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# THE LEGALISATION OF EUROPEAN UNION FOREIGN POLICY AND THE USE OF SANCTIONS

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## **ABSTRACT**

This article explores the legalisation of the Common Foreign and Security Policy (CFSP) of the European Union (EU) and its increasing use of sanctions. It argues that the breadth and depth of the numerous sanctions regimes in place shows that European foreign policy is not merely an aspiration but produces law and legal processes which share similarities with those in the rest of the EU's legal order. Further, the article examines the extent to which non-EU Member States in Europe have aligned themselves with EU sanctions. The argument is made that this is evidence not only of Europeanisation, but also crucially of a *legalised* foreign policy which has allowed Europe-wide, EU-led foreign policy to emerge.

## **KEYWORDS**

European Union (EU), Common Foreign and Security Policy (CFSP), Sanctions, Restrictive Measures, European Neighbourhood Policy (ENP), EU External Relations

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## INTRODUCTION

Can the foreign policy of the European Union (EU) be understood as ‘legal’? Foreign policy has long been seen as the ‘other’ to mainstream European integration: devoid of real ‘law’, based on coordination – not integration – and a place where legal scholars have little to contribute to debates over what the European Union is, or should be doing, and how to do it. Although the EU has enjoyed competences in the external sphere since the original Treaty of Rome, the Common Foreign and Security Policy (CFSP) as representing the core of EU ‘foreign policy’<sup>1</sup> has been generally understood as a place for political bargaining between the Member States with limited room for technical, legal reasoning. This is largely due to the ‘otherness’ of the CFSP found in the EU’s legal order as a separate ‘pillar’ upon its creation in the Treaty of Maastricht and special status in the Treaty of Lisbon.

This article asserts that the foreign policy of the CFSP has in fact been ‘legalised’. By this I mean that the CFSP may not produce the same ‘law’ with the same characteristics as other areas of EU law, such as formal enforceability. But this does not prevent us from seeing processes and outcomes in the CFSP which are underpinned by legal authority and which follow legal reasoning and logics. I argue that legalisation has taken place in spite of the attempts in the Treaty to ‘ring-fence’ foreign policy away from ‘mainstream’ areas of integration.

The article makes the claim that the use of sanctions<sup>2</sup> are the key to understanding the legalisation of the EU’s foreign policy. In recent years the EU has

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<sup>1</sup> This article uses the CFSP to denote the EU’s foreign policy. This is distinct from ‘external relations’ which relates to a much wider set of competences and practices at EU level.

<sup>2</sup> Reference is made throughout this article to ‘sanctions’ as a shorthand for ‘restrictive measures’ which is the term used in the Treaty. International lawyers use the term ‘countermeasures’ to refer to non-forcible measures, which may include the type of

demonstrated both a strong willingness and ability to impose sanctions on third states, and natural and legal persons. These have been both as a result of United Nations Security Council (UNSC) resolutions and the EU's own autonomous initiatives. There are now over 30 active sanctions regimes in place. Sanctions are both a foreign policy tool and a legal instrument, capable in some circumstances of being challenged in the courts and following a (albeit unique) legislative process. Sanctions often connect foreign policy actorness with the EU's considerable economic weight and in many cases have become the 'go to' remedy at the European level. The extent to which sanctions have been imposed, or at the very least discussed in the Council, mean that it is little exaggeration to say that the CFSP has become oriented towards sanctions as an appropriate response to global or regional problems.

I argue that the EU's use of sanctions has contributed to a two-way process by which the use of sanctions has facilitated the legalisation process to the extent that the post-Lisbon CFSP is centred on the use of sanctions as representing a particularly legalised form of instrument. The legal and procedural formalism associated with sanction regimes brings these phenomena within the scope and development of foreign policy in spite of assertions by some Member States that the CFSP is outside the scope of 'law'. At the same time, the legalisation of CFSP has in turn allowed sanctions regimes to be developed in a more sophisticated way in the Council which explains their diversity, both geographical and substantive.

In the second part of the article, I explore two consequences of the legalisation of the EU's foreign policy which have emerged via the use of sanctions. The first is that the

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measures employed by the EU but often refers to suspension of treaty obligations, which is beyond the scope of analysis here. See further J Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002) and F Dopagne 'Sanctions and Countermeasures by International Organizations: Diverging Lessons for the Idea of Autonomy' in R Collins and ND White *International Organisations and the Idea of Autonomy* (Routledge, 2011)

extent to which the EU has developed its use of sanctions as a core foreign policy tool and the range of third states and situations to which they apply are a success in terms of meeting some of the Treaty-based foreign policy goals. Second, the extent to which non-Member States of the EU in Europe have adopted the same sanctions – and publicly aligned themselves with the EU – demonstrates that the EU has made great strides in forging a *European* foreign policy, and one based on Law. This speaks to the argument that EU foreign policy is not merely words, but ‘actions’ too. Further, it fulfils a Treaty-based goal for the EU to promote its values, particularly with neighbouring countries.

## 1. THE PROGRESSIVE ‘LEGALISATION’ OF EU FOREIGN POLICY

Legalisation refers to two interconnected phenomena. First, it refers to a process by which gradual cooperation between actors over time develops into an institutionalised arena, which abides by a set of rules which the members regard as being bound by (whether or not there is any enforcement mechanism).<sup>3</sup> In this respect, legalisation thus represents a general transformation from the informal to the formal. Second, legalisation can refer to a set of characteristics defined according to conditions of obligation, precision and delegation.<sup>4</sup> That is to say, institutions can be more or less legalised, depending on the extent to which they abide by sets of rules or commitments (obligation), whether these are unambiguous (precision) and if authority has been granted to make decisions and enforce them (delegation).<sup>5</sup> The social context and social practices

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<sup>3</sup> In the EU context, this has been used in particular by ME Smith, *Europe’s Foreign and Security Policy: the Institutionalization of Cooperation* (Cambridge University Press, 2004).

<sup>4</sup> KW Abbott, ‘The Concept of Legalisation’ (2000) 54 *International Organization* 401

<sup>5</sup> Ibid. See also, A Sari, ‘Between Legalisation and Organisational Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy’ in PJ Cardwell (ed) *EU External Relations Law and Policy in the Post-Lisbon Era* (Asser Press/Springer, 2012)

of law are brought to the fore in this vision of legalisation.<sup>6</sup> Legalisation in this respect could be seen as akin to institutionalisation, and indeed I have argued elsewhere that the CFSP represents an institutionalised form of cooperation.<sup>7</sup> But legalisation is used here specifically because of the distinction it makes in identifying the transition from the informal to the formal. Since sanctions are formal instruments which produce ‘hard’ legal effects, it is possible to characterise the whole of the CFSP as being ‘legalised’ due to the central role in which the process of imposing sanctions plays, particularly in the post-Lisbon era. Similarly, there are parallels with the literature on Europeanisation, though this often relates more closely to the domestic changes in the Member States who are engaged in the integration process than the EU institutional level changes.<sup>8</sup>

Foreign policy occupies an unusual place within the legal and institutional system of the EU. The EU’s ‘new legal order’<sup>9</sup> was established very early in the integration process, but even as the legal system of the EU matured, the drafters of the Treaty of Maastricht deliberately kept foreign policy away from the mainstream legal order. Testing the extent to which European foreign policy has been legalised requires an analysis of the extent to which actors (Member States) are capable of agreeing measures, on what subject matters, how regularly and whether they believe themselves to be creating ‘law’. Although the legalisation could be achieved merely by the ‘internal’ rules of behaviour established by the members, the legalisation can also be measured by the extent of which its external

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<sup>6</sup> Though see also Finnemore and Toope, who argue that this view of legalisation is ‘unnecessarily narrow’ and instead use a much wider concept of law which is not fully dependent on the effect of legal texts and delegation: M Finnemore and S Toope ‘Alternatives to Legalisation: Richer Views of Law and Politics’ (2001) 55 (3) *International Organization* 743

<sup>7</sup> PJ Cardwell, *EU External Relations and Systems of Governance* (Routledge, 2009) pp 72-74

<sup>8</sup> See, for example, the contributions to M Green Cowels, JA Caporaso and T Risse (eds) *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, 2001) and K Fetherstone and C Radaelli (eds) *The Politics of Europeanization* (Oxford University Press, 2003)

<sup>9</sup> *van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, EU:C:1963:1

projection through foreign policy results in changes to law and legal systems outside the EU too.<sup>10</sup>

The original EC Treaty did not foresee any substantial foreign policy role for the nascent EU and hence there was no application of the Community method of law-making to foreign policy, or any means of discussing pertinent issues between the Member States. There were provisions in the Treaty which concerned economic dimensions relating to the world beyond Europe's borders, in particular the Common Commercial Policy and tariffs towards countries which had been, or which were still, European colonial possessions.<sup>11</sup> But these were more a necessary counterpart to the internal integration process than an attempt to forge a common external policy. Whilst the option of forging a foreign and security policy was present at the outset of the European integration process, the formation of a European Defence Community in the mid 1950s failed,<sup>12</sup> which put a stop to any moves to include foreign and defence cooperation within the ambit of the European integration process.

The early 1970s witnessed two innovations which changed the nature of the EU's engagement with the wider world. First, in 1970 the Council of Ministers adopted the Davignon Report,<sup>13</sup> which laid the foundations for what became European Political Cooperation (EPC). EPC was a 'purely' intergovernmental forum for the Member States to discuss international issues of concern in a 'pragmatic and flexible' way<sup>14</sup> and aimed to

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<sup>10</sup> This is explored further in part 4

<sup>11</sup> Article 217 TFEU

<sup>12</sup> A Menon, A Forster and W Wallace 'A Common European Defence?' (1992) 34 (3) *Survival* 98

<sup>13</sup> Report by the Foreign Ministers of the Member States on the problems of political unification (Davignon Report), *Bulletin of the European Communities*, no 11. (Office for Official Publications of the European Communities, 1970) pp 9-14

<sup>14</sup> G Fitzgerald 'European Political Cooperation' in AH Robertson (ed), *European Yearbook/ Annuaire Européen* (Martinus Nijhoff, 1976). For a fuller history of EPC, see S Nutall *European Political Cooperation* (Oxford University Press, 1992)

promote and ensure solidarity and a ‘harmonization of views’.<sup>15</sup> EPC provided a platform for discussion of foreign policy between the Member States but was initially ascribed no decision- or law-making competences, until the Single European Act 1987 made some attempts to formalise the practices the Member States had developed.

Second, the Court of Justice laid down in the *AETR/ERTA* judgment of 1971<sup>16</sup> the principle of implied external powers which belonged to the Community on the basis of its own internal competences found in the Treaty. This was a major step in recognising the ability of the institutions to act with the external dimension of policies in mind, but was not without controversy. The Court stated that ‘each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no long have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.’<sup>17</sup> The controversy arose from this wide-ranging provision due to the Court’s lack of explanation of the exact circumstances where implied competences might arise.<sup>18</sup> The imposition of sanctions is not based on this jurisprudence *per se*, but it does provide the context for the discussion here. This is because there was little doubt left that the Court was willing to place the EU’s international relations more broadly within the ambit of its *legal* order.

The intergovernmental nature of EU foreign policy remained its hallmark in the Treaty on European Union (TEU) agreed at Maastricht in 1992. The ‘pillar’ structure created by the Treaty ensured that the CFSP – as the ‘second’ pillar – was not subject to the law-making powers of the first pillar Community method and thus outside the ‘new

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<sup>15</sup> Davignon Report, see note 13 above

<sup>16</sup> *Commission v Council of the European Communities*, C-22/70, EU:C:1971:32

<sup>17</sup> *Ibid* para 17

<sup>18</sup> P Koutrakos *EU International Relations Law*, 2<sup>nd</sup> ed (Hart Publishing, 2015) p 82

legal order' identified in *Van Gend en Loos*.<sup>19</sup> Instead the policy was given specific instruments of which the legal enforceability was questionable,<sup>20</sup> and deliberately distinct from the Regulations, Directives and Decisions of (now) Article 288 TFEU. The CFSP was shown to be more resistant than the 'third' pillar of Justice and Home Affairs, which was gradually Communautarised in the Treaties of Amsterdam and Lisbon, despite the strong criticisms levelled at the CFSP for its perceived lack of effectiveness and merely 'declaratory' nature during the 1990s and 2000s. The Treaties of Amsterdam and Nice did introduce some incremental changes, including the role of the High Representative for Foreign and Security Policy,<sup>21</sup> rationalising the decision-making procedures<sup>22</sup> and launching a European Security and Defence Policy (ESDP).<sup>23</sup> However, the characterisation of a weak EU foreign policy has been difficult to throw off.

Following the Treaty of Lisbon, which attempted to promote greater coherence between the EU's competences in the external sphere, the 'pillar' structure was largely abandoned, and the Union – rather than just the Community – gained legal personality in its own right.<sup>24</sup> Whilst the single legal personality ended the confusing separateness at the heart of the EU institutional arrangements, the CFSP itself remains distinct from the general legal order of the Union, in a manner which I have characterised elsewhere as being 'ring-fenced'.<sup>25</sup> In order to reinforce the 'otherness' of the CFSP within the EU's

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<sup>19</sup> G De Baere *Constitutional Principles of EU External Relations* (Oxford University Press, 2008) p 204

<sup>20</sup> E Denza *The Intergovernmental Pillars of the European Union* (Oxford University Press, 2002) pp 132-133. See also the discussion on pre-Lisbon CFSP instruments in A Dashwood 'The Law and Practice of CFSP Joint Actions' in M Cremona and B De Witte (eds) *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008)

<sup>21</sup> Now Article 27 TEU

<sup>22</sup> Now Article 31 TEU

<sup>23</sup> P Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press, 2013); J Howarth, *Security and Defence Policy in the European Union*, 2<sup>nd</sup> ed (Palgrave MacMillan, 2014)

<sup>24</sup> Article 47 TEU

<sup>25</sup> PJ Cardwell 'On 'ring-fencing' the Common Foreign and Security Policy in the legal order of the European Union' (2013) 64 (4) *Northern Ireland Legal Quarterly* 443

legal order, at Lisbon the exclusion of the jurisdiction of the Court of Justice of the European Union (CJEU) over the provisions of the CFSP was made explicit, both in the section devoted to the CFSP<sup>26</sup> and the provisions dealing with powers of the CJEU, in Article 275 TFEU.<sup>27</sup> The pre-Lisbon version of the TEU had made no mention of the powers of the Court in the CFSP articles or possibility for judicial review of CFSP measures.<sup>28</sup> But the settlement at Lisbon appeared to pre-empt any attempt by the Court to replicate what it had done in *Pupino*<sup>29</sup> for the former third pillar, whereby the legal principle of indirect effect was ‘read across’ and held to apply in the domain of justice and home affairs too. This is in spite of the general principle of loyalty for the Member States now laid down in Article 24 TFEU<sup>30</sup> and which applies across the EU’s activities. Sealing the CFSP away from a Court which has long-since been seen as integrationist appears to have been the aim of the drafters of the Treaty of Lisbon. Through its extensive case-law on sanctions and in particular the decision in *Parliament v Council* (2012),<sup>31</sup> the Court of Justice has safeguarded the separateness endowed on the CFSP

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<sup>26</sup> Article 24 (1) TEU: ‘The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU’

<sup>27</sup> ‘The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions’.

<sup>28</sup> A Hinarejos *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press, 2009)

<sup>29</sup> *Criminal Proceedings against Maria Pupino*, C-105/03, EU:C:2005:386. The principle was read across from *Mangold v Helm*, Case C-144/04, EU:C:2005:709 and *Kücükdeveci v Swedex GmbH*, Case C-555/07, EU:C:2010:21. For further comment, see V Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009) p 26 and M Fletcher, ‘Extending “Indirect Effect” to the Third Pillar: the Significance of *Pupino*’ (2005) 30 *European Law Review* 862

<sup>30</sup> ‘The member states shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area.’

<sup>31</sup> *European Parliament v Council of the European Union (individual restrictive measures case)* C-130/10, EU:C:2012:472

within the Treaty and acted upon its role of policing the boundaries of the EU's various competences. This in turn places the CFSP fully within the EU's constitutional order.<sup>32</sup>

However, despite the Treaty-level 'ring-fencing' of the CFSP, the practice of European foreign policy is not immune from increasing legalisation. The objectives and principles governing the conduct of external relations, including the CFSP, were brought within the same section of the Treaty.<sup>33</sup> The aim was to promote coherence in the EU's external relations across its spheres of activity, even if different objectives may apply to different dimensions.<sup>34</sup> The institutional framework, whilst prioritising the role of the Council as the main (intergovernmental) actor, nevertheless permits the Commission to take a leading role and thus part of an institutional 'functional whole'.<sup>35</sup> The High Representative for Foreign and Security Policy is also a Vice-President of the Commission,<sup>36</sup> which not only leaves a large amount of scope for the individual post-holder to shape the role but also leaves open the question of how a single person is meant to divide their institutional 'loyalties' within the same function. Van Vooren has suggested that the CFSP has evolved into having a personality in its own right, separate from the (former) first pillar and the Member States collectively, and this is embodied in the post of the High Representative.<sup>37</sup> Similar institutional questions have been raised regarding the EU's diplomatic service, the European External Action Service (EEAS).<sup>38</sup>

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<sup>32</sup> C Hillion 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law* (Hart Publishing, 2014) p 65

<sup>33</sup> Articles 21-22 TEU

<sup>34</sup> See, in particular, Article 21 (3) TEU

<sup>35</sup> P Koutrakos 'The EU's Common Foreign and Security Policy' in D Ashiagbor, N countouris and I Lianos (eds) *The European Union After the Treaty of Lisbon* (Cambridge University Press, 2012) p 188

<sup>36</sup> Article 18 (3) and (4) TEU

<sup>37</sup> B Van Vooren *EU External Relations Law and the European Neighbourhood Policy; A Paradigm for Coherence* (Routledge, 2012) pp 39-40

<sup>38</sup> C Carta *The European Union Diplomatic Service* (Routledge, 2012); L Erkelens and S Blockmans 'Setting up the European External Action Service: an act of Institutional Balance' (2012) 8 *European Constitutional Law Review* 246 and

Taken together, fusing institutional roles as well as competences in a bid to ensure coherence makes any attempt to separate the ‘legal’ from the ‘non-legal’ largely futile.

Further, as Hillion has argued, the Court’s jurisdiction in relation to the CFSP is not as limited as an initial reading of the post-Lisbon Treaty arrangements might suggest.<sup>39</sup> He asserts that although there are limits to what the CJEU is able to do in terms of the substantive contents of the CFSP, the Court has gained jurisdiction over constitutional principles including respect for fundamental rights, the principle of sincere cooperation and the requirement of consistency.<sup>40</sup> Therefore, the exclusion of the Court in practice is not as complete or watertight as the text of the Treaty implies.

Nevertheless, against a backdrop of institutional developments which makes the CFSP more legalised than it is often thought to be, the instruments available to the institutions under the CFSP<sup>41</sup> do not enjoy the formal enforceability provided by legislative acts. Article 24 (1) TEU explicitly states that, ‘The adoption of legislative acts shall be excluded’ within the CFSP,<sup>42</sup> distinguishing them from the ‘legal acts of the Union’ defined in Article 288 TFEU.

As such, it is difficult to argue that the obligation dimension of legalisation<sup>43</sup> has been adequately met, that is to say, by the agreement of binding (in a formal sense) rules. However, examining the evolution of the CFSP since the Treaty of Lisbon in particular reveals that sanctions are increasingly prominent in its field and scope of activity which, it is worth recalling, covers ‘all aspects’ of foreign policy.<sup>44</sup> The argument here is that the

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G De Baere and R Wessels ‘EU Law and the EEAS: Of Complex Competences and Constitutional Consequences’ in J Batora and D Spence (eds), *The EU’s Diplomatic System: post- Westphalia and the European External Action Service*, (Palgrave MacMillan, 2014).

<sup>39</sup> Hillion, see note 32 above

<sup>40</sup> Ibid, p 66

<sup>41</sup> As listed in Article 25 TEU

<sup>42</sup> Also repeated in Article 31 TEU

<sup>43</sup> Abbott, see note 4 above

<sup>44</sup> Article 24 (1) TEU: “The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the

post-Lisbon CFSP represents a step further of legalisation given the importance of sanctions as a lynchpin of the contemporary CFSP. To be clear: it is not that the instruments under the CFSP can be seen in exactly the same way as the legal acts mentioned in Article 288 TFEU, but rather that the practice of negotiating the CFSP measures which will be mirrored in enforceable legislation has exerted a strong influence on the legalisation process. To support this point, it is first necessary to explore how the current sanctions regime as an integral part of the CFSP came about.

## 2. THE DEVELOPMENT OF EU SANCTIONS REGIMES

Sanctions are measures which aim to restrict the economic and other relationships between states, or between states and the international community (including regional organisations). Sanctions are used as a means to promote a change in behaviour, as a punishment or a means to isolate a state, or a combination thereof. The same rationale applies to more recent moves to impose sanctions on natural and legal persons who are suspected of involvement in international criminal acts, such as terrorism. Though beyond the limits of the discussion in this article, there is much debate about whether – in general terms or when applied to a specific country or individual – they are an effective tool in terms of punishment, promoting change or preventing the spread of terrorism.<sup>45</sup> In the EU context, sanctions are one of the best examples of the blurred lines between (external) trade policy and foreign policy, and their respective competences

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Union's security, including the progressive framing of a common defence policy that might lead to a common defence.”

<sup>45</sup> For an overview, see A Vines ‘The effectiveness of UN and EU sanctions: lessons for the twenty-first century’ (2012) 88 (4) *International Affairs* 867 and D Hawkins and J Lloyd ‘Questioning Comprehensive Sanctions: the Birth of A Norm’ (2003) 2 (3) *Journal of Human Rights* 443

and institutional responsibilities in the Treaty arrangements.<sup>46</sup> It is argued here that it is impossible to separate the ‘legal’ consequences and considerations of imposing sanctions from the ‘political’ in both a formal and a conceptual sense as they are intrinsically linked.

The use of sanctions by the UNSC first emerged during the 1960s. Once a UNSC Resolution has been adopted, international law requires states to enact national measures to enable the legal effectiveness of sanctions.<sup>47</sup> Initially, adopting UNSC sanctions was achieved by the Member States individually and without the involvement of the EU institutions,<sup>48</sup> since the latter are not bound by obligations under the UN Charter and there was nothing in the Treaty arrangements at the time to suggest any transfer of competence. This individual approach was problematic in terms of the lack of coherence between the Member States in their national measures, leading to distortions (potential or actual) within the common market. In turn, the distortions impacted on the externally-facing Common Commercial Policy which already enjoyed extensive EU competence.<sup>49</sup> There has also been a debate on whether a transfer of obligations has occurred between the Member States and the EU according to the theory of state succession, which the General Court (formerly the Court of First Instance) eventually attempted to lay down in *Kadi* and *Yusuf*<sup>50</sup> on the basis of the EU’s experience with GATT obligations.<sup>51</sup>

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<sup>46</sup> P Eeckhout *EU External Relations Law*, 2<sup>nd</sup> ed (Oxford University Press, 2011) pp 501-502

<sup>47</sup> United Nations Charter, Articles 41 and 103

<sup>48</sup> P Koutrakos, *EU International Relations Law*, 2<sup>nd</sup> ed (Hart Publishing, 2015) pp. 495-496. Rhodesia was the target state of the first set of sanctions concluded in this manner.

<sup>49</sup> Now Article 207 TFEU

<sup>50</sup> *Abmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, T-306/01, EU:T:2005:331 and *Yassin Abdullah Kadi v Council and Commission*, T-315/06, EU:T:2005:332

<sup>51</sup> *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, C-21/72 to 24/72, EU:C:1972:115. J Klabbbers ‘*Völkerrechtsfreundlich?* International Law and the Union Legal Order’ in P Koutrakos (ed) *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar, 2011) pp 106-107

The number of UNSC resolutions on imposing mandatory sanctions was limited until the end of the Cold War, with only Rhodesia (1966-1979) and South Africa (1977-1994)<sup>52</sup> as the objects. Only after the end of the Cold War and the lack of major ideological differences in the UNSC has the ‘trend’, as Cassese has termed it, for the international community to react to gross breaches of international law by means of sanctions emerged.<sup>53</sup> UNSC sanctions on Libya, Sudan and Afghanistan during the 1990s<sup>54</sup> were spearheaded by the United States and began – even before 9/11 – to target states which supported terrorist groups.<sup>55</sup> For its part, autonomous EU sanctions were applied to both the USSR and Argentina in the early 1980s.<sup>56</sup>

The end of the Cold War coincided with the eventual moves towards the conclusion of the Treaty of Maastricht which, in attempting to endow the Union with an international political voice consummate with its economic might, allowed the EU to engage in a more proactive approach with regard to the projection of its values via the imposition of sanctions.<sup>57</sup>

This was an important turning point, but one which required a *legal* response to the question of how to connect the non-legally enforceable CFSP with the mainstream legal order. The response was found in the practices which initially emerged during the 1980s, by adopting a decision in the framework of EPC, followed by a Regulation

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<sup>52</sup> N White and A Abass ‘Countermeasures and Sanctions’ in N Evans (ed), *International Law*, 2<sup>nd</sup> ed (Oxford University Press, 2006) p 527

<sup>53</sup> A Cassese, *International Law*, 2<sup>nd</sup> ed (Oxford University Press, 2005) pp. 310-311

<sup>54</sup> D Cortwright and GA Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Lynne Rienner Publishing, 2000)

<sup>55</sup> EC Luck ‘Tackling Terrorism’ in DM Malone *The UN Security Council: From the Cold War to the 21<sup>st</sup> Century* (Lynne Rienner Publishing, 2004) p 94-95

<sup>56</sup> Council Regulation (EEC) No 596/82 of 15 March 1982 amending the import arrangements for certain products originating in the USSR and Council Regulation (EEC) No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina

<sup>57</sup> U Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press, 2008) p. 187; E Herlin-Karnell, ‘EU values and the shaping of the international legal context’ in D Kochenov and F Amtenbrink (eds) *The European Union’s Shaping of the International Legal Order* (Cambridge University Press, 2014)

concluded via the familiar Community method in the domain of the Common Commercial Policy.<sup>58</sup> This arrangement continued to provide the basis for the settlement at Maastricht by transferring the practice to a combination of measures: a CFSP instrument which ‘paves the way’<sup>59</sup> for a Regulation. A specific Treaty article was introduced which provides for the following:

*Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.*<sup>60</sup>

Therefore, a ‘link’ between the ‘political’ CFSP (under Title V of the Treaty on European Union) and the ‘legal’ Community order was created, which largely remains intact to this day. It has been cited as an example of the TEU acting in a ‘far sighted’ way in terms of coherence and consistency of the Union’s action.<sup>61</sup> The years following the end of the Cold War permitted the UNSC to impose sanctions more regularly. Though criticised for inaction in the face of the breakup of Yugoslavia, the EU began to enact restrictive measures independently of the UNSC as it began to try to capitalise on the Treaty innovations at Maastricht outlined in part 1.

The 9/11 attacks in the United States in 2001 were the catalyst for both the UNSC and the EU to begin to impose restrictive measures against natural and legal persons. The extent to which these types of sanctions have been imposed has meant that they have not only become a key part of the EU’s practice of sanctions but that they

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<sup>58</sup> Koutrakos, see note 48 above, p 496

<sup>59</sup> F Hoffmeister ‘The Contribution of EU Practice to International Law’ in M Cremona *Developments in EU External Relations Law* (Oxford University Press, 2008) p 91

<sup>60</sup> Article 215 (1) TFEU

<sup>61</sup> S Duke ‘Consistency, Coherence and EU External Action’ in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar, 2011) p 25

have become a ‘cornerstone’ of the CFSP.<sup>62</sup> Some of these have resulted in high-profile legal challenges, and have led the CJEU to striking down sanctions against targeted individuals.<sup>63</sup>

As Koutrakos has noted, the very fact that a foreign policy measure is required as an integral part of the process of the imposition of sanctions demonstrates the ‘maturity’ of the foreign policy rules and practices of the Union.<sup>64</sup> By linking the CFSP with the ‘regular’, non-CFSP legal order of the Union ensures that the EU is employing its economic strength and, crucially, an aspect of its legal order where transfer of competences and pooling of sovereignty has occurred. Further support for this point is provided by the decision of the Court of Justice in *Centro Com*,<sup>65</sup> in which the CJEU held that a Regulation implementing a UN embargo against Serbia and Montenegro had established a system of mutual confidence between Member States in the effective implementation of the restrictive measures.<sup>66</sup> The Court further held that even where measures ‘have been adopted in the exercise of national competence in matters of foreign and security policy, they must respect the Community rules adopted under the common commercial policy’.<sup>67</sup>

The result is therefore that even if the CFSP measure itself must necessarily be followed by a Regulation concluded via the Community Method (Article 215 TFEU

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<sup>62</sup> C Eckes, ‘EU Restrictive Measures against Natural and Legal Persons: From Counterterrorism to Third Country Sanctions’ (2014) 51(4) *Common Market Law Review* 869

<sup>63</sup> Most notably in the Kadi series of cases: *European Commission v Yassin Abdullah Kadi (Kadi II)*, C-584, C-593 and C-595/10, EU:C:2013:518. This point is returned to in the following part.

<sup>64</sup> Koutrakos, see note 48 above, p 497

<sup>65</sup> *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, C-124/95, EU:C:1997:8

<sup>66</sup> It should be noted that the *Centro Com* case pre-dated the current legal arrangements provided for in the Treaty, which were considered in the *Kadi* cases, but the point made here remains valid: Eeckhout, see note 46 above

<sup>67</sup> *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, C-124/95, EU:C:1997:8 para 30

states that the Council ‘shall’ – not ‘may’ – adopt measures)<sup>68</sup>, the Member States are working according to legal logics. In particular for autonomous measures, the Member States are working in a foreign policy context which is going to yield enforceable legal results as part of a CFSP *acquis*.<sup>69</sup> The structure of the discussions of whether to impose sanctions, and if so how, is essentially a legalised one.

In 2003, the Council adopted Guidelines on the implementation and evaluation of CFSP sanctions, and entrusted this task to the ‘Foreign Relations Councillors Working Party’. The mandate of the Working Party includes the development of best practices among Member States in implementation of restrictive measures, using national experts. It has, since 2008, regularly issued an extensive ‘Best Practices Paper’ to the Permanent Representatives Committee of the Council (COREPER) on the use of the different types of sanctions.<sup>70</sup> Best practice, which involves multiple actors, non-binding guidelines and continuous dialogue between stakeholders could be considered as an example ‘new governance’ which has become prevalent in other areas of European integration and cooperation.<sup>71</sup> For the purposes of the discussion here, the institutionalised use of best practices is further evidence of a sophisticated level of engagement between actors which goes far deeper than periodic meetings between foreign ministers in a formal Council setting restricted to discussion of ‘high’ politics only.

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<sup>68</sup> B Van Vooren and RA Wessel *EU External Relations Law* (Cambridge University Press, 2014) p 395

<sup>69</sup> R Wessel ‘Resisting Legal Facts: Are CFSP Norms as Soft as they seem?’ (2015) 20 (3) *European Foreign Affairs Review* 123

<sup>70</sup> See, for example, Council of the EU ‘Foreign Relations Counsellors Working Party: Update of the EU Best Practices for the effective implementation of restrictive measures’ (2015) 7383/1/15 REV 1

<sup>71</sup> ‘New governance’ and ‘new modes of governance’ is particularly associated with areas of EU activity where ‘hard’ legislation is often eschewed in favour of modes which rely on multi-level coordination, benchmarking and peer-review. It is particularly widespread in areas associated with ‘Social Europe’. See J Scott and DM Trubek ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ (2002) 8 (1) *European Law Journal* 1 and KA Armstrong ‘The Character of EU Law and Governance: From ‘Community Method’ to New Modes of Governance’ (2011) 64 *Current Legal Problems* 179

Taken to its logical conclusion, the forum in which the Member States discuss sanctions and take measures is that same forum as which discusses non-sanctions CFSP matters too. For example, the Conclusions of the Foreign Affairs Council of June 2015<sup>72</sup> reveal that of the eleven items on the agenda, two were directly concerned with the continuation of EU sanctions regimes (against Syria and the Russian Federation) and a third indirectly (as part of possible future action to take against Burundi). Two other items were closely related to the EU's use of sanctions (discussion on future elections to be held in Myanmar, which is currently under an EU sanction regime) and as part of the discussions on EU-UN cooperation.

With this in mind, it is less likely that the logics change when discussing matters, making the 'political' and the 'legal' an artificial distinction in terms of both substance and institutional competences. That is not to say that the same outcomes will always be reached for a foreign policy issue under discussion within the CFSP. Rather, a view that a 'political' CFSP operates in isolation from potential 'legal' outcomes becomes increasingly hollow, and especially in the post-Lisbon era. As Wessel explains, 'given the dynamics of the Lisbon approach to consolidating the EU's external relations, it will be increasingly difficult to deny a link with other policies, allowing the Court to take CFSP-dimensions along in its assessment of those policies'.<sup>73</sup>

In short, sanctions are a key foreign policy tool at the disposal of the EU and underpinned by legal processes. The division between the CFSP as representing the 'core' of the EU's foreign policy and the rest of the EU's legal order is not indicative of an absolute unwillingness to bestow on foreign policy the procedural qualities provided by law. Moreover, the iterative processes of legal challenges, redrafting and reissues of sanctions demonstrates that this is a highly-legalised domain.

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<sup>72</sup> Council of the European Union 'Outcome - 3400<sup>th</sup> Council Meeting: Foreign Affairs' (2015) 10185/15

<sup>73</sup> Ibid p 14

### 3. EXPLORING THE DEPTH AND BREADTH OF EU SANCTIONS

Considering the legalisation of the EU's foreign policy must inevitably go hand in hand with examining the context of the cases where sanctions have been used. One might say that this is a chicken and egg situation, i.e. did the legalisation occur as a result of the use of sanctions, or does the legalisation of the foreign policy facilitate the use of sanctions as a lynchpin of EU foreign policy? The argument here is that it is a two-way process: the nature of sanctions themselves as being more than a symbolic gesture necessitates a legal approach in working out the detail of the sanctions themselves, their likely effects on the third country/individual and the impact on and interface with other EU policies.

Conversely, the increase since the Treaties of Maastricht and Lisbon in the instances of imposing sanctions and their variety in substance and depth shows that the EU's extensive use of sanctions – or even merely discussing whether they should be applied or not – is evidence of a legalised foreign policy machinery capable of taking such decisions and applying them. This section explores the nature and diversity of the sanctions regimes currently in place to support this point.

As of mid-2015, the EU operates 33 sanctions regimes. All but two of these regimes are in place towards third countries: 11 of the target countries are in sub-Saharan Africa,<sup>74</sup> nine in the Middle East, North Africa and Gulf,<sup>75</sup> three in Asia,<sup>76</sup> six in Europe<sup>77</sup> and two in the Americas.<sup>78</sup> Most of these are addressed to the government of the country, but they might also concern only part of a country which may not be under the effective control of the national government. Ukraine, for example, is listed as a

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<sup>74</sup> Central African Republic, Democratic Republic of Congo, Côte d'Ivoire, Eritrea, Guinea-Bissau, Liberia, Republic of Guinea, Somalia, South Sudan, Sudan, Zimbabwe

<sup>75</sup> Afghanistan, Egypt, Iran, Iraq, Lebanon, Libya, Syria, Tunisia, Yemen

<sup>76</sup> China, Myanmar, North Korea

<sup>77</sup> Belarus, Bosnia and Herzegovina, Moldova, Russia, Serbia and Montenegro, Ukraine

<sup>78</sup> Haiti and the United States of America

sanctions regime but this only applies to areas in Eastern Ukraine which are not under the control of the national government, and to the government of the Russia Federation for its actions in Ukraine. A similar situation applies to Moldova, where sanctions apply only to the break-away Transnistria region. The remaining two regimes apply to suspected natural or legal persons who are members or supporters of Al Qaida<sup>79</sup> or other groups listed as supporting terrorism.<sup>80</sup> They may also be addressed to a former government of the country and the individuals associated with it (such as the case for Tunisia)<sup>81</sup>. Most of the sanctions regimes, as well as the lists of individuals and entities are revisited and regularly updated: the Implementing Regulation for the original CFSP Common Position 2002/42 has been revised and updated 226 times as of March 2015.<sup>82</sup>

The use of sanctions is thus widespread in terms of geographical reach. This demonstrates on the one hand that the EU has used them in relations to foreign policy issues beyond its immediate borders, or only towards countries which have, for example, only a limited economic relationship with the Union. If the use of sanctions was limited only to the latter examples – for example, small states in Africa – it might be suggested that the EU was only prepared to use sanctions against countries where there was no economic or other impact on the EU and its interests. However, the list of target countries reveals that this is not the case: the EU has demonstrated a willingness to use sanctions as a foreign policy tool across the globe, and against both large and small states with varying degrees of economic and military power. The geographical aspect is also

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<sup>79</sup> Council Common Position (EU) 2002/402/CFSP [2002] OJ L139/4 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them

<sup>80</sup> Council Common Position (EU) 2001/931/CFSP [2001] OJ L344/93 on the application of specific measures to combat terrorism

<sup>81</sup> Council Decision (EU) 2011/72/CFSP [2011] OJ L28/62 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia

<sup>82</sup> Source: European External Action Service

[http://eeas.europa.eu/cfsp/sanctions/docs/measures\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf) (accessed 26 June 2015)

significant in considering a legalised foreign policy which does not merely rely on bilateral relations with states concerned. Rather, because of the multitude of complex frameworks which rely on multilateral and bilateral legal agreements based on a mix of CFSP and non-CFSP competences, including the EU-African, Caribbean and Pacific (ACP) group; the European Neighbourhood Policy and so on, any discussion of sanctions must necessarily pay attention to the effects on multilateral relationships which involve other states too. Hence, not only are different solutions likely for sanctions towards different states for political reasons, but potentially also for legal ones too.

The type of sanctions and their variety is revealing in terms of the huge diversity in the areas covered and their *raison d'être*. Although there is no space here for a detailed examination of sanctions as they apply on a case-by-case basis,<sup>83</sup> it is essential to note the scale of sanctions in place and the lack of a 'one size fits all' approach. For example, the sanctions placed on Iran for both its nuclear programme and human rights situation are extensive.<sup>84</sup> They cover limitations on imports and exports of goods, the provisions of services, embargoes on dual-use goods and any arms of related material and travel bans on individual leaders. The sanctions on Iran regarding its nuclear programme were agreed in a UNSC resolution,<sup>85</sup> but the EU has also added individuals to the sanctions list unilaterally.<sup>86</sup>

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<sup>83</sup> See, for a general overview, F Giumelli *Coercing, constraining and Signalling: Explaining UN and EU Sanctions after the End of the Cold War* (ECPR Press, 2011) and for case-studies on Iran, Russia and North Korea: PE Dupont 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran' (2012) 17 (3) *Journal of Conflict and Security Law* 301; R Patterson 'EU Sanctions on Iran: the European Political Context' (2013) 20 (1) *Middle East Policy* 135

<sup>84</sup> Council Decision (EU) 2010/413/CFSP [2010] OJ L195/39 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP and Council Decision (EU) 2011/235/CFSP [2011] OJ L100/51 concerning restrictive measures directed against certain persons and entities in view of the situation in Iran

<sup>85</sup> UNSC Resolution S/RES/1737 (2006)

<sup>86</sup> C Beaucillon 'Comment choisir ses mesures restrictives' (2012) *EUISS Occasional Paper*, No. 100 p 15

More recently, the sanctions placed on the Russian Federation<sup>87</sup> are also extensive but were not prompted by a UNSC Resolution. Placing extensive sanctions on Russia is significant for many reasons, including the impact on the extensive economic relations between the EU and Russia, the diplomatic relationships within other institutional frameworks (both EU and non-EU, such as NATO) and on bilateral/multilateral relations with other neighbouring countries.<sup>88</sup>

Other sanctions regimes are much less extensive, and apply only to limited economic or military domains. At the other end of a scale, the sanctions applicable to the United States<sup>89</sup> are very limited and relate only to the extraterritorial effects of domestic legislation which continues the embargo against Cuba.

Restrictive measures on individuals are often known as ‘smart’ sanctions since measures taken against states in which they reside or operate would not be effective in meeting the aims of disrupting the activities of those suspected of terrorism, and are likely to cause humanitarian and wider economic problems. Although primarily associated with the period following 9/11, the first use of smart sanctions against individuals was by UNSC Resolution 1267 (1999). This resolution obliged states to freeze the financial assets owned or controlled by Osama bin Laden, Al-Qaida and the Taliban. UNSC Resolution 1373 (2001) was aimed at the prevention of terrorism more generally. The variety of sanctions applied in different situations supports the legalisation argument. In deciding whether to impose sanctions, what kind of sanctions and against whom, the actors must necessarily take into consideration the goals to be achieved as well as the previous sets of practices the EU has built up. This is more than simply

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<sup>87</sup> Council Decision (EU) 2014/512/CFSP [2014] OJ L229/13 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

<sup>88</sup> This point is returned to in the following part.

<sup>89</sup> Council Joint Action (EU) 96/668/CFSP [1996] OJ L309/7 and Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom OJ L309/1

paying regard to the political ramifications of sanctions (though this is of course important) because the EU must take into account what the legal effects of sanctions – particularly the more creative use of ‘smart’ sanctions – would be. For instance, how can a travel ban on officials from a country under sanctions work in practice? Would the way in which it is put in place violate principles of international law? What should be the required amount of intelligence required for inclusion in a sanctions regime? All the questions can be answered by a build-up of rule-making through practice in the different situations. This also includes the case-law of the CJEU and General Court as the post-*Kadi*<sup>90</sup> due process requirements and confidential-information handling, including changes to its rules of procedure.<sup>91</sup> The regularity of this practice and build up of rules and norms means that the decision-making process does not occur in a legal vacuum.

Much of the focus has been on due process rights and the intensity of review of sanctions imposed upon individuals,<sup>92</sup> particularly in the *Kadi* rulings. These sanctions regimes are a combination of UNSC-based ones and autonomous EU sanctions, including regional-based organisations considered to be involved in terrorism.<sup>93</sup> Member State authorities are responsible for feeding this information up to the EU level.<sup>94</sup> As

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<sup>90</sup> There is a wealth of academic commentary on the *Kadi* caselaw. For a detailed, multi-angled analysis, see the contributions to M Avbelj, F Fontanelli and G Martinico (eds) *Kadi on Trial: a Multifaceted Analysis of the Kadi Trial* (Routledge, 2014)

<sup>91</sup> See the explanatory notes provided in the following: Council of the EU ‘Draft Rules of Procedure of the General Court’ (2014) 7795/14, 17 March 2014

<sup>92</sup> For an overview, see C Eckes *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009); N Lavranos ‘Judicial Review of UN Sanctions by the European Court of Justice’ (2009) 78 (3) *Nordic Journal of International Law* 343; C Harlow and R Rawlings *Process and Procedure in EU Administration* (Hart Publishing, 2015) pp 312-321

<sup>93</sup> C Eckes ‘EU Counter-Terrorist Sanctions against Individuals: Problems and Perils’ (2012) 17 (1) *European Foreign Affairs Review* 113-132

<sup>94</sup> Common Position (EU) 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (2001) OJ L344/93. Article 1 (4) of the Common Position details the procedure for feeding information: ‘The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned .... Persons, groups and entities identified by the

such, the EU does not merely play a substitute role for what the Member States would be obliged to do individually according to the rules of international law. Instead, it has asserted its own autonomy in decision-making on the basis of information provided by at least one Member State.<sup>95</sup> Since an EU measure would of course be effective across all the Member States, this practice necessarily indicates a level of trust that the information provided by the authorities in the Member States is accurate and that action is thus justified.

The role of the Court of Justice and the protection of individual rights is necessary for the discussion here, since the opportunity for the Court to review CFSP measures adds to the increasingly dense legal landscape and thus – as a necessary consideration – feeds back into the Council’s decision-making processes. The Treaty provisions preclude procedural and substantive review of CFSP measures, via the judicial review process<sup>96</sup> or from a preliminary reference from a national court,<sup>97</sup> except for the legality of restrictive measures.<sup>98</sup> Human rights challenges cannot engage the Court with regards to CFSP measures, even though EU foreign policy has already given rise to cases

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Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list. For the purposes of this paragraph "competent authority" shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.’

<sup>95</sup> N Tsagourias ‘Conceptualizing the Autonomy of the European Union’ in R Collins and ND White *International Organizations and the Idea of Autonomy* (Routledge, 2011) pp 348-349

<sup>96</sup> Article 263 TFEU

<sup>97</sup> Article 19 (3) (b) TFEU gives the authority to the Court of Justice to give preliminary rulings ‘on the interpretation of Union law or the validity of acts adopted by the institutions’. The Article does not mention the CFSP but says (in Article 19 (3)) “in accordance with the Treaties”. See also M Brkan ‘The Role of the European Court of Justice in the Field of Common Foreign and Security Policy after the Treaty of Lisbon: New Challenges for the Future’ in PJ Cardwell (ed) *EU External Relations Law and Policy in the Post-Lisbon Era* (TMC Asser Press, 2012) p 100

<sup>98</sup> Article 215 (3) TFEU

in the European Court of Human Rights<sup>99</sup> and the Treaty foresees the eventual EU adhesion to the European Convention.<sup>100</sup> Article 47 of the Charter of Fundamental Rights of the Union on the right to an effective remedy is difficult to square with the exclusion of the Court from CFSP matters, which could conceivably affect the legal rights of individual citizens.<sup>101</sup>

Under Article 275 TFEU, the Court is permitted to review decisions affecting rights of natural/legal persons (brought under Article 263 TFEU) but *only* in cases where restrictive measures are placed upon them.<sup>102</sup> The individual lists have been the subject of numerous challenges in the General Court and from this we can surmise, as Eeckhout has posited, that strict review is exercised.<sup>103</sup> It is also worth noting Declaration 25 attached to the Treaty on Articles 75 and 215 TFEU which underlines the importance of due process and the Court's legal oversight:<sup>104</sup>

*'The Conference recalls that the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure.'*

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<sup>99</sup> M-G Garbagnati Ketvel 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 *ICLQ* 77

<sup>100</sup> See further, C Eeckhout 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 *Modern Law Review* 645 and T Lock 'Accession of the EU to the ECHR' in D Ashiagbor, N Countouris and I Lianos (eds) *The European Union after the Treaty of Lisbon* (Cambridge University Press, 2012) p 109.

<sup>101</sup> Brkan, 'The Role of the European Court of Justice, see note 97 above, p 106

<sup>102</sup> It is worth noting here that since this provision is new, it was not used in the *Kadi and Al Barakaat* cases (see note 63 above) which were brought on the basis of the implementation powers via a Regulation pursuant to a CFSP Common Position (formerly Article 60 and 301 EC, now found in Article 215 TFEU).

<sup>103</sup> Eeckhout, see note 46 above, p 546

<sup>104</sup> P Craig *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford University Press, 2010) p 396

Attempts to enlarge the scope of human rights review of CFSP measures have not been fully successful. In its 2012 judgment in *Parliament v Council*, the Court rejected an argument by the European Parliament that it would be contrary to EU law to adopt measures having a direct impact on the fundamental rights of individuals and groups which excluded the participation of the Parliament.<sup>105</sup> The Court stated that the Charter binds all institutions (and therefore also when institutions are acting under the CFSP) but did not elaborate on Article 47 specifically.<sup>106</sup> However, in a further *Parliament v Council*<sup>107</sup> decision (which did not concern sanctions) the Court held that a minimum of democratic and judicial scrutiny applies to the CFSP.<sup>108</sup> The result of the decision confirms the view that the CFSP is more integrated into the legal order of the EU than can be assumed from some of the Treaty provisions. The Court has a further opportunity to review the compatibility of CFSP measures and sanctions and judicial oversight in the pending *Rosneft* case.<sup>109</sup>

The question of whether sanctions are effective in terms of achieving goals and outcomes is beyond the scope of the discussion here. Existing literature on this topic holds that sanctions can be an effective tool, but this is also context-specific. Whether effective or not – or whether motivated by values or economic/security interests, the argument here is that the discussion and eventual decision to impose sanctions is significant: it marks the EU out as an actor capable of ‘doing’ things. And even where

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<sup>105</sup> *Parliament v Council*, see note **Error! Bookmark not defined.** above, para 83

<sup>106</sup> *Ibid.* paras 83-84.

<sup>107</sup> *European Parliament v Council of the European Union* (Mauritius Treaty), C-658/11, EU:C:2014:2025

<sup>108</sup> *Ibid.* para 73

<sup>109</sup> *Rosneft*, C-72/15 (pending). The case, referred by the High Court of England and Wales to the CJEU via the preliminary reference procedure, concerns the sanctions against the Russian Federation and asks a series of questions pertaining to the Court’s right to review CFSP measures, including with reference to the Charter of Fundamental Rights Article 47.

sanctions are the result of a UNSC lead, the EU has demonstrated its willingness to go further in some cases.

But more than that, the extensiveness of the sanctions regimes demonstrates that the EU is able to meet some of its Treaty-based goals in the CFSP. It has been argued that despite the EU's claims to pursue a value-led foreign policy based on the contents of Article 21 (2) TEU, economic and security interests take precedence.<sup>110</sup> Yet, economic and security interests are also part of the CFSP given its very wide definition ('all areas of foreign policy', as per Article 24 (1) TEU). The frequent calls for sanctions to be imposed on a country by *inter alia* the European Parliament, for example on countries which have passed discriminatory legislation against minorities,<sup>111</sup> are made in part because the EU has demonstrated its ability and willingness to do so. And again, this is because the underpinning of legal authority and the density of legal interactions on individual rights between the institutions over the sanctions regimes makes the EU's foreign policy both legalised and 'real'.

#### **4. AN EU-LED 'EUROPEAN' FOREIGN POLICY**

This section takes the argument one step further and suggests that the development of use of sanctions by the EU has had a secondary effect, namely the opportunity for wider leadership in the European neighbourhood via the CFSP and its sanctions regimes. In practice, this development has opened up the possibility for 14 non-EU states in Europe to be offered the opportunity to align themselves with the restrictive measures regimes imposed by the EU on a case-by-case basis via a CFSP Declaration. In accepting the

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<sup>110</sup> K Brummer 'Imposing Sanctions: The Not So "Normative Power Europe"' (2009) 14 (2) *European Foreign Affairs Review* 191

<sup>111</sup> European Parliament, Resolution 2014/2634(RSP) of 13 March 2014 on launching consultations to suspend Uganda and Nigeria from the Cotonou Agreement in view of recent legislation further criminalising homosexuality

offer by the Council to align with a Declaration, the scope of the restrictive measures is effectively enlarged beyond the EU's borders. Although the non-EU states are not involved in the (legalised) processes of defining the scope and depth of sanctions, the domestic legal effect they give them contributes to a greater geographical reach of the CFSP.

The background context to this practice can be found in the enlargement process. During the preparations for the enlargement to Central and Eastern Europe and the Mediterranean in 2004, the candidate states underwent a process of adapting to all existing EU legislation and policies in force, including the CFSP. This was the first time that the enlargement process included the variety of types of sanctions detailed in the previous section. Since the sanctions regimes are put in place by a combination of a CFSP measure and a Regulation, these would form part of the *acquis*. But the innovation during the process was to invite the candidate states to publicly align themselves with the EU's CFSP Declarations. CFSP Declarations have no binding force, but they have been the most visible instrument of the CFSP during its inception in the TEU (which has, of course, led to the familiar accusation that the CFSP is 'declaratory' and little more).<sup>112</sup>

Approximately three to five Declarations are issued each month. Most Declarations address pressing issues in international affairs, such as condemning an instance of death penalty use, aggressive behaviour by a state or human rights abuses. They were previously issued by the Council Presidency until the Treaty of Lisbon, which makes the High Representative responsible for their coordination, agreement and publication. There has been little academic attention paid to Declarations, especially from

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<sup>112</sup> T Vončina 'Speaking with One Voice: Statements and Declarations as an Instrument of the EU's Common Foreign and Security Policy' (2011) 16 *European Foreign Affairs Review* 169

legal scholars, though they do reveal the EU's collective views on issues, and hence allow for an insight into the way in which we (should) view the EU as an international actor.<sup>113</sup>

The various non-EU states are invited to align themselves with *all* Declarations issued by the High Representative, and the states are listed at the end of the Declaration text.<sup>114</sup> The specific type of CFSP Declaration under examination here, however, is that which refers to the alignment of sanctions regimes by the third country and therefore *does* relate to the adoption of legal norms.

The process is as follows: after every combination of CFSP Decision and subsequent Regulation creating or amending a sanctions regime, a CFSP Declaration is issued by the Council for the sole purpose of stating which of the 14 have aligned themselves and undertaken to make the domestic changes to their internal law and policies necessary to give legal effect to the sanctions. It is thus an example of legislative approximation, but – uniquely – one which is expressed through the CFSP.

There is a clear rationale for this practice in the case of candidate states, since they will eventually be involved in the formation of the CFSP itself as full members. The extent to which they align themselves or not is commented upon in the periodic enlargement reports and in the case of repeated non-alignment may hamper the accession process.<sup>115</sup> But what is interesting here is that this practice has been extended

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<sup>113</sup> See, for example, H Sjursen 'What Kind of Power?' (2006) 13 (2) *Journal of European Public Policy* 169

<sup>114</sup> This typically takes the following form: 'X have aligned themselves with this Declaration. They will ensure that their national policies conform to this Council Decision. The European Union takes note of this commitment and welcomes it.'

<sup>115</sup> For example, the October 2014 report on the former Yugoslav Republic of Macedonia notes, "The country's alignment with EU Declarations and Council decisions in the field of foreign and security policy deteriorated as compared with previous years and needs to be improved." European Commission 'Progress Report: the former Yugoslav Republic of Macedonia' (2014). Available at: [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-the-former-yugoslav-republic-of-macedonia-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-the-former-yugoslav-republic-of-macedonia-progress-report_en.pdf) (accessed 26 June 2015) p 59

to states around the EU's borders who have no (immediate) opportunity to apply to join the EU as full members, or who have chosen not to seek membership.

The rationale for this practice is strongly related to the 2004 and 2007 enlargements, which pushed the frontiers of the EU eastwards towards 'new neighbours'. In 2004, the European Neighbourhood Policy (ENP) was launched. This was not solely a CFSP instrument but rather 'cross pillar'. The main aim was to foster closer relations and 'share values' with all the states bordering, or close to, the EU and was initially known as 'wider Europe', with a focus firmly on the East. The aim of 'building security in our neighbourhood' had already been articulated in the European Security Strategy (2003).<sup>116</sup> The ENP was officially separate to the Euro-Mediterranean Process (the Barcelona Process) for states in the Middle East and North Africa, though was closely linked.<sup>117</sup> The latter were brought into ENP due to the insistence of some EU Member States (especially France and Spain) who worried that the EU might focus too heavily on the East to the detriment of the South. The Treaty of Lisbon introduced an express provision that to build 'special' relationships with neighbouring countries based on the values of the Union.<sup>118</sup>

As part of the EU's mission to 'share values' with (new) neighbours in the East, the EU has since 2007 invited most ENP states in Europe (Armenia, Azerbaijan,

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<sup>116</sup> Council of the European Union 'European Security Strategy: A Secure Europe in a Better World' (2003) 12 December 2003. Available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> (accessed 26 June 2015)

<sup>117</sup> PJ Cardwell 'EuroMed, European Neighbourhood Policy and the Union for the Mediterranean Overlapping Policy Frames in the EU's Governance of the Mediterranean' (2011) 49 (2) 219

<sup>118</sup> Article 18 (1) TEU: 'The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.'

Georgia, Moldova and Ukraine)<sup>119</sup> to align themselves with CFSP Declarations. Although extending the invitation to other neighbourhood partners in the Mediterranean region, including Morocco and Jordan, has been mooted, it has not occurred.<sup>120</sup> In addition to the states engaged in the enlargement process (Croatia,<sup>121</sup> former Yugoslav Republic of Macedonia (FYROM), Montenegro, Serbia and Turkey), the invitation has also been extended to European Economic Area (EEA) members Iceland (which subsequently became part of the enlargement process), Norway and Liechtenstein, and the remaining states involved in the Western Balkans as ‘potential EU membership candidates’ (Albania and Bosnia and Herzegovina).<sup>122</sup> This brings to total number of invitees during the period under examination of 2007 to 2014 to a maximum of 15.<sup>123</sup> The third states do not have any formal input into the text of the Declaration: the text is transmitted to them and the Declaration is issued several days later with their alignment listed if they have decided to take up the opportunity to do so. It is thus a ‘take it or leave it’ approach, though the EU may wish to consider the rate of alignment should a state move closer to starting the enlargement process or seek deeper relations with the EU under ENP.

This evidence demonstrates that this practice can be seen as a success. From 2007 until 2014, 556 Declarations were transmitted to the third states (these include

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<sup>119</sup> Belarus is technically covered by the ENP but has no substantial bilateral relationship with the EU, though the latter is using a variety of means to improve the democratic situation in the country. See further, E Korosteleva ‘The European Union and Belarus: Democracy Promotion by Technocratic Means?’ (2015) *Democratization* DOI: 10.1080/13510347.2015.1005009

<sup>120</sup> Council of the European Union ‘Conclusion of the 2809<sup>th</sup> Council Meeting’ (2007) 10657/07, 18 June 2007. The text of the conclusions states that a ‘similar possibility should be pursued for the EU’s Mediterranean partners’.

<sup>121</sup> Croatia was a candidate state from 2004 and an ‘accession state’ from December 2011 until its full EU membership in July 2013.

<sup>122</sup> Kosovo is regarded a potential candidate for EU membership, but its statehood is not currently recognised by several Member States and has not been invited to align. See further, S Keukeleire, A Kalaja and A Çollaku ‘The European Union’s Policy on Kosovo’ in P Koutrakos *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011).

<sup>123</sup> The period under examination begins in January 2007. The invitation to align was extended to Armenia, Azerbaijan and Georgia in July 2007. Since Croatian accession to the EU, the total number of partner states is 14.

general Declarations and the specific Declarations relating to sanctions). The rates of alignment for seven states was over 90% (Croatia, Montenegro, Iceland, Albania, Liechtenstein, Norway and Moldova); over 70% for Turkey, FYROM, Bosnia and Herzegovina, Serbia and Ukraine; 62% for Armenia, 58% for Georgia and 20% for Azerbaijan.

Of the total number of 556 Declarations, 149 are of particular interest here as these Declarations give specific notice of the alignment of the third states with a CFSP Decision (or, pre-Lisbon, a Common Position) on the imposition of restrictive measures against a state, a breakaway region of a state or individuals through the two counter-terrorism regimes. The number of Declarations to this effect as a percentage of the total (27%) underlines the importance of sanctions as a foreign policy tool and part of the CFSP. The third states undertake to align their legal systems to enable the freezing of assets, limitation of trade or impose travel bans on officials. Although the EU has no mechanism to assess whether the restrictive measures are in fact respected within the country, it has commented (as part of the enlargement process) on states which do not yet have the necessary tracing procedures at a domestic level in place.<sup>124</sup>

The rates of alignment vary considerably and the rates of alignment are, in general, lower than the rates identified above for general Declarations which do not require any domestic legal changes. Croatia, before it became a Member State in July 2013, aligned itself with all restrictive measures. This would be expected of a state which is close to completing the accession process, though future enlargement itself does not

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<sup>124</sup> For example, as in the case of Serbia, where the Commission commented in 2014 that, “A law that would establish a system for tracking the implementation of restrictive measures still needs to be adopted.” European Commission ‘Progress Report: Serbia’ (2014) [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20140108-serbia-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20140108-serbia-progress-report_en.pdf) (accessed 26 June 2015) p 62

always explain a higher or lower rate of alignment.<sup>125</sup> FYROM, Montenegro, Albania and Liechtenstein aligned themselves with over 90% of restrictive measures; Iceland and Norway over 80%; Serbia and Moldova over 70% and Turkey, Armenia, Georgia and Bosnia and Herzegovina between 40% and 50%. Azerbaijan only aligned itself with approximately 5% of sanctions, which generally occurred during a short period of several months in 2013. Nevertheless, the extent to which third states have committed themselves to adopting instances of EU law on sanctions into their domestic legal systems is impressive and effectively widens to the scope and impact of a measure.

This practice has been particularly effective with the two sanctions regimes on individuals and the measures taken against countries in Africa (such as Côte d'Ivoire and Guinea),<sup>126</sup> Syria<sup>127</sup> and Burma/Myanmar.<sup>128</sup> It has been markedly less successful with the measures taken against the Russian Federation following its annexation of Crimea, where the states aligning have often not included (for example) Serbia, Moldova and states in the Caucasus, even if the states supported UN General Assembly resolutions recalling Ukraine's territorial integrity.<sup>129</sup> The dominance of the issue of Russia's actions within the CFSP in 2014 and a clear nervousness amongst neighbourhood states in aligning

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<sup>125</sup> For example, Turkey is part of the enlargement process but has a lower overall rate of alignment than some other states which are not (yet) in this position.

<sup>126</sup> See, for example: Declaration by the High Representative on behalf of the European Union on the alignment of certain third countries with the Council Decision 2011/412/CFSP amending Decision 2010/656/CFSP renewing the restrictive measures against Côte d'Ivoire; Declaration by the Presidency on behalf of the European Union on the alignment of certain third countries concerning restrictive EU measures against the Republic of Guinea (Common Position 2009/788/CFSP)

<sup>127</sup> Declaration by the High Representative on behalf of the European Union on the alignment of certain third countries with Council Decision 2014/74/CFSP amending Council Decision 2013/255/CFSP concerning restrictive measures against Syria

<sup>128</sup> Declaration by the High Representative on behalf of the European Union on the alignment of certain third countries with the Council Decision 2011/239/CFSP amending Decision 2010/232/CFSP renewing restrictive measures against Burma/Myanmar

<sup>129</sup> See, for example, European Commission 'Progress Report: the former Yugoslav Republic of Macedonia' (2014) [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-the-former-yugoslav-republic-of-macedonia-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-the-former-yugoslav-republic-of-macedonia-progress-report_en.pdf) (accessed 26 June 2015) p 59

themselves with restrictive measures against Russia means that the overall level of alignment has dropped towards the end of the period under examination. The same rationale applies for some states nervous about contradicting Russian policies which have differed sharply from those of the EU, such as those towards Libya.<sup>130</sup> This demonstrates that the adoption of Declarations rests on a political evaluation of the consequences of aligning itself firmly with the EU as well as the legalised process of giving effect to the sanctions. Nevertheless, if sanctions related to Russia are removed from the equation then the overall level of alignment with EU restrictive measures – both autonomous and emerging from the UNSC – increases for most states.

Thus, the EU can be seen to have succeeded in integrating the non-EU states in its neighbourhood into its sanctions regimes. The above analysis demonstrates that in many cases, adoption of sanctions has become more than a political decision but a legalised one too: the non-EU states habitually respond positively to the EU's invitations and incorporate the sanctions into their domestic legal orders. This matters for the narrative in this article, since a high level of alignment with a CFSP sanctions regime puts the EU in the role of a leader of a *European*, as opposed to only an *EU*, foreign policy. A Declaration issued in the name of the EU and its Member States with 14 additional states in addition to the EU's 28 brings the total to 42 states. This is over a fifth of the total number of states in the United Nations (193) and can be presented beyond Europe as a truly continent-wide view. A high degree of alignment is potentially very useful if the EU hopes to spearhead efforts for a new international agreement, where a head-count of states (despite their size) is crucial.

For restrictive measures, the alignment by third countries significantly increases the practical reach of the CFSP, assuming of course that states who align

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<sup>130</sup> N Ghazaryan and A Hakobyan 'Legislative approximation and application of EU law in Armenia' in P Van Elsuwege and R Petrov *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge, 2014) p 213

themselves are taking the necessary steps to ensure that restrictive measures are enforced within their territories. Enlarging the geographical scope of restrictive measures brings together the EU's economic weight with potential strong foreign policy influence over the targeted third states or individuals. An expanded reach of EU sanctions is likely to disrupt the movement of financial assets from state-to-state. The trend for 'smart' sanctions which aim to restrict financial transactions by freezing assets etc can be more effective through alignment even with (very) small states such as Liechtenstein, since the presence of significant financial institutions in the partner state and their importance is not linked to the size of a territory or, for example, military strength. Alignment by third states with restrictive measures via public CFSP Declarations is proof that the Union has the capacity to put in place 'practical' measures grounded in law as well as words which have a strong potential to meet the goals of the sanctions, and hence the CFSP itself. The practice of alignment therefore underlines the significance of the CFSP as a legalised EU foreign policy.

## CONCLUSION

This article has attempted to demonstrate that the foreign policy of the EU as encapsulated by the Common Foreign and Security Policy is far from a domain in which there is no 'law'. Rather, through a process of legalisation, the 'otherness' of the CFSP is less profound than is often assumed. With the increase in the imposition of traditional and 'smart' sanctions via autonomous measures and counter-terrorism listings, the EU has 'largely occupied the field'<sup>131</sup> of activity vis-à-vis the Member States, and of the CFSP itself. This is a remarkable state of affairs when one considers that neither sanctions nor the CFSP were assumed to be anywhere close to the core of the EU's external activity at the time of the conclusion of the Treaty of Maastricht.

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<sup>131</sup> Eeckhout, see note 46 above, p 546

The developments since the Treaty of Lisbon in terms of using sanctions as a cornerstone of foreign policy, and in particular towards Russia, demonstrates that the EU has succeeded in tying together its economic weight with its search for an international role. As part of the CFSP, the increasingly sophisticated use of sanctions and their application to situations around the globe is evidence of a symbiotic relationship: sanctions sustain and provide a backbone to the CFSP whilst the legalised underpinnings of the CFSP provide the institutional context in which sanctions can be discussed and agreed. In turn, this creates the expectation that sanctions – and thus foreign policy – represent something the EU can do which has practical effects in fostering change.

As a consequence, the CFSP should be understood less as the ‘other’ and more the ‘normal’ within the EU’s institutional arrangements and even its legal order. Furthermore, the CFSP merits continued scholarship and attention from lawyers in terms of how the legal norms are created: this is particularly the case given the success the EU has experienced in ‘exporting’ the CFSP to neighbouring countries and forging what should be seen as a genuine Europe-wide sanctions regime and, hence, foreign policy.