necessary extension of the Atalanta military operation, pursuing the same objective of preserving international peace and security, the [Pirate Transfer] Agreement falls within the sphere of the CSDP” as defined in Articles 42 and 43 TEU. The observation put forward by the Parliament

27. Opinion, para 70.
28. Opinion, paras. 72 and 78.
29. Opinion, para 84.
32. Case C-130/10, Parliament v. Council, para 76.
33. Opinion, para 93.
and the Commission, that the transfer of suspects of piracy and all related activities relate more to judicial cooperation in criminal matters as defined in the Treaty provisions on the Area of Freedom Security and Justice (AFSJ) did not affect his conclusion. In this respect, the Advocate General pointed out that CSDP missions can make use of civilian means to tackle threats to international security stemming from criminal activities. Nevertheless, he understood that the arguments put forward by the Parliament and the Commission concern a more fundamental problem, which is the absence of a clear delimitation between the CFSP and the AFSJ.

According to the Advocate General, a connection with the AFSJ is only justified in situations where judicial and/or police cooperation developed outside the Union is directly related to the internal security of the Union. On the other hand, a link with the CFSP is in place when a Union action aims at fostering the external security situation, i.e. in a region outside the Union. He admitted that this basic division is not always easy in practice. However, taking into account that the Pirate Transfer Agreement with Mauritius forms part of an international cooperation initiative launched by the Security Council to combat security threats in the Indian Ocean, the balance is tilted in favour of the CFSP in this particular case. In other words, the objectives and context of a particular action rather than its specific nature are decisive for the choice of the legal basis. As such, CSDP missions can make use of traditional AFSJ instruments in order to serve the objectives of the CFSP.

The Advocate General also set aside the argument that the Agreement includes a development component which might justify a modification of the CFSP legal basis. Despite the broad interpretation of development cooperation in the case law of the Court, there are also limits to the scope of application of Article 208 TFEU. In particular, “a distinction must be drawn between measures which are aimed at development and measures which pursue other objectives of the Union, such as CFSP objectives.” In the case at stake, the assistance to Mauritius did not go beyond the objectives for which the Atalanta operation was established, and therefore, a reference a supplementary legal basis relating to development cooperation was not deemed appropriate.

35. Opinion, para 112.
37. Opinion, para 118.
Finally, with regard to the Parliament’s second plea alleging a violation of Article 218(10) TFEU, the Advocate General first confirmed the jurisdiction of the Court to deal with this question. The procedural requirements laid down in Article 218 TFEU do not constitute specific CFSP measures within the meaning of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU. As a result, they do not escape the scrutiny of the EU judicature even when agreements exclusively relating to the field of CFSP are at stake. Nevertheless, the Advocate General believed that the Court should take into account the specific characteristics of the CFSP. This implies, for instance, that the Council may be expected to act more quickly and to provide more detailed information when the Parliament is to give its consent or to be consulted than when it is only to be informed of agreements relating exclusively to the CFSP. Be that as it may, the Advocate General also clearly stated that “the information obligation under Article 218(10) TFEU is generally applicable, including in matters of the CFSP” He did not see any problem as far as the case at stake was concerned. The Council informed the President of the Parliament about the opening of negotiations, of the adoption of the contested decision and the signing of the Agreement. As the Parliament was not required to give its opinion on the content of the Agreement, there was no need to provide information about the progress of the negotiations. Also the late communication of the contested decision and the Agreement was not found to be problematic. Even though “it would have been more in keeping with the spirit of Article 218(10) TFEU” if the Parliament had been informed before their publication in the Official Journal, “the period in question neither infringed the Parliament’s prerogatives nor could it influence the content of the Agreement”. For this reason, he proposed that the Court dismiss the Parliament’s application entirely.

4. Judgment of the Court of Justice

After repeating its classic rules on the choice of legal basis, the Court emphasized that the Parliament did not contest the use of Article 37 TEU as the sole substantive legal basis for the adoption of the contested decision. It subsequently rejected a textual interpretation of Article 218(6) TFEU to define whether or not the Parliament should be involved in the procedure for concluding the Pirate Transfer Agreement with Mauritius. Rather, the Court
extensively analysed not only the wording but also the objectives and context of Article 218 TFEU.

As regards the objectives, Article 218 TFEU was introduced with the Treaty of Lisbon in order to establish “a single procedure of general application concerning the negotiation and conclusion of international agreements which the European Union is competent to conclude in the fields of its activity, including the CFSP, except where the Treaties lay down special procedures.”\(^{44}\) However, the procedural rules defined in Article 218 TFEU must take into account the specific powers of the institutions under the respective EU policies. For this reason, Article 218(6) TFEU distinguishes between three different situations as far as the involvement of the Parliament is concerned for the conclusion of an international agreement (consent, consultation and information). This division reflects the internal decision-making procedures. The Parliament’s consent is required for the conclusion of agreements covering areas which internally require the ordinary legislative procedure or the special legislative procedure where the consent of the Parliament is needed. Following the same logic, the Parliament is precluded from participation in the conclusion of agreements exclusively relating to the CFSP and needs to be consulted in all other occasions. Hence, in line with the Opinion of the Advocate General, the ECJ interpreted the meaning of Article 218(6) TFEU in light of the institutional balance as provided under the Treaties.\(^{45}\)

The identified symmetry between the internal and external decision-making procedures implies that the substantive legal basis of the Council decision concluding an international agreement determines the type of procedure applicable under Article 218(6) TFEU. In other words, when an agreement is legitimately founded on a sole legal basis pertaining to the field of CFSP, the agreement can be concluded without the Parliament’s consent or opinion. In contrast to the Advocate General, the ECJ did not enter into the discussion whether the sole use of Article 37 TEU was indeed appropriate for the adoption of Council Decision 2011/640/CFSP concluding the Pirate Transfer Agreement with Mauritius. The Parliament’s explicit acceptance of Article 37 TEU allowed the Court to confine itself to the procedural aspects of the case. As a result, the judgment carefully avoids any references to the delimitation between CFSP and TFEU competences and simply concludes that the first plea of the Parliament is unfounded.

With regard to its second plea in law, alleging the infringement of Article 218(10) TFEU, the Parliament was more successful. After confirming its

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44. Judgment, para 52.
45. Judgment, para 56.
jurisdiction to deal with this question, the ECJ clarified the Parliament’s right to be fully and immediately informed by the Council. This obligation constitutes an essential procedural requirement because it allows the Parliament “to exercise democratic scrutiny of the EU’s external action” and, more specifically, to ensure that its powers are respected in the process leading to the choice of legal basis for a decision concluding an international agreement. In contravention to the Advocate General, who suggested that the Court adopt a lenient approach, taking into account the limited role of the Parliament in the field of CFSP, the ECJ stressed the fundamental importance of the information requirement as “an expression of democratic principles on which the European Union is founded”. As a result, the delayed communication on behalf of the Council resulted in the annulment of the contested Council decision. Upon request of both the Parliament and the Council, and the majority of the intervening Member States, the Court maintained the effects of the annulled decision until it is replaced. This was deemed necessary to ensure the continuity of the operations carried out on the basis of the EU-Mauritius Agreement and, in particular, “the full effectiveness of the prosecutions and trials of suspected pirates arrested by EUNAVFOR”.

5. Comments

The Court’s judgment clarifies the procedural aspects for the conclusion of international agreements in the post-Lisbon EU legal order. In particular, it sheds light on the role of the European Parliament with regard to agreements pertaining to the sphere of the CFSP. With its explicit recognition of the Parliament’s right to information under Article 218(10) TFEU, the ECJ confirms that the CFSP is no longer to be regarded as a purely intergovernmental construction escaping judicial and parliamentary control. At the same time, the Court equally safeguards the institutional balance by rejecting a textual interpretation of Article 218(6) TFEU. However, the judgment did not tackle the most significant constitutional challenge, which is the need for clear criteria to define the scope of the CFSP in relation to other EU policies, in particular the external dimension of the AFSJ.

46. Judgment, paras. 69–74. The ECJ essentially pointed at the general application of Art. 218 TFEU and the need for a narrow interpretation of the exception that CFSP measures fall outside the Court’s general jurisdiction as established under Art. 19 TEU.
47. Judgment, para 79.
5.1. **Limits to the insulation of the Common Foreign and Security Policy in the EU legal order**

Pursuant to Article 24(1) TEU, the CFSP is “subject to specific rules and procedures”. This implies, amongst others, a dominant role for the European Council and the Council, the absence of parliamentary involvement in the decision-making process, and the exclusion of the Court’s jurisdiction with regard to CFSP acts unless the borderline between CFSP and non-CFSP competences and procedures is at stake or when judicial review of restrictive measures against natural or legal persons is concerned. Nevertheless, the CFSP is also an integral part of the EU legal order, which is based upon a single legal personality since the abolition of the pillar structure with the Treaty of Lisbon. As a result, the interpretation and application of CFSP activities is subject to the constitutional norms of EU law.\(^{50}\)

The Court’s judgment builds upon this new reality to draw significant conclusions regarding the scope of its own jurisdiction, on the one hand, and the role of the European Parliament in the field of CFSP, on the other. First, Article 19 TEU confers on the ECJ a general competence to ensure that in the interpretation and application of the Treaties the law is observed. The exclusion of the Court’s jurisdiction with regard to CFSP measures constitutes an exception to this rule, which has to be interpreted restrictively.\(^{51}\) This is a direct result of the Lisbon Treaty, which reversed the order in the sense that under the old rules the Court only had jurisdiction where it was explicitly provided.\(^{52}\)

Second, the recognition of the Court’s jurisdiction has more far-reaching implications as far as the position of the CFSP in the EU legal order is concerned. The abolition of the pillars and, as a consequence, the integration of the CFSP in the unitary legal order of the Union implies that CFSP acts are no longer to be regarded as distinct intergovernmental measures immune to any judicial intervention. Rather, they are full-fledged sources of EU law be it of a specific, non-legislative, nature the content of which cannot be challenged before the Court. Nevertheless, as far as procedural questions are concerned or when key constitutional issues such as the balance of power or the rule of law are at stake, the ECJ has its role to play.\(^{53}\) This, for instance, also implies that CFSP acts do not escape the duty to respect fundamental rights, in

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51. Judgment, para 70.

52. Ex Art. 46 TEU.

53. Hillion, op. cit. supra note 50.
accordance with Article 51(1) of the EU Charter of Fundamental Rights. Even though the Court did not feel a need to reiterate this principle in its judgment on the present case, Advocate General Bot correctly stated that the CFSP “like the Union’s other policies, is subject to respect for fundamental rights.”

Third, according to the same logic, the European Parliament is not completely side-lined from the field of application of the CFSP. Of course, the level of democratic control to be exercised by the Parliament is strictly limited as a result of the balance of powers laid down in the Treaties. Or, to use the Court’s own words, it is “the result of the choice made by the framers of the Lisbon Treaty” to confer a more limited role on the Parliament with regard to the Union’s action under the CFSP in comparison to other policy areas. This, however, does not mean that the CFSP is isolated from the Parliament’s activities. There is only a lesser degree of parliamentary intervention, which basically means a simple right to be informed about ongoing CFSP activities. This is, with so many words, expressed in Article 36 TEU for the adoption of CFSP measures and in Article 218(10) TFEU as far as the conclusion of international agreements in the field of CFSP is concerned. In contrast to the Advocate General, who minimized the significance of Article 218(10) TFEU since the Parliament is not required to give its opinion on the content of the Agreement, the Court stressed the importance of the Parliament’s right to information “as an expression of the democratic principles on which the European Union is founded.” Hence, just as with regard to the jurisdiction of the ECJ, also the role of the European Parliament in relation to the area of CFSP has strengthened as a result of the Lisbon Treaty and the abolition of the pillars.

Arguably, the so-called “PESCalization” of the EU’s external relations, pointing at the increasing importance of the CFSP in policies such as counterterrorism, is partly balanced as a result of a certain “parliamentarization” of the CFSP. As pointed out by the Court, observing

55. Opinion, para 119.
56. In Case C-409/13 (Council v. Commission, EU:C:2015:217, para 96), the ECJ confirmed that the principle of democracy cannot be disconnected from the division of powers. This was expressed even more explicitly in the Opinion of A.G. Jääskinen in the same case, when he observed that “adopting from the outset a principle of preference for maximising the Parliament’s participation in the decision-making process is tantamount to altering the institutional balance laid down by the Treaties” (para 52).
57. Case C-130/10, Parliament v. Council, para 82.
59. Hillion, “Fighting terrorism through the EU Common Foreign and Security Policy”, in Govaere and Poli (Eds.), Management of Global Emergencies, Threats and Crises by the European Union (Brill, 2014), p. 82.
the Parliament’s right to information is crucial to guarantee the democratic scrutiny of the Council’s activities in this field and to ensure that the correct procedures are followed. In this respect, it is noteworthy that the Treaty of Lisbon has reinforced the Parliament’s role in relation to the CFSP. Article 36 TEU uses mandatory language to describe the High Representative’s obligation to regularly consult the European Parliament about the basic policy choices and the evolution of the CFSP and CSDP. Moreover, she “shall ensure that the views of the European Parliament are duly taken into consideration.” Even though the latter commitment is difficult to verify, it illustrates that the drafters of the Lisbon Treaty intended to enhance the democratic legitimacy of the CFSP. For this purpose, the European Parliament is also given a right to ask questions and to make recommendations on CFSP-related matters, whereas “twice a year it shall hold a debate on implementing” the CFSP. In light of the identified symmetry between the internal rules on the adoption of EU measures and the procedure for the conclusion of international agreements (see below), the Court’s explicit recognition of the Parliament’s right to be informed about exclusive CFSP agreements thus makes sense. Of course, the question remains how far such a right to information can stretch taking into account the often sensitive political nature of CFSP agreements. The case law on access to documents at least indicates that the secrecy of international negotiations cannot be used as a general excuse to refuse information to the public. Constitutional principles such as transparency and proportionality apply in this respect, whether or not the Council is acting in the field of CFSP. By analogy, the duty to inform the Parliament under Article 218(10) TFEU, as a reflection of the more general duty of sincere cooperation among the institutions set out in Article 13 TEU, is to be interpreted in light of those principles.

60. Judgment, para 86.
62. Art. 36 (1) TEU.
63. Art. 36 (2) TEU.
5.2. *A holistic approach to the choice of legal basis for the conclusion of international agreements*

Whereas the ECJ confirmed the Parliament’s right of scrutiny in respect to the CFSP, it rejected the suggested textual interpretation regarding the procedural rules for the conclusion of international agreements under Article 218(6) TFEU. As pointed out by Advocate General Sharpston in another context, “Article 218 TFEU is based on a particular interinstitutional balance between the Commission, the Council and the Parliament”.65 The interpretation proposed by the Parliament would significantly affect this balance. As Advocate General Bot correctly observed, it is nearly impossible to envisage an international agreement in the field of CFSP that does not, in one way or another, affect other EU policy areas.66 As a result, the Parliament’s interpretation would *de facto* exclude the possibility of exclusive CFSP agreements, which is difficult to reconcile with Article 40(2) TEU, or, it would lead to situations where the Council opposes the integration of other policy aspects into the CFSP measures it adopts, which contradicts the purpose of consistency as expressed in Article 21(3) TEU.

Moreover, the suggested disconnection between the substantive legal basis of a Council decision and the procedural requirements under Article 218(6) TFEU would lead to very complex situations. It would then, for instance, be possible that two agreements with a substantive CFSP legal basis nevertheless need to follow different procedural rules depending on a second “exclusivity test”. Such an approach would indeed create (additional) legal uncertainty since the borderline between situations where an agreement predominantly or exclusively pursues CFSP objectives is particularly difficult to define. Instead, the Court’s contextual interpretation of Article 218(6) TFEU in light of general constitutional principles such as the institutional balance and the requirement of consistency is much more convincing.

Of course, this holistic approach to the choice of legal basis does not solve the key constitutional challenge, which is the need for “clear criteria to define the scope of the CFSP in relation to other fields of the Union’s external action”.67 The Court managed to circumvent this tricky issue due to the Parliament’s acceptance of Article 37 TEU as the substantive legal basis for the agreement. As a result, the judgment does not teach us much about the

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interpretation of Article 40 TEU or the role of Article 21 TEU. Nevertheless, the Court reiterated the traditional “centre of gravity test” hinting that also in the post-Lisbon context the aim and content of a measure are crucial to decide on the choice of legal basis.\textsuperscript{68} In line with the earlier Smart sanctions case, this implies that the Court does not consider possible alternative criteria such as the principle of \textit{lex specialis derogat lex generalis} or a distinction on the basis of the legislative nature of the respective measures.\textsuperscript{69} The horizontal application of the centre of gravity test may therefore be regarded as another implication of the EU’s unified legal order.

The question arises whether the outcome of this test may lead to a combination of CFSP and TFEU legal bases. Whereas this option was ruled out for the adoption of unilateral measures in the Smart sanctions case,\textsuperscript{70} no procedural incompatibilities exist as far as international agreements are concerned.\textsuperscript{71} This is a direct consequence of the single procedural code of Article 218 TFEU and its direct link with the substantive legal basis of the Council decision for concluding the agreement. In other words, when an agreement equally concerns CFSP and TFEU competences, the interpretation of Articles 218(6) and (8) TFEU implies that the consent of the European Parliament can perfectly be combined with a unanimous decision in the Council. Such a particular form of CFSP-TFEU mixity is already applied in practice, for instance, with regard to the Treaty of Amity and Cooperation in Southeast Asia.\textsuperscript{72}

5.3. \textit{The delimitation between the external and internal security policies of the Union: In search of clear criteria}

Although the centre of gravity test seems clear and logical, its application to concrete situations is far from evident. This is particularly the case when the delimitation between CFSP and non-CFSP policies is at stake. First, Article 24(1) TEU does not provide for specific CFSP objectives but rather bluntly defines the EU’s CFSP competence as covering “all areas of foreign policy and questions relating to the Union’s security”. Second, Article 21 TEU

\textsuperscript{68} Judgment, para 43.
\textsuperscript{69} Such alternative solutions have been suggested in literature. See, e.g. Cremona, “Defining competence in EU external relations: Lessons from the Treaty Reform Process” in Dashwood and Maresceau (Eds.), \textit{Law and Practice of EU External Relations} (CUP, 2008), p. 64.
\textsuperscript{70} Case C-130/10, \textit{Parliament v. Council}, para 46.
\textsuperscript{71} Adam, “The Legal Basis of International Agreements of the European Union in the Post-Lisbon Era” in Govaere, Lannon, Van Elsuwege, Adam (Eds.), \textit{The European Union in the World: Essays in Honour of Marc Maresceau} (Brill, 2014), p. 82.
includes a comprehensive list of objectives for the entire range of EU external action, implying a closer integration of the EU’s external policies. Third, the old delimitation rule that priority should be given to the non-CFSP legal basis whenever possible no longer applies.\(^7_3\) Fourth, despite the legal obligation to respect the procedural requirements and institutional powers under the CFSP and TFEU policies – as reflected in the “mutual non-affectation clause” of Article 40 TEU – the reality on the ground implies that any attempt to make such a neat distinction is almost by definition an artificial endeavour. This is also reflected in EU policy documents stressing the indivisibility of security threats and the necessity of increased coherence in response to crisis situations.\(^7_4\)

The solution offered by Advocate General Bot to apply a pre-Lisbon understanding of CFSP objectives is not without criticism.\(^7_5\) This approach is difficult to reconcile with the horizontal application of Article 21 TEU and with the aim of the Lisbon Treaty to ensure more coherence in the EU’s external action. It seems, therefore, no coincidence that the Court did not make such a connection in the **Smart sanctions** case. There, the Court simply observed that the preservation of peace, the prevention of conflicts and the strengthening of international security – objectives mentioned under Article 21(2)(c) TEU – form “part of Chapter 1 laying down general provisions on the Union’s external action in Title V of the EU.”\(^7_6\) As a result, those objectives are not exclusively related to the CFSP but may well be addressed by other Union policies as well.

The logic of Article 21 TEU and the generic definition of the CFSP under Article 24(1) TEU thus implies that the balancing of largely overlapping objectives is inherently problematic. For this reason, additional elements must be taken into account to decide on the correct legal basis. It appears that at least three elements are important in this respect. First, reference can be made to the more specific policy objectives of the Common Security and Defence Policy

\(^7_3\) Ex Art. 47 TEU as interpreted in Case C-91/05, **Commission v. Council**, EU:C:2008:288, paras. 58–62. For comments see e.g. Van Elsuwege, “On the boundaries between the European Union’s First Pillar and Second Pillar: A comment on the ECOWAS judgment of the European Court of Justice” (2008) CJEL, 531–548.


\(^7_5\) Opinion, para 87, see also his Opinion in Case C-130/10, **Parliament v. Council**, para 63. In his Opinion on the Mauritius Pirate Transfer Agreement, the A.G. also included the objectives set out in Art. 21(2)(h) TEU as belonging to “those that are traditionally assigned to the CFSP”. This is remarkable since those objectives, involving the promotion of “an international system based on stronger multilateral cooperation and good governance” were not included in ex Art. 11 TEU.

\(^7_6\) Case C-130/10, **Parliament v. Council**, para 62.
(CSDP), laid down in Articles 42 and 43 TEU. This is what the Court did in the Smart sanctions case \(^77\) and what Advocate General Bot proposed with regard to the Pirate Transfer Agreement with Mauritius. \(^78\) Second, the existence of a link with a United Nations Security Council Resolution is another relevant factor that may be derived from the Smart sanctions case. This means that the UN mandated international actions of the Union presumably fall within the scope of the CFSP. \(^79\) Hence, not only the “aim and content” of the contested EU measure is taken into account, but also the broader context, in particular the link with UN Security Council Resolutions and the objectives of the latter. Third, for international agreements, the connection with other unilateral EU measures is relevant. Advocate General Bot, for instance, argued that the Pirate Transfer Agreement with Mauritius cannot be disconnected from the CFSP Joint Action that established Operation Atlanta. \(^80\)

This preoccupation with the broader context and objectives is remarkable in light of the Court’s pre-Lisbon case law. In its ECOWAS judgment, the Court stressed that a Council Decision implementing a CFSP Joint Action does not necessarily fall within the CFSP. \(^81\) It also completely ignored the existence of United Nations Security Council Resolutions inviting the international community to reduce the spread of small arms and light weapons in West Africa. \(^82\) Of course, the post-Lisbon constitutional setting is fundamentally different, but this does not absolve the EU institutions from respecting the principle of conferral as expressed in the specific legal bases mentioned in the Treaties. \(^83\) Hence, it appears a bridge too far to suggest that an international agreement concluded in the framework of a CFSP action by definition exclusively belongs to the field of CFSP.

Whereas such a contextual approach to the choice of legal basis helps to solve the identified delimitation dilemmas, it implies that the content of an international agreement (in this case dealing with criminal procedure and mutual legal assistance) and the nature of the activities pursued (in this case

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77. Case C-130/10, Parliament v. Council, para 64.
78. Opinion, paras. 94–98.
79. Opinion, para 114.
80. Opinion, paras. 70–71.
82. The Swedish Government referred to the existence of such United Nations Security Council Resolutions to claim that the contested EU decision fell within the EU's CFSP competence. See Case C-91/05, Commission v. Council, para 51.
83. This can be derived from Art. 3(6) TEU, which states that “The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties”. See also: Dashwood, “Conflicts of Competence in Responding to Global Emergencies”, in Antoniadis, Schütze and Spaventa (Eds.), The European Union and Global Emergencies. A Law and Policy Analysis (Hart, 2011), p. 35.
the judicial treatment of persons) is largely ignored. As a result, the scope of the CFSP is stretched to its outer limits involving a wide range of military and civilian activities contributing to the objectives of international peace and security. In the Advocate General’s view, this is a logical consequence of the increased synergies between the EU’s different policies in the sense that “the traditional instruments of the AFSJ can be mobilized to serve the objectives of the CFSP.” Accordingly, “the external dimension of the AFSJ is thus absorbed by the exercise of the Union’s foreign policy competence.”

Whereas the first part of this reasoning is in line with the EU’s comprehensive approach to crisis situations, the conclusion that the interaction between various instruments leads to an absorption of legal bases is more controversial. Arguably, such an interpretation goes beyond the requirement of consistency between the different EU policy areas. The latter implies that policy instruments with a different legal basis in the Treaties can be used to attain common objectives. From this perspective, the achievement of international peace and security – as an external action objective laid down in Article 21 TEU – may be pursued by both CFSP and TFEU instruments. The Advocate General, on the other hand, starts from the presumption that all actions contributing to the EU’s external security belong to the CFSP, whereas the AFSJ is reserved for actions contributing to the internal security of the Union. Such a basic division is difficult to uphold – not only because the question of security is essentially indivisible, but also because it disregards the specific nature of the different policy instruments involved. For instance, the unfolding EU military operation in the Mediterranean Sea (EUNAVFOR Med) clearly aims to address the issue of migration to the EU and as such it contributes to the objectives of the AFSJ. Nevertheless, there is no doubt that this operation belongs to the area of the CFSP, more specifically the CSDP, if one looks at the specific nature and content of the activities pursued (such as the interception and destruction of ships). This example illustrates the limits of a mere objective-oriented approach.

It remains to be seen whether the Court will uphold the Advocate General’s approach in the pending case on the Pirate Transfer Agreement with Tanzania. In that case, the European Parliament explicitly challenges the substantive legal basis of Council Decision 2014/198/CFSF, claiming that the

85. Opinion, para 118.
86. Art. 21(3) TEU.
87. Opinion, para 112.
agreement equally concerns the EU’s competence on judicial cooperation in criminal matters (Art. 82 TFEU) and on police cooperation (Art. 87 TFEU). The latter presupposes a flexible interpretation of Article 67 TFEU. This provision reveals that EU action in the field of AFSJ pursues a wide range of objectives which are all in one way or another related to the internal security of the European Union. Moreover, Articles 82 and 87 TFEU concern the relationship between EU Member States and remain silent on cooperation with third countries. Hence, a strict reading of the Treaty provisions may lead to the conclusion that the Pirate Transfer Agreement goes beyond the Union’s competence in the field of AFSJ. On the other hand, the view that the agreement falls within the sphere of the CSDP, as argued by Advocate General Bot, equally requires a flexible reading of the Treaty provisions. Articles 42 and 43(1) TEU indeed refer to the possible use of civilian means to support third countries in combating terrorism in their territories, but the list of tasks does not include issues such as the transfer of persons and property.

6. Concluding remarks

The inter-institutional conflict on the procedure for the conclusion of the EU-Mauritius Pirate Transfer Agreement illustrates quite well the constitutional challenges of post-Lisbon EU external relations. In particular, it reveals how the division between CFSP and non-CFSP external action remains a major source of tension. Whereas the Court’s judgment circumvented the crux of the matter, it helps to understand the inter-institutional balance in the procedure for the conclusion of international agreements.

The Court logically builds upon the unitary nature of the EU legal order to underline the parallelism between the internal division of powers and the procedural rules under Article 218(6) TFEU. This implies that the role of the European Parliament with regard to CFSP agreements corresponds to its right to be informed about CFSP initiatives under Article 36 TEU. In an attempt to strike a balance between respect for the principle of conferral, on the one hand, and the principle of democracy and legitimacy, on the other hand, the Court’s

90. Remarkably, the Parliament did not uphold its claim made in respect to the Mauritius Agreement that there is also a link with the EU’s development cooperation policy.


92. This argument was put forward by the European Parliament in the case. Without many considerations, A.G. Bot responded that in his view “the list of CSDP tasks in Art. 43(1) TEU is broad enough to cover all the provisions of the Agreement and, accordingly, to conclude that that Agreement is an integral part of a CSDP task”. See Opinion, paras. 96–98.
judgment confirms that the Parliament’s involvement in the field of CFSP is more than a mere formality. Just as with regard to the circumscription of the Court’s jurisdiction, the exclusion of the Parliament from the decision-making process forms an exception to the general rule and must, therefore, be interpreted restrictively.

The Court’s judgment also reiterates the classic “centre of gravity test” without, however, applying this test to the facts of the case. The limits of this approach to distinguish between CFSP and non-CFSP external action are well known, even though the more specific objectives of the CSDP (Arts. 42 and 43 TEU) and contextual factors such as UN Security Council resolutions may help to solve the conundrum. Nevertheless, this is not a panacea given the unavoidable interference between various EU policies and objectives. This is particularly the case with regard to the often blurred borderline between the CFSP and the AFSJ. Hence, further guidance from the Court is needed to cope with the legal uncertainty surrounding the post-Lisbon institutional balance in the field of EU external relations.

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