



The Normalisation of the EU's Common Foreign and Security Policy

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Topics

- › Why is CFSP special?
- › Why is CFSP not special?
- › The Court's role in normalising CFSP
- › How to make CFSP decision-making more effective?

What is CFSP?

A wide scope, and the preferred option

- **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 Union's security, including the progressive framing of a common defence policy that might lead to a common defence.[...]

What is CFSP used for?

- nearly half of all the CFSP decisions are based on Article 29 TEU (47%). This indicates that sanctions are by far the most used instruments in the Union's foreign policy.
 - they are followed by implementing decisions, based on Article 31(2) (29.8%), which themselves mostly amend existing sanction regimes
- > Ramses A. Wessel, Elias Anttila, Helena Obenheimer and Alexandru Ursu, 'The Future of EU Foreign, Security and Defence Policy: Assessing Legal Options for Improvement' (2021)

What is meant by the ‘normalisation’ of CFSP

- › Consolidation and constitutionalisation
 - “a policy producing norms just as any other EU public policy does.”
(Saurugger and Terpan)
- › A ‘tradition of otherness’ (Cardwell), which is difficult to change
- › The principle of consistency (e.g. Art. 219(3) TEU)
 - “The Union shall ensure consistency between the different areas of its external action and between these and its other policies.”
 - A binding obligation of coherence in EU external relations
- › Confirmation by the Court in its recent case law

Why is CFSP special?

CFSP in the EU Treaty

- › Title V of the Treaty on European Union: “General provisions on the Union’s external action and specific provisions on the Common Foreign and Security Policy”.
- › CFSP (incl. CSDP) only policy area in TEU (apart from ENP)

Special position of CFSP

- **Article 24(1) TEU:** The common foreign and security policy is subject to specific rules and procedures.
- **The nature of the competence remains unclear.** CFSP is not mentioned in Articles 3-6 TFEU under either of the categories: exclusive competences, shared competences or supporting, coordinating or supplementing competences
- **Different roles** of the European Commission and the European Parliament in the decision-making process, the impossibility of the Court to rule on most CFSP decisions and treaty provisions, the different effects of CFSP decisions in the domestic legal orders of the member States, and the different nature of the instruments

Different decision-making procedures

- › Article 24(1) TEU: CFSP is formed on the basis of “specific rules and procedures” and the use of “legislative acts” is excluded
- › Unanimity as the default rule
- › CFSP decisions are **not adopted on the basis of the legislative procedure**, which is, *inter alia*, characterised by a Commission initiative, co-decision by the European Parliament and qualified majority voting.
 - But, this largely relates to decision-making *procedures* and tells us less about the legal *nature* of the acts

Why is CFSP not special?

Institutions and decision-making

- The Institutions responsible for the CFSP do not differ from the ones in other policy areas: a “single institutional framework”
- CFSP is a **Union policy**
 - ‘the European Union shall’, ‘the Union’s policy’
 - No mixed agreements in CFSP, only EU-only agreements

- Yet, the role of the Institutions is clearly different and a number of organs are specifically relevant for the CFSP.

Legal acts are binding

- According to Article 28 (1) TEU, whenever CFSP Decisions are adopted, “[t]hey shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation”. CFSP Decisions can therefore not be adopted half-heartedly
- The **mandatory force** of CFSP Decisions is quite clear
 - **Article 28 (2) TEU:** Decisions referred to in paragraph 1 **shall commit the Member States** in the positions they adopt and in the conduct of their activity
 - CFSP Decisions Actions, once adopted, limit the freedom of member states in their individual policies.
 - Member states are not allowed to adopt positions or otherwise to act contrary to the Decisions.
 - They have committed themselves to adapting their national policies to the agreed Decisions

- **Article 29 TEU:** The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. ***Member States shall ensure that their national policies conform to the Union positions.***
- It is basically up to the Council to decide on the necessity of deviations.
- To engage in legal relationships with third states or other international organizations, the European Union may to conclude **international agreements**, also in the area of CFSP
 - Note: EU CFSP Agreements are EU-only agreements and not mixed agreements (!)

The Court's role in CFSP

Limited role of the Court

- Articles 24(1) TEU + 275 TFEU: no jurisdiction with respect to the specific provisions on the Common Foreign and Security Policy' enshrined in chapter 2 of the TEU
 - Exceptions
 - Art. 40 TEU: choice of legal basis
 - Art. 275 TFEU: restrictive measures

- Opinion 2/13, para 252: “as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice”.

The Court's broad conception of its jurisdiction

- "the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, **and they must, therefore, be interpreted narrowly.**"
 - Case C- 658/11 *EP v Council* (Mauritius), ECLI:EU:C:2014:2025, para 70. See also, Case C-439/13P *Elitaliana*, ECLI:EU:C:2015:753, para 41. Case C-455/14P *H v Council*, ECLI:EU:C:2016:569, para 40

Joined Cases C-402/05 P & C-415/05 P *Kadi and Al Barakaat International Foundation v Council*

- › 283 In addition, according to settled case law, **fundamental rights form an integral part of the general principles of law whose observance the Court ensures.** For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by **international instruments for the protection of human rights** on which the Member States have collaborated or to which they are signatories. In that regard, the **ECHR** has special significance [...]

Joined Cases C-402/05 P & C-415/05 P *Kadi and Al Barakaat International Foundation v Council*

- › 326 ... the Community judicature must ... **ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights** forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations ...

The Court's broad conception of its CFSP-related jurisdiction

- › "the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of **the general jurisdiction which Article 19 TEU** confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, **and they must, therefore, be interpreted narrowly.**"
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Recent CFSP judgments by the CJEU

- › Jurisdiction of the Court in staff matters
 - 19 July 2016, C-455/14 P, *H v Council*, 5 July 2018, C-43/17, *Jenkinson*; 25 June 2020, C-14/19 P, *SatCen*.
- › Jurisdiction of the Court in public procurement
 - 12 November 2015, C-439/13 P, *Elitaliana*
- › Jurisdiction of the Court to answer preliminary questions by national Court in CFSP sanctions cases
 - 28 March 2017, C-72/15, *Rosneft*
- › Jurisdiction of the Court to deal with non-contractual liability/ damage compensation in CFSP matters
 - 6 October 2020, C-134/19 P, *Bank Refah Kargaran*.

Recent CFSP judgments by the CJEU

- **A preliminary reference concerning the interpretation of a CFSP decision on restrictive measures?**
 - AG Ćapeta's: while the Court cannot interpret general provisions of a CFSP Decision, it has the prerogative to interpret EU fundamental rights and principles to assess the legality of national measures implementing EU CFSP
 - C-351/22 Neves 77 Solutions [2022] OJ C 368; Case C-351/22 Neves 77 Solutions [2022] OJ C 368, Opinion of AG Ćapeta

- **Jurisdiction in more substantive CFSP situations?**
 - AG Ćapeta: EU courts are competent to hear actions for damages brought by individuals based on alleged breaches of fundamental rights arising from any CFSP measure
 - Joined Cases C-29/22 P and C-44/22 P KS and KD v Council and Others [2022] ECLI:EU:C:2023:901; Joined Cases C-29/22 P and C-44/22 P KS and KD v Council and Others [2022] ECLI:EU:C:2023:901, Opinion of AG Ćapeta, para 141.

Article 19 TEU

+ the principle of effective juridical remedies in Art. 47 CFR

- › 3. The Court of Justice of the European Union shall, in accordance with the Treaties:
 - (a) rule on actions brought by a Member State, an institution or a natural or legal person;
 - (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
 - (c) rule in other cases provided for in the Treaties

- › 1. [...] **Member States shall provide remedies** sufficient to ensure effective legal protection in the fields covered by Union law.

Consistency in the Court's approach

- › The debate on the role of the Court in relation to CFSP, is not about CFSP
- › Consistent line of argumentation that constitutional principles apply across the board (remember cases like *Hautala* on access to documents)
- › Limits to be found where the MS expressly excluded the Court
- › **The 'normalisation' of CFSP is merely affirmed by the Court, not created**

How to make CFSP decision-making more effective?

The shift to QMV on the agenda

- › EU institutions but also some EU governments – called on the Member States to gradually move from unanimity to QMV in CFSP matters.
- › Between mid-2013 and mid-2022, we have observed **25 major political calls to shift from unanimity to QMV** in CFSP matters (p. 65 of the Report)
- › ‘Group of Friends for QMV’ (GoF)
 - Belgium, Germany, Finland, France, Italy, Luxembourg, Netherlands, Romania, Slovenia and Spain

Vetoes and delays

- EU Member States increasingly – formally or informally – **block or delay the adoption of certain CFSP decisions**
- 30 individual vetoes, threats of veto or delays could be observed since 2016.
 - See Table in our report for the European Parliament on p. 64
- From these 30 cases, 60 percent are related to Hungary (18 cases), while the rest can be linked to eight other Member States (Greece (4), Cyprus (2) and Austria, Czech Republic, Italy, France, Malta and Romania (1 each)).
 - **BUT**: probably in most cases, the threats of vetoes have not reached the public domain

Existing Treaty possibilities to use QMV

- › The Council **shall** act by QMV (Art. 31(2) TEU)
 - A CFSP decision on the basis of a European Council decisions
 - A CFSP decision on the basis of a proposal by the HR following a specific request by the European Council
 - Any decision implementing a decision
 - Appointing a special representative
- › Procedural questions: a normal majority (Art. 31(5))
- › The Regulation on restrictive measures following a CFSP Decision
- › MS may block the use of QMV “for vital and stated reasons of national policy” (**emergency break**)

Existing possibilities to use QMV

- › **Link with non-CFSP issues** to side-step unanimity
 - Increasingly a result of the integration of EU external policies
 - E.g. links to trade - example: the anti-coercion instrument
- › Statements in international organisations (including the UN human rights Council)?

Constructive abstention

- › The second subparagraph of Article 31(1) TEU **allows a small group of Member State(s) to abstain from a vote and not to apply a CFSP Decision**
 - Option for MS not to block a CFSP decision, but at the same time save face back home
 - Abstaining MS cannot take actions that would go against the EU's position

Allowing for derogations

- › Adopt a CFSP decision by unanimity, but **allow for exemptions**
 - Example: the oil ban against the Russian Federation
 - Pragmatic way out of the dilemma, but a negative effect on the ‘common’ nature of CFSP

The general passerelle clause

- > Art. 48(7) TEU ('treaty revision light'): **shift to QMV for certain policies after a unanimous decision by the European Council**
 - Possible for CFSP
 - but not for decisions having military implications or those in the area of defence
 - Civilian CSDP missions?
 - EP and national parliaments are involved
- > 'Super QMV' as a compromise (27 minus 2 or 3); (proposal HR/VP in 2022)

The specific CFSP passerelle clause (Art. 31(3) TEU)

- › **Extending the list of already existing possibilities for QMV in CFSP**
- › This seems to be the ‘easiest’ option as it is less comprehensive and allows for QMV introduction for specific areas
 - Restrictive measures, human rights statements, cybersecurity?
 - Not for decisions having military or defence implications
- › No consensus reached at the GAC in September 2022

Finally: political considerations

- › When is **the 'Common' nature of CFSP** affected? (only 25 votes in favour OK, but what about only 20, or less?)
- › How does this affect consistency in EU foreign policy (which is a Treaty requirement)
- › Which countries should have voted in favour in which situations?

Conclusion: CFSP as a Common EU and MS Policy? Challenges

- With the increasing ‘normalisation’ of CFSP it has become part and parcel of the overall external relations regime of the Union and it becomes **difficult to clearly separate foreign policy from other EU external action**
- This also points to another looming risk: fragmentation in CFSP may make it more **difficult to live up to many of the principles** that are at the basis of *all* EU law and cooperation.
 - Will the use of QMV affect the ‘commonness’ of CFSP?