

# ARTICLE 22 TEU AND THE UNNOTICED RESURRECTION OF THE FAILED COMMON STRATEGIES

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## ABSTRACT

The old common strategies instrument was introduced by the Treaty of Amsterdam in order to improve the coherence and effectiveness of EU external action. However, shortly after its introduction the instrument suffered an inglorious demise because it failed to provide any added value. It is therefore surprising that the Lisbon Treaty, rather unnoticed, holds on to this instrument in Article 22 of the Treaty on European Union (TEU). Yet, rather than a relic of the past, this move represents a deliberate endeavor to tackle the shortcomings of its predecessor. Despite its significant potential in the new external action constellation, Article 22 TEU has however not yet been used in practice, suggesting that its innovative constitutional design did in fact not reply to any pressing political needs.

## 1. INTRODUCTION

Article 22 TEU empowers the European Council to adopt decisions on the strategic interests and objectives of the Union. These decisions are designed to set out a comprehensive EU approach aimed at improving the coherence and effectiveness of policies in the areas they address. Once such a European Council decision has been agreed, it enables the adoption of implementing Common Foreign and Security Policy (CFSP) decisions by qualified majority voting (QMV), instead of the general rule of unanimity in this policy field.

Whilst not explicitly stated, this design irrefutably recycles the concept of the old common strategies, a CFSP instrument introduced by the Treaty of Amsterdam.<sup>1</sup> Eventually, only

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<sup>1</sup> Ex Art 13(2) TEU.

three such strategies were adopted (on Russia, Ukraine and the Mediterranean region) and the instrument soon fell into disuse for failing to impact on the development and implementation of concrete EU policies. This resulted from a number of in-built flaws that made its purpose of comprehensiveness conflict with the EU's constitutional structure that firmly encapsulated the various external action strands in three separate pillars.

Article 22 TEU addresses the main shortcomings of its predecessor and provides a more solid constitutional basis for all-encompassing EU action. Whereas this redesign suggests that the Treaty drafters saw a future for this instrument in the new external action constellation, not a single European Council decision of this kind has yet been adopted. This curious resurrection, that has gone largely unnoticed in scholarly debate, raises questions with regard to the potential of this instrument in the new constitutional, procedural and institutional architecture of the Lisbon Treaty. In order to better grasp its added value and understand why the new instrument holds greater potential, it is necessary to first take a few steps back and analyse the reasons behind the failure of its predecessor.

## **2. THE RISE AND FALL OF THE COMMON STRATEGIES: CHRONICLE OF A DEATH FORETOLD**

In language that noticeably reminds of the more recent Laeken Declaration,<sup>2</sup> the 1996 Intergovernmental Conference (IGC) completed in Amsterdam was to ensure that the Union's 'external action is coherent and effective in all its aspects, and it must improve its decision-making procedures, if it is to play a role in the world commensurate with its responsibilities and its potential'.<sup>3</sup> One of the main endeavours to fulfil these objectives was ex Article 13 (now as amended Article 26) TEU that called the common strategies into being:

2. The European Council shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.

Common strategies shall set out their objectives, duration and the means to be made available by the Union and the Member States.

3. ... The Council shall recommend common strategies to the European Council and shall implement them, in particular by adopting joint actions and common positions.

By empowering the European Council these provisions ensured strategic guidance over EU external action from the highest institutional level. The adoption of a CS moreover opened

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<sup>2</sup> This document lay at the basis of the constitutional reform process that eventually resulted in the adoption of the Lisbon Treaty; Laeken Declaration on the Future of the European Union, European Council, 14 and 15 December 2001, Annex I to the Presidency Conclusions.

<sup>3</sup> Presidency Conclusions, European Council, Dublin, 13 and 14 December 1996.

the possibility to derogate from the general CFSP rule of unanimity in the Council and allowed to vote by qualified majority on joint actions and common positions taken on its basis.<sup>4</sup>

With this innovative design the CSs clearly aimed to strengthen strategic leadership, enhance its coherence and streamline voting procedures.<sup>5</sup> In this manner they replied to a number of important foreign policy preoccupations within the EU and therefore seemed to be accorded a promising future.<sup>6</sup> Nonetheless this experiment was short-lived, which can be explained by a number of in-built flaws (2.1.) resulting in substantive deficiencies of the adopted strategies (2.2.).

## 2.1. STRUCTURAL DEFICIENCIES

Rather than stemming from a willingness to develop a truly strategic instrument, the creation of the common strategies represented a political compromise between those Member States keen to introduce QMV and those sticking to unanimity in the sensitive area of CFSP.<sup>7</sup> The provision that joint actions and common positions taken on its basis shall be adopted by QMV was part of a deal set out in ex Article 23(2) (now as amended Article 31(2)) TEU. This article lists the exceptions to the general rule of unanimity that were acceptable to all Member States.<sup>8</sup> This concealed motivation for creating a strategic instrument resulted in two main structural deficiencies.

First, a closer reading indicates that this compromise formula was in fact unbalanced or even unreal. Member States that feared to be outvoted in implementing decisions were provided with two important opportunities to step on the brake. In the first place, CSs were adopted by the European Council taking decisions by consensus.<sup>9</sup> In order to avoid giving a safe-conduct for subsequent decisions in the Council, every Member State could thus strive to circumscribe the mandate in areas it considered sensitive.<sup>10</sup> In other words, Member States could simply ensure that the bulk of decision-making moved up in the institutional hierarchy

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<sup>4</sup> Ex Art 23(2) TEU.

<sup>5</sup> S. Keukeleire and J. MacNaughtan, *The Foreign Policy of the European Union* (Palgrave Macmillan, Basingstoke, 2008) 155.

<sup>6</sup> M. Maresceau, 'EU Enlargement and EU Common Strategies on Russia and Ukraine: An Ambiguous yet Unavoidable Connection' in C. Hillion (ed), *EU Enlargement: A Legal Approach* (Hart, Oxford, 2004) 182.

<sup>7</sup> UK House of Lords, EU Select Committee, Report on the Common Mediterranean Strategy, Session 2000-2001, Ninth Report, 14 March 2001, paras 3-4.

<sup>8</sup> The other two exceptions were the adoption of decisions implementing a joint action or a common position and the appointment of special representatives.

<sup>9</sup> Even though this was not explicitly stated in the Treaty.

<sup>10</sup> S. Griller, et al., *The Treaty of Amsterdam: Facts, Analysis, Prospects* (Springer, Vienna, 2000) 385.

to the level of the European Council.<sup>11</sup>Second, also the implementation of this potentially thorough bargain could be blocked by any Member State in the Council on the basis of the escape clause included in ex Article 23(2) (now as amended Article 31(2)) TEU:

If a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.

This provision, reminiscent of the unfortunate Luxembourg compromise, granted every Member State able to demonstrate important reasons of national policy – the meaning of which was left to the individual discretion of the opposing State – the power to block a vote by QMV.<sup>12</sup>Finally, the QMV possibility did not apply to decisions having military or defence implications.<sup>13</sup> These restraining conditions regarding the adoption and implementation of CSs represented a kind of in-built fear for QMV with a potentially paralysing effect.

A second consequence of this focus on procedural issues was that significantly less attention went to the substance of the instrument.<sup>14</sup>This arises clearly from the short and vague Treaty language of ex Article 13 TEU. Especially the provision that the Council shall implement the CSs 'in particular by adopting joint actions and common positions' raised many questions as to what constituted the other 'means to be made available'.<sup>15</sup>Given the European Council's mandate to provide the necessary impetus for the whole of the EU,<sup>16</sup> the common strategies could be expected to have a comprehensive scope. This would imply that they could touch upon the external aspects of the Community pillar (such as trade, fisheries and environmental policy) as well as aspects of the two intergovernmental pillars of the CFSP and the Police and Judicial Cooperation in Criminal Matters (PJCCM, tackling for instance terrorism, organised crime, etc.) Yet, common strategies were *de jure* strictly CFSP instruments and therefore many authors initially did not interpret Article 13 TEU as a basis for cross-pillar action.<sup>17</sup>

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<sup>11</sup>R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International, The Hague, 1999) 145-146.

<sup>12</sup>According to the EU Select Committee of the UK House of Lords it provides a stronger safeguard than the national veto under the Luxembourg compromise (op.cit. note 7, para. 8).

<sup>13</sup>Ex Art 23(2) TEU.

<sup>14</sup>H. Haukkala, 'The Making of the European Union's Common Strategy on Russia' in H. Haukkala and S. Medvedev (eds), *The EU Common Strategy on Russia: Learning the Grammar of the CFSP* (Ulkopoliittinen instituutti&Institut für Europäische Politik, 2001) 39.

<sup>15</sup>Art 13 (3) and (2) TEU.

<sup>16</sup>Ex Art 4 TEU.

<sup>17</sup>Dashwood for instance noted that this provision could be interpreted as an acknowledgement of *sui generis* Council Decisions in the CFSP (A. Dashwood, 'External Relations Provisions of the Amsterdam Treaty' (1998) 35(5) *Common Market Law Review*, 1032).

It was the General Affairs Council of December 1998 that first set the CSs on a cross-pillar path by stating that they should make 'full use of all the means and instruments available to it' and be in conformity with then Article M (ex Article 47, now as amended Article 40) TEU.<sup>18</sup> This was the main article defining the relationship between the three pillars. It stated that nothing in the TEU 'shall affect the Treaties establishing the European Communities'. This was interpreted by the EU Court of Justice as a 'hierarchical delimitation rule',<sup>19</sup> implying watertight pillar walls combined with the subordination of CFSP and PJCC measures that were prohibited from 'encroaching' on EC competences.<sup>20</sup>

The first CS on Russia subsequently took away all doubt with its all-encompassing focus including elements of economic and social policy, stability and security as well as justice and home affairs.<sup>21</sup> In an annexed declaration it was moreover specified that the Council acts by QMV when adopting CFSP measures on the basis of this strategy, whereas other acts continued to be adopted according to the decision-making procedures provided by the relevant provisions of the Treaties. In one stroke this was as a formal recognition of its cross-pillar character, as well as a reminder that despite the comprehensive nature of the common strategies the EU 'reste prisonnière de ses compétences cloisonnées'.<sup>22</sup>

From a practical perspective this comprehensive scope was conducive to the coherence and effectiveness of EU external action. Moreover, it was not illogical that an instrument under the auspices of the CFSP, as the main political arm of EU foreign policy, took on the task of providing direction to the whole of Union activities towards a certain country or region. From a legal point of view, however, such a cross-pillar approach was considerably more problematic.<sup>23</sup> A CFSP instrument that provides direction to – let alone imposes obligations on – EC policies risked to be at cross-purposes with the explicit hierarchy laid down in the

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<sup>18</sup> Council Report to the European Council on Common Strategies annexed to the Conclusions of the General Affairs Council, Brussels, 8 December 1998.

<sup>19</sup>P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: in Search of a New Balance between Delimitation and Consistency' (2010) 47(4) *Common Market Law Review*, 988.

<sup>20</sup> Case C-176/03 (Environmental Penalties), Commission v. Council [2005] ECR I-7907; Case C-440/05, Commission v. Council (Ship-Source Pollution) [2005] ECR I-9128.

<sup>21</sup> European Council (1999/414/CFSP) Common Strategy on Russia of 4 June 1999, O.J. L157/1, 24.06.1999.

<sup>22</sup>E. Decaux, 'Le Processus de Décision de la PESC: Vers une Politique Etrangère Européenne?' in E. Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International, The Hague, 2002) 37.

<sup>23</sup>B. Weidel, 'Regulation or Common Position - The Impact of the Pillar Construction on the Union's External Policy' in S. Griller and B. Weidel (eds), *External Economic Relations and Foreign Policy in the European Union* (Springer, Vienna, 2002) 54-55.

Treaties.<sup>24</sup> In the light of ex Article 47 TEU, that prohibited the TEU from affecting the Treaty establishing the European Community (TEC), this was moreover subject to judicial review.

This constitutional anomaly was to a certain extent compensated on an institutional level. Without having a formal role in the mainly intergovernmental CFSP decision-making, the Commission – as guardian of the EC *acquis communautaire* – was nevertheless fully associated with the work carried out and had its President participating in European Council meetings.<sup>25</sup> However, these provisions were not able to prevent the resurgence of concerns about the intergovernmental contamination of the EC.<sup>26</sup> The preparatory work on the first CS immediately led to the Commission voicing its opposition against potential legal obligations imposed upon it<sup>27</sup> and the European Parliament lamenting its lack of involvement.<sup>28</sup>

### 2.1.1. SUBSTANTIVE DEFICIENCIES

Between June 1999 and June 2000 the European Council adopted three common strategies on Russia, Ukraine and the Mediterranean region.<sup>29</sup> In view of their open-ended Treaty mandate, the first served as a kind of prototype that was taken over in the subsequent strategies<sup>30</sup> with a gradually optimised structure and improved wording.<sup>31</sup> These CSs were interesting documents that gave a good overview of existing policies and enumerated unanimously agreed positions and objectives. However, as a result of the structural defects in their conceptual design set out above, the adopted texts were at the same time too detailed and too vague to function as genuine EU strategies towards the targeted countries and region.

First, their remarkable degree of detail resulted from the above-discussed design of the QMV exception that turned out to have a restraining rather than a facilitating effect. The European Council's Treaty mandate for setting out the objectives, duration and means was exploited to the fullest in order to adopt detailed documents that contained 'more specific provisions, in

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<sup>24</sup> The ex TEU explicitly stated that the Union supplements the European Community (ex Art 1 TEU) and shall maintain in full and respect the *acquis communautaire* (ex Arts 2 and 3 TEU).

<sup>25</sup> Ex Arts 27 and 4 TEU.

<sup>26</sup> J. Monar and W. Wessels, *The European Union after the Treaty of Amsterdam* (Continuum, London/New York, 2001) 254.

<sup>27</sup> J.-M. Dumond and P. Setton, *La Politique Étrangère et de Sécurité Commune (PESC)* (La Documentation Française, Paris, 1999) p 93.

<sup>28</sup> European Parliament (A4-0219/99) Report containing a proposal for a European Parliament recommendation to the Council on the common strategy towards the Russian Federation, 22.04.1999.

<sup>29</sup> CS on Russia, op.cit. note 21; European Council (1999/877/CFSP) Common Strategy on Ukraine of 11 December 1999, O.J. L331/1, 23.12.1999; European Council (2000/458/CFSP) Common Strategy on the Mediterranean region of 19 June 2000, O.J. L183/5, 22.07.2000.

<sup>30</sup> Particularly the drafting of the Common Strategy on Ukraine consisted of considerable copy pasting. This is illustrated by the fact that in both the French (para 47) and the Dutch version (Part II Title III.I.i) it was forgotten to change the word 'Russia' into 'Ukraine'.

<sup>31</sup> Decaux (2002) op.cit. note 22, 36-37.

lengthier texts, than the “common positions” hitherto adopted by the Council’.<sup>32</sup>The fear for QMV – that was explicitly recognised by the UK House of Lords in the context of the CS on the Mediterranean and its provisions on the Middle East Peace Process<sup>33</sup> – resulted in long lists of objectives supplemented with even more detailed enumerations of specific initiatives. For instance, in the particular field of money laundering, the CS on Russia stated that it shall cooperate with the latter by drawing up a common plan for its effective prosecution and organising seminars on the existing types and methods. Such meticulous prescriptions could function as a blockade for any initiative that would go beyond them and thus unequivocally circumscribed the range of policy choices left for the implementation in the Council.<sup>34</sup>Conversely, the most sensitive topics, such as the issue of enlargement in the case of Ukraine and the Chechnya crisis in the CS on Russia, were left entirely untouched. This silence ensured that if a decision were to be taken on these subjects, any Member State could argue that this did not constitute an implementing measure in the sense of ex Article 23(2) TEU, meaning that a vote would still have to be taken by unanimity.

Second, with regard to the modalities of implementation the CSs then again remained remarkably vague. On the one hand, all three documents ambitiously stated that the EU will achieve the cited objectives by ‘making appropriate use of all relevant instruments and means available to the Union, the Community and to the Member States’.<sup>35</sup>Moreover, flirting with a breach of ex Article 47 TEU, the Council, the Member States and the Commission were called upon to review and adjust their existing actions, programmes, instruments and policies in consistency with the CS. However, when turning to the operationalisation of this strong language, the strategies were considerably more timid.<sup>36</sup>They did not set out any division of labour, attached specific financial means or imposed concrete obligations on the EU institutions or the Member States beyond ‘examining’ possibilities, ‘considering’ means or ‘preparing’ reports.

This vagueness can be explained by their constitutionally questionable cross-pillar nature. The adopted strategies clearly sought to strike a balance between improving the coherence of EU external action and respecting the integrity of the EC legal order.<sup>37</sup>While all three

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<sup>32</sup> UK House of Lords (2001) op.cit. note 7, para. 6.

<sup>33</sup> Ibid., para. 14.

<sup>34</sup> To the opposite, in in a remarkable open-endedness the CS on the Mediterranean states that ‘the EU intends to make use of the evolving [ESDP] to consider how to strengthen ... cooperative security in the region’ (para. 8). This counter-intuitive vagueness in such a sovereignty-related area can however be explained by the fact that QMV is in any case excluded for implementing decisions having military or defence implication.

<sup>35</sup> Even though ex Art 13(2) TEU had limited this to the means of the EU and Member States.

<sup>36</sup> C. Spencer, ‘The EU and Common Strategies: The Revealing Case of the Mediterranean’ (2001) 6(1) *European Foreign Affairs Review*, 46.

<sup>37</sup> Weidel (2002) op.cit. note 23, 55-56.

documents included provisions that could require the Commission to initiate implementing action, obligations were formulated in an open-ended fashion so as to allow sufficient leeway. The downside hereof was a lack of institutional transparency that diffused policy responsibility and did not provide any clarity as to the choice of legal basis for implementing measures.<sup>38</sup> The task of planning, reviewing and evaluating this implementation was left to the six-monthly presidencies. Because the latter were not provided with specific guidelines, work plans were drawn up in an ad hoc fashion that soon became more of a ritual than a thorough strategic exercise.<sup>39</sup>

The lack of transparency provided even more reason for concern regarding the CSs overlap with other EU policy frameworks. All three strategies served to re-endorse the EU's commitment in high-profile and complex areas where the existing instruments were not delivering the desired results.<sup>40</sup> In the case of Russia and Ukraine these were the Partnership and Cooperation Agreements (PCAs),<sup>41</sup> and cooperation with the Mediterranean had mainly been based on the Barcelona declaration.<sup>42</sup> Yet, in a probable attempt to stay clear of ex Article 47 TEU the CSs did not specify their relation or contribution to these mixed agreements.<sup>43</sup> By contrast, the CSs largely mirrored their structure and content without clarifying how previous shortcomings would be addressed. This was bound to lead to confusion, not only within the EU but also for the EU's partners.

These contradictory tendencies of drafting CSs at the same time sufficiently precise to restrict the room of manoeuvre for lower-level decisions and vague enough to avoid encroaching upon the *acquis*, resulted in documents that were 'presentationally helpful'<sup>44</sup> but lacked clear focus. The lengthy enumerations of objectives and activities – resembling something between inventories and shopping lists – spanned the EU's pillars, but did not

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<sup>38</sup>P. Koutrakos, *EU International Relations Law* (Hart, Oxford, 2006) 396-397.

<sup>39</sup>Maresceau (2004) op.cit. note 6, 216.

<sup>40</sup>S. Becker-Alon, *The Communitarian Dimension of the European Union's Common Foreign and Security Policy* (Nomos, Baden-Baden, 2011) 185-186.

<sup>41</sup> Council and Commission Decision (97/800/EC, ECSC, Euratom) of 30 October 1997 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, O.J. L327/1, 28.11.1997; Council and Commission Decision (98/149/EC, ECSC, Euratom) of 26 January 1998 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part, O.J. L49/1, 19.02.1998.

<sup>42</sup> Barcelona declaration adopted at the Euro-Mediterranean Conference, 27-28.11.95.

<sup>43</sup>The CS on Russia cursory states that the PCA remains the core of the relationship, the CS on Ukraine that PCA is the legal basis of the relationship, and in the case of the Mediterranean it is stated that the CS builds on the Barcelona process.

<sup>44</sup>E. Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, Oxford, 2002) 292-293.



provide any connections between them or set out a clear allocation of tasks.<sup>45</sup>For strategies worthy of their name, these documents did not sufficiently make clear what the EU wanted to achieve with them. It seemed that, rather than the starting point or guide for future actions, the stock-tacking of objectives and activities that met with the approval of all Member States was the true objective of the CSs exercise.<sup>46</sup>Koutrakos goes as far as stating that the appearance of providing coherence was the actual purpose of the CSs, that mainly sought 'to assuage concerns over the potential undermining implications of the functioning of the second pillar alongside the Community legal framework'.<sup>47</sup>Such inward-looking documents, that were moreover the result of an EU-only drafting process, appeared to relegate the recipients of EU policies to the background.<sup>48</sup>Particularly with regard to the Mediterranean these EU-imposed objectives therefore risked to smell of neo-colonialism.<sup>49</sup>

### 2.1.2. A SILENT DEMISE

Already a couple of months after the publication of the last Common Strategy on the Mediterranean, the demise of this instrument was set in motion when a confidential report by High Representative Solana was leaked in January 2001. This remarkably critical note starts from the observation that the CSs had so far not contributed to a stronger and more effective EU in international affairs.<sup>50</sup> Solana did not shy away from using harsh words and summarised the shortcomings as follows:

'The existing Common Strategies tend to be too broadly defined in scope to be truly effective and to have added value. They are sometimes so thoroughly negotiated among the Member States that they do not contain real priorities or posteriorities and have become little more than inventories of existing policies and activities.'<sup>51</sup>

The report recognises that the Member States' fear for QMV explains their reluctance to fully commit and has resulted in a 'Christmas tree' approach with long lists of objectives based on the lowest common denominator.<sup>52</sup>The High Representative does however not give up on the instrument and demonstrates a commitment to draw lessons and take steps to improve its

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<sup>45</sup>C. Hillion, 'Common Strategies and the Interface between E.C. External Relations and the CFSP: Lessons of the Partnership between the E.U. and Russia' in A. Dashwood and C. Hillion (eds), *The General Law of E.C. External Relations* (Sweet and Maxwell, London, 2000) 301.

<sup>46</sup>Decaux (2002) op.cit. note 22, 38.

<sup>47</sup> Koutrakos, op.cit. note 38, 399.

<sup>48</sup>H. Haukkala, 'The EU's Common Strategy on Russia: Four Lessons Learned About Consensus Decision-Making in Foreign Policy' (2008) 13(3) *European Foreign Affairs Review*, 329-330.

<sup>49</sup> UK House of Lords (2001) op.cit. note 7, para. 58.

<sup>50</sup> Secretary-General/High Representative (14871/00) Report on the Common Strategies, 21.12.2000, para. 3.

<sup>51</sup> Ibid. para. 21.

<sup>52</sup> Secretary General/High Representative (2000) op.cit. note 50, para. 10.

functioning. Importantly, the report proposes to grant the Commission and the High Representative a greater role in defining, implementing and monitoring more focussed objectives. These proposals, that were largely upheld by the General Affairs Council of February 2001,<sup>53</sup> allow to expand the much-needed institutional support for such comprehensive policy frameworks.

A joint follow-up report of the High Representative and the Commission not only served to demonstrate an enhanced institutional backing for this CFSP instrument but also appeared to tone down the obsession with QMV. Departing from the realisation that none of the existing CSs had led to a single vote by qualified majority, it is stressed that this 'should not be seen as an end in itself, but rather as a way to speed up and facilitate consensus decisions'.<sup>54</sup>

Unfortunately, rather than a new start, this report appeared to be a last convulsion of the common strategy instrument. The reasonable recommendations were of no avail and the CSs still failed to impact on EU policies. Many initiatives towards Russia, Ukraine and the Mediterranean arose outside the established frameworks and only a marginal number of joint actions and common positions referred to the CSs.<sup>55</sup> Notably, none of the latter were adopted by QMV and Member States remained committed to seeking consensus in CFSP decision-making.<sup>56</sup> The attention for this policy tool gradually diminished. Each of the CSs was extended for one term and then never again.<sup>57</sup> With regard to Russia the EU's attention shifted towards the four 'common spaces' launched in 2003,<sup>58</sup> whilst EU policies towards Ukraine and the Mediterranean were from 2004 directed by the European Neighbourhood Policy (ENP).<sup>59</sup> The announced CS for the Western Balkans,<sup>60</sup> where it could arguably have provided most added value in view of the absence of a comprehensive EU framework, was never adopted. Instead the EU engrafted its approach towards this region entirely on the Stabilisation and Association Process (SAP) that was enforced by the Council in

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<sup>53</sup> General Affairs Council, 2331st Council meeting, Conclusions on the Common Strategies, Brussels, 26-27.02.2001.

<sup>54</sup> Secretary General/High Representative and the Commission (5607/02) Joint Report on the Effectiveness of Common Strategies, 23.01.2002.

<sup>55</sup> In 2001, for instance, only one of the 20 adopted joint actions referred to a CS (Ibid. para. 9).

<sup>56</sup> Keukeleire and MacNaughtan (2008) op.cit. note 8, 109.

<sup>57</sup> European Council (2003/471/CFSP) Common Strategy of 20 June 2003 amending Common Strategy 1999/414/CFSP on Russia in order to extend the period of its application, O.J. L157/68, 26.06.2003; European Council (2003/897/CFSP) Common Strategy of 12 December 2003 amending Common Strategy 1999/877/CFSP on Ukraine in order to extend the period of its application; European Council (2004/763/CFSP) Decision of 5 November 2004 amending Common Strategy 2000/458/CFSP on the Mediterranean region in order to extend the period of its application.

<sup>58</sup> Joint Statement (9937/03 (Presse 154)) EU-Russia Summit, St.-Petersburg, 31.05.2003.

<sup>59</sup> Commission Communication (COM(2004) 373 final) European Neighbourhood Policy Strategy Paper, Brussels, 12.5.2004

<sup>60</sup> European Council, Presidency Conclusions, Vienna, 11-12.12.1998, para. 74.

1999.<sup>61</sup> Furthermore, thematic strategies such as the EU Strategy to combat illicit accumulation and trafficking of Small Arms and Light Weapons (SALW) and the EU Counter-Terrorism Strategy, were enforced as European Council conclusions, rather than being adopted on the legal basis that was specifically created for such purposes.<sup>62</sup>

All these elements taken together served as a silent confirmation of the common strategies' inglorious demise.<sup>63</sup> The Amsterdam Treaty had created an innovative instrument for which the EU's constitutional and institutional framework was clearly not ready. In the end, it proved vain hope that a legal instrument would be able to iron out all the difficulties of the EU's fragmented external action constellation.

### **3. THE UNNOTICED RESURRECTION: ARTICLE 22 OF THE LISBON TEU**

In the light of the unfortunate experience of the common strategies and the fading of both policy and academic attention, one could have expected the instrument to be silently dropped from the new constitutional framework of the Lisbon Treaty. At first glance this is confirmed by the new Article 26 TEU, the formal successor of ex Article 13 TEU, that no longer makes any mention of the CSs. The European Council shall still 'identify the Union's strategic interests' but seems no longer accorded with a concrete legal instrument to give effect to this responsibility. Also Article 25 TEU, that sets out the CFSP's toolbox, does not list the CSs or any other instrument of that kind. This creates the impression that strategic guidance is taken out of the realm of operational decision-making and reverted back to the European Council's declaratory role of defining general guidelines for the CFSP in its conclusions.

Yet, a more profound look at the new TEU indicates that while the name of the common strategies may not have survived the Treaty changes, its form clearly has. The provisions were simply moved out of the CFSP chapter and added to Article 22 TEU that rebrands the instrument – a bit less catchy – as 'Decisions of the European Council on the strategic interests and objectives of the Union'. The rationale of the old CSs, as comprehensive strategic frameworks, remains in place and is even taken to a higher level (cf. *supra*).

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<sup>61</sup> General Affairs Council, 2192nd Council meeting, Conclusions on the Development of a Comprehensive Policy based on the Commission Communication on 'The Stabilisation and Association Process for Countries of South-Eastern Europe', 21-22.06.1999.

<sup>62</sup> A Secure Europe in a Better World - European Security Strategy (Brussels), 12.12.2003; Council (15708/03) EU strategy against proliferation of Weapons of Mass Destruction, Brussels, 10.12.2003; Council (14469/4/05) The EU Counter-Terrorism Strategy, Brussels, 30.11.2005.

<sup>63</sup> Maresceau (2004) op.cit. note 6, 219.

In order to understand this unexpected twist, the preparatory work of the Lisbon Treaty and the changes to the concept will first be analysed in more depth. Second, this contribution will focus on the place of Article 22 in the new EU external action architecture in order to explain why this refurbished instrument has greater potential than its predecessor. A final part will shed some more light on the surprising absence of efforts to exploit this potential.

### 3.1. L'HISTOIRE SE REPÈTE?

The discussions of the Amsterdam IGC on the benefits and disadvantages of extending qualified majority voting to the CFSP were largely repeated in the Working Group on External Action of the 2001-2003 Convention on the Future of Europe, which lay at the basis of the Lisbon Treaty. The Group agreed that QMV, as an instrument of last resort, has an important role to play in unblocking stalemates and stimulating consensus-building. Opinions diverged however on the extent to which this expedient should apply to the CFSP in general or be reserved for exceptional circumstances.<sup>64</sup> Eventually, it could only be agreed to make better use of the existing exceptions to the general rule of unanimity.

By contrast, when turning to the CSs, the emphasis was very different from that at the time of its creation. Rather than a compromise mechanism, 'akin to a form of ceasefire in the constitutional politics of the EU',<sup>65</sup> the members of the Group focused on the integrative potential of this instrument. Whilst acknowledging that it had not lived up to expectations, they commended the CSs as a concrete and operational tool to ensure that all instruments of EU external action, regardless of their nature, are used in a manner consistent with that strategy.<sup>66</sup> Moreover, the idea surfaced to create a new type of joint initiative by the High Representative and the Commission aimed at integrating the various elements of EU external action. It is clearly out of these reflections that the refurbished common strategies of the Lisbon Treaty emerged:

#### Article 22

1. On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.

Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific

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<sup>64</sup> Working Group VII External Action (CONV 459/02) Final Report, Brussels, 16 December 2002, paras 44-46.

<sup>65</sup> P. Eeckhout, *EU External Relations Law* (Oxford University Press, Oxford, 2011) 476.

<sup>66</sup> Final Report of Working Group VII External Action (2002), op.cit. note 64, para. 47.

country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties.

2. The High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council.

Rather than a remainder of the previous Treaty framework, Article 22 TEU thus results from a purposeful undertaking to breath new life into the old instrument. The absence of any reference to the old common strategy provisions indicates a desire to turn a corner a start with a clean sheet. Article 22 grants the European Council the power to adopt decisions on the strategic interests and objectives of the Union that may be geographic or thematic in approach. It is moreover made explicit that these decisions shall (not 'may') relate to the CFSP and to other areas of EU external action. In this light, the transfer of these provisions from the CFSP Chapter to the 'General Provisions on the Union's External Action' is not a mere cosmetic change, but must be seen as a deliberate rectification of the constitutionally questionable nature of the former CSs. In a sign that the emphasis of this instrument is now undoubtedly on enhancing the coherence of EU external action, the European Council decisions are placed from the outset in the context of the unified principles and objectives of Article 21 TEU.<sup>67</sup> A more symbolic but nonetheless significant change is that instead of adopting CSs 'in areas where the Member States have important interests in common',<sup>68</sup> these European Council decision now focus on the interests and objectives 'of the Union'.

On a procedural level changes were less pervasive. The European Council continues to take these decisions unanimously<sup>69</sup> on a recommendation from the Council. It is specified that the latter adopts such a recommendation under the arrangements laid down for each area. The exception to take decisions defining a Union action or position – the new denomination for CFSP joint actions and common positions – by QMV remains in place, as does the Member States' escape clause.<sup>70</sup> Arguably, the restraining potential of the latter has slightly been softened. Instead of 'important' reasons, Member States now have to state 'vital' reasons of national policy. Furthermore, rather than simply referring the issue to the European Council

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<sup>67</sup>Art 22(1) TEU.

<sup>68</sup> Ex Art 13 TEU.

<sup>69</sup> This fills a void left by the old Treaty framework that did not explicitly state this, although it was uncontested in policy practice.

<sup>70</sup>Art 31(2) TEU.

for a decision by unanimity, the High Representative is accorded with a mediating task and shall first try to seek a solution that is acceptable to all Member States. A final notable provision, clearly inspired by the above-mentioned report of the European Convention, is Article 22(2) TEU that enables the High Representative, for the CFSP, and the Commission, for other areas of external action, to submit joint proposals to the Council. These measures are aimed at the implementation of the European Council decisions and ensure the much-needed institutional support for giving effect to such comprehensive policy measures.<sup>71</sup>

### **3.2. A MORE SOLID CONSTITUTIONAL BEDDING**

The main innovation of Article 22 TEU is the explicit mandate to bridge the legal divide between CFSP and other (former EC) external competences. This represents in fact a codification of the former practice of the common strategies. Yet, the essence of the reform lies not in the article itself but in the new constitutional framework in which it is embedded. While there was no basis for cross-pillar action under the previous Treaty framework, such a comprehensive approach is entirely in agreement with the streamlined external action constellation of the Lisbon Treaty.<sup>72</sup> The pillar structure has been abolished by dissolving the EC into the Union and the latter is accorded a single legal personality.<sup>73</sup> With regard to external action these changes are reflected in Article 21 TEU that groups together and interlinks all its principles and objectives – that were previously spread across the different external competences of the Treaties – under a single heading. Another important innovation is the strengthening of the duty, for EU institutions and Member States, to ensure consistency between the various EU external policies and the fact that the Court is enabled to adjudicate on its application.<sup>74</sup> Furthermore, the Lisbon Treaty has created new institutional functions with a mandate spanning both CFSP and other external competences, namely the High Representative for the CFSP/Vice-President of the Commission, the European External Action Service (EEAS) and the Union Delegations.<sup>75</sup>

These provisions read like a plea to interlink and integrate various external policies and objectives. Yet, at the same time the CFSP is still governed by ‘specific rules and procedures’ that continue to exclude the bulk of this policy area from the jurisdiction of the

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<sup>71</sup>Interview EU official at the Legal Service of the Council, Brussels, 18.02.13.

<sup>72</sup>For a complete study on this issue: Van Elsuwege, op.cit. note 19, 987-1019.

<sup>73</sup>Art 47 TEU.

<sup>74</sup>Art 21(3) TEU; see further on the duty of consistency: P. Van Elsuwege and H. Merket, 'The Role of the Court of Justice in Ensuring the Unity of the EU's External Representation' in S. Blockmans and R.A. Wessel (eds), *Principles and Practices of EU External Representation*, CLEER Working Papers 2012/5 (Centre for the Law of EU External Relations, The Hague, 2012) 37-57.

<sup>75</sup>Respectively Arts 18 and 27(3) TEU and Art 221 TFEU.

EU Court of Justice (ECJ)<sup>76</sup> and keep the Commission and the European Parliament at arm's length from its decision-making process. In addition, the CFSP is excluded from the Treaty on the Functioning of the EU (TFEU) that lists all the other EU (external) competences. In this manner the Lisbon Treaty appears to formulate contradictory pleas for integrating and delimitating CFSP and TFEU competences that seem difficult to reconcile in practice.

This integration-delimitation paradox is echoed in Article 40 TEU, the successor of the hierarchical delimitation clause of ex Article 47 TEU. This article now states that the implementation of CFSP competences shall not affect the procedures and institutional balance of TFEU policies and *vice versa*. On the one hand this mirrors the depillarisation by making an end to the explicit subordination of the CFSP and placing it on an equal footing with the TFEU. On the other hand, it exemplifies and even strengthens the CFSP-TFEU demarcation by according the old provision a Janus face and granting a similar level of protection to the CFSP. It is consequently not surprising that Article 40 TEU has generated a lot of debate on what it means for the practice of developing EU external policies and ensuring coherence between them.<sup>77</sup>

Article 22 TEU formulates an interesting answer to this paradox. The European Council decisions, that relate to both CFSP and TFEU external competences, can function as comprehensive framework documents interlinking the various EU instruments and policies targeted at a certain country, region or theme, as mandated by Article 21(3) TEU. The established framework can subsequently be implemented by a variety of distinct measures 'in accordance with the procedures provided for in the Treaties'.<sup>78</sup> While these measures are linked together by a comprehensive strategy, they can be designed in such a way that they do not interfere with each other's procedural, legal and institutional rules. In this manner Article 22 TEU opens a window of opportunity for coping with the decades-old challenge of ensuring coherence across the constitutional divide between CFSP and non-CFSP external policies.

This approach of integrating CFSP and TFEU competences in policy design while at the same time respecting their delimitation in the implementation phase is perfectly in line with the language of Article 40 TEU. The provisions of this article no longer focus on separating competences under two Treaties (as was the aim of ex Article 47 TEU), but state – in so

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<sup>76</sup>Art 24(1) TEU.

<sup>77</sup> Van Elsuwege, *op.cit.* note 19, 1002-1004; E. Cannizzaro, 'Unity and Pluralism in the EU's Foreign Relations Power' in C. Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (Oxford University Press, Oxford, 2007) 230-232; M. Cremona, 'The Two (or Three) Treaty Solution: The New Structure of the EU' in A. Biondi, et al. (eds), *EU Law after Lisbon* (Oxford University Press, Oxford, 2012) 54-58.

<sup>78</sup>Art 22(1) TEU.

many words – that the *implementation* of CFSP/TFEU policies shall not affect the application of the procedures and the extent of the powers of the institutions under the TFEU/CFSP.

The issue of procedural incompatibility does not arise at the level of the European Council decisions, which are adopted unanimously. The right institutional balance can be ensured through the Council recommendations, on which the European Council decisions are based, that are to be adopted ‘under the arrangements laid down for each area’. Arguably, this phase would have benefited from a wider institutional participation, in particular of the Commission and the Parliament. The more so since there seems to be nothing in the Treaty that would prevent the European Council – as the main motor providing direction to the Union<sup>79</sup> – from laying down obligations upon EU institutions acting under the TFEU.<sup>80</sup> Unfortunately, Article 22 TEU does not shed much light on its relationship to the TFEU. It could however be argued that the Commission’s voice is ensured through the High Representative/Vice President of the Commission, who chairs the Foreign Affairs Council. Yet, if this wouldn’t provide sufficient guarantees, the only opportunity for the Commission, as well as for other institutions, to settle disagreements is to revert to the EU Court of Justice. The latter is empowered to review the legality of acts of the European Council intended to produce legal effects vis-à-vis third parties ‘on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers’.<sup>81</sup> While Article 24(1) TEU prevents the Court from directly reviewing the CFSP elements of such European Council decisions, it must on account of Article 40 TEU guarantee that the right balance is struck between CFSP and TFEU competences.

The issue of procedural compatibility does matter in the implementation phase. Here, the right of initiative shared by the High Representative and the Commission, set out in Article 22(2) TEU, provides a solid basis for fine-tuning balanced agreements on the implementation of the various EU measures covered by such a strategy document. In case this joint initiative would not be able to result in a compromise solution, the accurate choice of legal basis and the compliance of these measures with the European Council decisions, the Treaties and in particular Article 40 TEU could again – as a measure of last resort – be enforced before the Court.

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<sup>79</sup>Art 15(1) TEU.

<sup>80</sup> Piet Eeckhout, to the contrary, is not certain that these European Council decisions have binding force when acting under the TFEU and states that it is left to the duty of consistency: Eeckhout (2011) op.cit. note 65, 476.

<sup>81</sup>Art 263 TFEU.



Article 22 also provides a possible alternative for dealing with the complexity of combining legal bases. In its long-standing case law on this issue the ECJ has attached three main conditions to such a combination: (1) the different components of the measure must be inseparably linked, (2) neither of them may be incidental to the other and (3) the procedures laid down for each legal basis need to be compatible.<sup>82</sup> Particularly the last condition has led to considerable confusion and it is difficult to distract a coherent line of reasoning from the various cases.<sup>83</sup> This has made it particularly hard to predict which procedures will found to be incompatible by the Court. The ECOWAS case provided the first and only pre-Lisbon instance where this issue arose in the context of the delimitation between EC (development cooperation) and CFSP competences. Here, the ECJ did not touch upon the question of procedural compatibility but simply ruled that a dual legal basis was prohibited in principle under ex Article 47 TEU.<sup>84</sup> Disregarding the merits of this controversial case,<sup>85</sup> the general prohibition of cross-pillar legal bases had – compared to the confusing case law on procedural compatibility – the advantage of legal clarity and predictability.

The innovations of the Lisbon Treaty and particularly the new provisions of Article 40 TEU evidently raise the question as to whether this approach is still valid today.<sup>86</sup> In case C-130/10 on the legal basis for restrictive measures – so far the only opportunity to shed more light on this issue – the Court begged the question of interpreting Article 40 TEU and hinted that a combination of a CFSP and TFEU legal basis for internal EU measures would lead to procedural incompatibility.<sup>87</sup> Another chance to settle the dust may surface in the pending case C-658/11.<sup>88</sup> Yet, even if a way could be found to deal with the procedural differences, the question remains what a CFSP-TFEU legal basis would imply for the institutional balance and how it could be reconciled with the explicit distinctiveness of the CFSP. More precisely it is unclear how the exclusion of the ECJ's jurisdiction over the latter could be ensured and

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<sup>82</sup> Case C-94/03, *Commission v. Council* [2006], ECR I-22, paras 35-36 and 52; for an elaborate analysis of this line of case law: P. Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals: Essays in European Law* (Hart Publishing, Portland, 2008) 171-198.

<sup>83</sup> T. Corthaut, 'Case C-166/07, European Parliament v. Council of the European Union - Institutional Pragmatism or Constitutional Mayhem' (2011) 48(4) *Common Market Law Review*, 1271-1296.

<sup>84</sup> Case C-91/05, *Commission v. Council* [2008] ECR I-3651, paras 75-76. Advocate-General Mengozzi, to the contrary, ruled that both legal bases are procedurally incompatible (para. 176 and n. 76).

<sup>85</sup> For a detailed discussion of this case: C. Hillion and R.A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?' (2009) 46(2) *Common Market Law Review*, 551-586.

<sup>86</sup> For instance: P. Eeckhout, 'The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism' in A. Biondi, et al. (eds), *EU Law after Lisbon* (Oxford University Press, Oxford, 2012) 275-276; Cremona, op.cit. note 77, 57-58.

<sup>87</sup> Case C-130/10, *Parliament v. Council* [2012] nyr, paras 47-48

<sup>88</sup> In this case, the Parliament contests the exclusive CFSP nature of Council Decision 2011/640/CFSP on the signing and conclusion of the Agreement between the EU and the Republic of Mauritius regarding the conditions of transfer of suspected pirates.

what would happen with the ambiguous application of (former EC) principles such as primacy and direct effect.<sup>89</sup>

By aiming to enhance the coherence of EU external action, the Lisbon Treaty has clearly also complicated efforts to respect its strictly-guarded delimitation of competences. In the light of the intricacy of combining legal bases, Article 22 TEU provides an interesting tool to establish a firm link between CFSP and TFEU competences while at the same time respecting the delimitation between them as expressed in Article 40 TEU.

### **3.3. THE UNEXPLOITED POTENTIAL**

Well-known documents as the European Security Strategy<sup>90</sup> as well as more specific ones like the EU Strategy on the adaptation to Climate Change<sup>91</sup> illustrate that the need for comprehensive strategic frameworks did not end with the demise of the CS instrument. In this respect it is surprising that the resurrection of the old instrument did not arouse the least attention. Despite its interesting potential the use of Article 22 TEU has – nearly four years since the entry into force of the Lisbon Treaty – not yet been considered in practice.<sup>92</sup>

This disregard is particularly remarkable in the debate on the EU's strategic partnerships that has been taken to the highest institutional level by European Council President Herman Van Rompuy. The September 2010 European Council Conclusions stress that bringing 'Europe's true weight to bear internationally [...] requires a clear identification of its strategic interests and objectives', but do not consider the legal instrument that was specifically designed for this purpose.<sup>93</sup> Whilst strategic partnerships are – as their name indicates – reciprocal in nature and can thus not be based on Article 22 TEU, that is aimed at setting out internally-agreed EU strategies, both could go hand in hand. The European Council decisions could set out the EU's approach towards the objectives of and those it wants to achieve with the respective strategic partnerships.

Yet, also strictly unilateral strategic documents such as the recent and noteworthy EU Strategy for Security and Development in the Sahel, the Strategic Framework for the Horn of Africa and the Strategic Framework on Human Rights and Democracy were not based on Article 22 TEU.<sup>94</sup> Rather they were endorsed by the Council. Adopting them as European

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<sup>89</sup> On the application of primacy and direct effect to the CFSP: Van Elsuwege (2010) op.cit. note 19, 989-991.

<sup>90</sup> A Secure Europe in a Better World - European Security Strategy (Brussels), 12.12.2003.

<sup>91</sup> Council, 'An EU strategy on adaptation to climate change', (Brussels, 11151/13), 18.06.2013.

<sup>92</sup> Interview EU official at the Legal Service of the Council, Brussels, 18.02.13.

<sup>93</sup> European Council Conclusions, Relations with Strategic Partners, Brussels 12.11.2010, para. 3.

<sup>94</sup> Foreign Affairs Council, 3076st Council Meeting, Conclusions on a European Union Strategy for Security and Development in the Sahel, Brussels, 21.03.2011; Foreign Affairs Council, 3124st Council

Council decisions on the strategic interests and objectives of the Union would not only have given them more political weight, but also a concrete and binding legal status. Yet, it could well be that it were precisely these characteristics that refrained the Member States from having recourse to Article 22 TEU. Moreover, the fear for being outvoted in implementing decisions based on QMV plausibly still applies. This risks to lead either to a revival of the Christmas-tree approach or to no decisions being taken at all. This fear plays much less for other QMV exceptions in the CFSP, such as adopting decisions implementing a decision defining a Union action or position,<sup>95</sup> given that they do not have the same aim of comprehensiveness. Their much narrower scope limits the room of manoeuvre for implementing decisions by QMV.

In this sense, addressing the Union's strategic interests and objectives through Council conclusions offers more hope for transcending the lowest common denominator. Another important advantage of this approach is that it allows more flexibility to respond to changing needs and circumstances in both the EU and abroad. Then again, Article 22 TEU offers a more solid framework for encapsulating unanimously agreed guidelines, instructions and a division of labour between and among Member States and EU institutions. This can be of particular importance in areas where competence boundaries are fuzzy and duplication and fragmentation abound, such as EU crisis management or security sector reform.<sup>96</sup>

There are thus a number of advantages and disadvantages connected to the use of Article 22 TEU that will have to be weighed against each other. This points to a general observation with regard to EU Treaty reform: constitutional reorganisation can aim to remove existing obstacles to effective and coherent action, but the eventual decisions will continue to depend on political considerations. While Article 22 TEU is theoretically a useful innovation in line with the constitutional reforms of the Lisbon Treaty, its disuse in practice suggests that it may not provide a response to any pressing political needs.

## 4. CONCLUSIONS

The lifespan of the common strategies was an unsuccessful but instructive experience. Paradoxically, the cross-pillar dimension and the introduction of QMV are what constituted its potential strengths as well as the weaknesses leading to its demise. On the one hand, the

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meeting, Conclusion on the Horn of Africa, a Strategic Framework for the Horn of Africa, Brussels, 14.11.2011; Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', 11855/12, Luxembourg, 25.06.2012.

<sup>95</sup>Article 31(2) TEU.

<sup>96</sup>For an analysis of the unclear delimitation between EU security and development competences: H. Merket, 'The EU and the Security-Development Nexus: Bridging the Legal Divide', *European Foreign Affairs Review*, forthcoming.

possibility of voting on implementing joint actions and common positions in the Council by qualified majority had a restraining rather than a facilitating effect. On the other hand, the common strategies ran up to the competence boundaries they were meant to transcend. Soon after its creation the instrument consequently slinked off the political scene.

Rather unnoticeably the Lisbon Treaty revitalises this instrument in the form of Article 22 TEU that sets out the European Council decisions on the strategic interests and objectives of the Union. This at first sight counterintuitive move represents a determined effort to tackle the shortcomings of its predecessor and thus grant it a more promising future. In particular, the Lisbon Treaty provides a more solid legal bedding for comprehensive EU action. These European Council decisions embody the two main characterizing Treaty articles of the EU's reformed external action system. First, in the spirit of Article 21 TEU, they can function as policy umbrellas grouping together the various EU objectives, principles, competences, instruments and actors with relevance to a certain country, region or theme. Second, in the implementation phase this comprehensive approach can then be broken up in various separate measures that serve a shared objective. Importantly, these measures respect the EU's division of competences and in particular the painstakingly guarded CFSP-TFEU delimitation as set out in Article 40 TEU.

This potential has however not yet been turned into reality and instead the Union's strategic interests and objectives are still set out in Council conclusions. This approach has the advantage of being less stringent and allows more flexibility in the fluctuating field of external relations. A continuous cost-benefit analysis among EU Member States will therefore determine whether Article 22 TEU will eventually be put in practice or become a ghost clause that gradually disappears between the lines of the Lisbon Treaty. In theory, the article thus represents a good example of innovative constitutional design, but it may also be questioned whether it is not too far removed from political reality.