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Common Foreign, Security and Defence Policy

Central Issues

- The EU's foreign and security policy is based on a set of compromises. From the outset, Member States have been hesitant to hand-over powers in this area. Yet, the strong links with other policies as well as the single institutional structure, caused an integration of CFSP into the Union legal order and a further 'normalisation' of this policy field. While its distinct nature remains clearly visible, CFSP has become part and parcel of the EU's external relations regime.
 - In this chapter we will address the obligations of the Member States under CFSP as well as the role of the EU institutions, including the CJEU, and the legal nature and function of the CFSP instruments.
 - Part of CFSP is the Common Security and Defence Policy (CSDP). The CSDP provisions not only allow the EU to be active as a global military actor, but new rules increasingly commit the EU members to work closer together in what is termed the Permanent Structured Cooperation (PESCO).
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I. Foreign Policy as an Integral Part of EU External Relations

The Common Foreign and Security Policy (CFSP) of the EU has for decades been the 'odd one out'. It emerged separate from the European Economic Community in an incremental, pragmatic fashion in the beginning of the 1970s. The process was

stimulated through the realisation that the coordination of the different foreign policies of the (six, then nine etc.) Member States was helpful and occasionally even necessary for the Community to pursue its goals. At present, CFSP objectives have become an integral part of the overall external objectives of the Union as laid down in Article 21 TEU (see Chapter 1).

L Lonardo, ‘Common Foreign and Security Policy and the EU’s External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union’ (2018) 14 *European Constitutional Law Review* 584, 607

The retention of the CFSP’s legal distinctiveness might be a response to the Member State’s need to maintain power ‘when it matters’: foreign policy is a domain at the core of state functions. But, as the rationale of Article 21(2) TEU suggests and the analysis of institutional behaviour has shown, there are no objectives exclusive to CFSP. All objectives specified under the eight letters of Article 21(2) have been used to pursue non-CFSP competences. Yet the same eight letters could have been CFSP objectives: as has been shown, there is a credible link between each of them and political or defence matters. While this is consistent with the desire to enhance the coherence of Union external actions, it also adds to the difficulty in delimitating the scope of CFSP.

Thus, this policy area has developed from a more intergovernmental form of information exchange, coordination, and cooperation in the days of the European Political Cooperation (EPC), to an EU competence in its own right and an area in which the Member States have accepted significant forms of institutionalisation and legalisation. The integration of CFSP policy goals is clearly visible in the Treaty when we look at the general statement of the EU’s objectives in Article 3(5) TEU (see Chapter 1), which includes peace and security, and the protection of EU citizens. Over the years, the ‘normalisation’ of CFSP – in the sense that it fully belongs to the Union’s legal order and is subject to most of its rules and principles – has become more accepted in scholarly work. Yet, the distinct development of CFSP in the early days that seems to be at the source of a ‘tradition of otherness’ sometimes blurs its present-day constitutionalisation.

PJ Cardwell, ‘On “Ring-Fencing” the Common Foreign and Security Policy in the Legal Order of the European Union’ (2015) *Northern Ireland Legal Quarterly*, 443–63, 445

This ‘otherness’ of the CFSP within the constitutional order is expressed in the ring-fencing metaphor. But it does not explain why the CFSP should be

exceptional within the EU's legal order. In one sense there is an obvious answer: the tradition of 'otherness' of the CFSP and legal expression of the Member States' fear of the encroachment on their sovereignty if the Court of Justice was able to extend supranational EU legal principles to foreign policy. The Treaty seems to stem the 'Brusselsization' of the CFSP where 'the member states have in practice entered a slippery slope of integration with decision-making competence 'creeping' to Brussels' with the Court in Luxembourg filling in the gaps. But given that other areas have been 'communitarianised' in the most recent Treaty, is the ring-fence likely to prove effective in keeping the CFSP separate from the rest of the EU's legal order? ... this is highly unlikely ...

Admittedly, the integration is not complete. The CFSP maintains a certain 'distinctiveness' from the general former 'Community logic'. Most notably, CFSP (with CSDP and the European Neighbourhood Policy) is the only substantive policy domain found in the Treaty on European Union, whereas other policies are found in the TFEU.

In some respects, the nature of CFSP still differs significantly from other 'common' policies, such as the Common Commercial Policy (Article 207 TFEU) or the Common Agricultural Policy (Article 38 TFEU). In the early years in particular, Member States showed a willingness to cooperate in CFSP, but remained reluctant to actually transfer competences. This makes it difficult to establish the *nature* of competence the EU has under CFSP (see Chapter 3). Nevertheless, the existence of a *Union* competence is beyond any doubt.

Article 2(4) TFEU

The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy ...

This provision indicates that CFSP has moved beyond intergovernmentalism. An actual competence has been *conferred* upon the Union rather than existing as a mere cooperative framework for the Member States. CFSP is not mentioned in Articles 3–6 TFEU under either of the categories: exclusive competences, shared competences or supporting, coordinating or supplementing competences. It would probably come closest to the field of complementary or parallel competence as observed in the field of development: both the Union and the Member States have roles to play, strong coordination is both legally required and politically desirable. At the same time, it remains somewhat unclear to what extent activities of the Union would pre-empt Member State action. Although most textbooks would present CFSP as

a non-pre-emptive competence the present chapter will highlight Member States' obligations. The *sui generis* nature of CFSP is usually related to a number of elements which are lacking when compared to most other Union policy areas: the 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 themselves.

II. The Nature of CFSP

On 7 February 1992, the Member States of the European Economic Community (EEC) entered a new phase in the ongoing process of intensifying their political cooperation. In signing the TEU they officially embraced foreign and security cooperation as an inextricable component of what from that moment on was to be referred to as the 'European Union' (see Chapter 1). CFSP was – from entry into force of the Treaty on 1 November 1993 – to be seen as one of the areas that would serve as the justification for the establishment of that Union.

The CFSP did not, however, appear out of the blue. Its origins date back to the 1950s.¹ The history of CFSP reveals an ongoing struggle to reach an agreement between the members of the EEC on political cooperation alongside their economic cooperation and, above all, on the legal-institutional relationship between the economic and political policy domains.

A. The Position of CFSP in the Treaty

The 2009 Lisbon Treaty made an end to the so-called 'pillar-structure'. Since the entry into force of that Treaty and the resulting amended Treaty on European Union, CFSP is no longer 'the second pillar' of the Union, but an integral part of the single legal person that is the EU. While CFSP is occasionally referred to in the first parts of the TEU in relation to the role of the institutions, the main provisions are to be found in Title V of the TEU, entitled 'General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy'. The 'specific provisions' to which the Treaty refers, are laid down in Chapter 2 of this Title V. CFSP has a wide scope and, at first glance, seems to cover all foreign policy dimensions of the Union.

¹One may even go back as far as 19 September 1946, when Winston Churchill stressed the need to establish 'a kind of United States of Europe'; or to 7 May 1948 when the so-called 'Congress of Europe' called for the establishment of a Political and Economic Union in Europe. See, on some of the history, G Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (Oxford, Hart Publishing, 2019) and RA Wessel, *The European Union's Foreign and Security Policy: A Legal institutional Perspective* (The Hague, Kluwer Law International, 1999).

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 ...

In principle, nothing in foreign affairs is excluded. At the same time, reference is made to the fact that the regular decision-making procedures that are applicable to other policy areas do not apply to CFSP. Chapter 2 of Title V thus provides its *lex specialis*. The key differences as regards the institutional balance and the role of the CJEU in CFSP are also spelled out in Article 24 TEU.

Article 24(1) TEU

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties ...

CFSP is thus characterised by different voting rules, different instruments, a different role for the institutions and, in particular, a more limited role for the Court of Justice. The subsequent sections in this chapter will analyse these aspects in more detail.

B. The Choice for the Correct Legal Basis

With a view to the many political questions underlying CFSP decisions, it remains important to underline that, from a legal perspective, CFSP is subject to legal rules and procedures. Its formulation is spelled out in detail in the Treaties and, in adopting CFSP decisions and actions, the Union is bound by the principles of EU law. As clearly emphasised by Article 23(1) TEU: 'The Union's action on the international scene, pursuant to this Chapter, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1.'

G Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (Oxford, Hart Publishing, 2019) 5

Despite seeming to be the contrary, CFSP matters are a legalised field. For lawyers, everything in EU external relations begins with a discussion on the legal basis for supporting actions. As the Union strives for more coordination, consistency and cooperation, the choice of legal basis is of profound importance. The law is only one element of EU external relations, but it is an integral component that caters for the execution of external action. This is even more so in CFSP matters where strict conditions for the procedural issues are set down in the treaties. This is not only in EU external relations law, but for all EU acts or measures, which must have a legal basis.

Chapter 3 examined the legal complexity that results from the principle of conferred powers: any and all EU action must find a legal basis in the TEU or TFEU. The centre of gravity test was developed to make the 'correct' choice as to whether an initiative falls within one or the other policy domain. However, in policy reality, such neat separations are often very difficult to make: trade and environmental issues can be interlinked, as can development and security. In fact, as we have seen in Chapter 8 on Development, the Treaty-mandated consistency requirement actually calls for a proactive approach to combining different areas of external action. Yet, especially in the field of CFSP, the diverging decision-making procedures make it difficult to combine a CFSP legal basis with a legal basis in another (TFEU) policy area. This is a significant legal obstacle to comprehensive external action.

In the pre-Lisbon version of the TEU, choices for the correct legal basis were to be made based on (former) Article 47 TEU. This so-called 'non-affect clause' had as its main purpose to 'protect' the so-called *acquis communautaire* from incursion by the special CFSP method, and provided that 'nothing in [the TEU] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them'. The landmark case at that time clarifying the application of the 'non-affect clause' was *ECOWAS* (or *Small Arms and Light Weapons*). The result of this case was that the Council CFSP Decision was annulled because it also included aspects of development cooperation, an area not covered by the CFSP legal basis. Post-Lisbon, the pillars no longer exist and Article 47 has been replaced by Article 40 TEU. This provision reflects the current focus on coherent EU external relations and is therefore more balanced between CFSP and the other Union policies now compiled in the TFEU. In substantive terms, it essentially reflects the method whereby the correct legal basis is found through establishing the 'centre of gravity' of the decision at stake (see Chapter 3).

Article 40 TEU

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this chapter.

In other words, in adopting CFSP decisions, the Council should be aware of the external policies in the TFEU *and vice versa*. Despite its ‘balanced’ approach, Article 40 implies that EU CFSP measures are excluded once they start to interfere with the exclusive powers of the Union, for instance in the area of Common Commercial Policy. This may seriously limit the freedom of the Member States in the area of restrictive measures (see below) or the export of ‘dual goods’ (commodities which can also have a military application). At the same time, the question may rightfully be asked what the current value of Article 40 is, since it mainly seems to repeat a general legal requirement in EU law: the correct legal basis is chosen on the basis of the centre of gravity test.

In Case C-130/10, the European Parliament challenged a Council Regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden. The Court confirmed the following:

Case C-130/10 *Parliament v Council (Smart Sanctions)*, ECLI:EU:C:2012:472

44 With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one’s being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases (see, in particular, *Parliament v Council*, paragraph 36 and case-law cited).

45 None the less, the Court has held also, in particular in paragraphs 17 to 21 of Case C-300/89 *Commission v Council* [1991] ECR I-2867 (‘Titanium dioxide’), that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other (see, in particular, *Parliament v Council*, paragraph 37 and case-law cited).

The different decision-making procedures and legal instruments render combinations of CFSP and other legal bases difficult.

In a more recent case from September 2018, the Court was given a chance to clarify how to deal with decisions or agreements that cover both CFSP and other policy areas. The ‘Enhanced Partnership and Cooperation Agreement’ is a bilateral mixed agreement between the EU and its Member States and the Republic of Kazakhstan. It was based on both CFSP (Articles 31(1) and 37 TEU) and TFEU provisions (Articles 91 and 100(2) TFEU (transport), and Articles 207 and 209 TFEU (trade and development cooperation)). The case was about the correct legal basis for the adoption of an EU position in the Cooperation Council that was created based on the Agreement. The Council felt that Article 31(1) TEU was to be included as a substantive legal basis of the decision, as it had also been included in the decision approving the provisional application of the Agreement with Kazakhstan. The Court thus had to apply its ‘gravity test’.

Case C-244/17 *Commission v Council (PCA with Kazakhstan)*, ECLI:EU:C:2018:662

42 It is true that, as the Advocate General has noted in points 64 to 68 of her Opinion, the Partnership Agreement displays certain links with the CFSP. Thus, Article 6 of that agreement, in Title II headed ‘Political dialogue, cooperation in the field of foreign and security policy’, is specifically devoted to that policy, the first paragraph of Article 6 providing that the parties are to intensify their dialogue and cooperation in the area of foreign and security policy and are to address, in particular, issues of conflict prevention and crisis management, regional stability, non-proliferation, disarmament and arms control, nuclear security and export control of arms and dual-use goods. Furthermore, Articles 9 to 12 of the Partnership Agreement, which define the framework of the cooperation between the parties regarding conflict prevention and crisis management, regional stability, countering the proliferation of weapons of mass destruction and the fight against illicit trade in small arms and light weapons, may also be linked with the CFSP.

43 However, it is clear that, as the Advocate General has observed in essence in point 69 of her Opinion, those links between the Partnership Agreement and the CFSP are not sufficient for it to be held that the legal basis of the decision on the signing of that agreement, on behalf of the European Union, and its provisional application had to include Article 37 TEU.

44 First, most of the provisions of the Partnership Agreement, which contains 287 articles, fall within the common commercial policy of the European Union or its development cooperation policy.

45 Second, the provisions of the Partnership Agreement displaying a link with the CFSP and cited in paragraph 42 of the present judgment, apart from being

few in number in comparison with the agreement's provisions as a whole, are limited to declarations of the contracting parties on the aims that their cooperation must pursue and the subjects to which that cooperation will have to relate, and do not determine in concrete terms the manner in which the cooperation will be implemented (see, by analogy, judgment of 11 June 2014, *Commission v Council*, C-377/12, ECLI:EU:C:2014:1903, paragraph 56).

46 Those provisions, which fall fully within the objective of the Partnership Agreement, set out in Article 2(2) thereof, of contributing to international and regional peace and stability and to economic development, are not therefore of a scope enabling them to be regarded as a distinct component of that agreement. On the contrary, they are incidental to that agreement's two components constituted by the common commercial policy and development cooperation.

47 Therefore, in the light of all those considerations, the Council was wrong to include Article 31(1) TEU in the legal basis of the contested decision and that decision was wrongly adopted under the voting rule requiring unanimity.

In other words, it not necessary to include a CFSP basis merely because there are CFSP elements in a certain agreement or decision. This line of reasoning is consistent with views held earlier by the Court in judgments relating to the agreements bringing Somali pirates before courts in *Mauritius* and *Tanzania*.²

III. Member State Obligations under CFSP

A. The Information and Consultation Obligation

Article 25 TEU

The Union shall conduct the common foreign and security policy by: ...

(c) strengthening systematic cooperation between Member States in the conduct of policy.

The concept of *systematic cooperation* directly builds on the system of European Political Cooperation (EPC), in which it was agreed that the participating states

²See, respectively, Case C-658/11 *Parliament v Council (Mauritius)*, ECLI:EU:C:2014:2025 and Case C-263/14 *European Parliament v Council (Tanzania)*, ECLI:EU:C:2016:435.

‘undertake to inform and consult each other on any foreign policy matters of general interest’.³ It is this systematic cooperation that formed the core of EPC from 1970–1993. In CFSP it still serves as the key notion, in the absence of which it would be impossible for the Union to define and implement a foreign and security policy. Article 32 contains the actual procedural obligations. In principle, the scope of issues to which the systematic cooperation applies is not subject to any limitation regarding time or space.

Article 32 TEU

Member States shall inform and consult one another within the European Council and Council on any matter of foreign and security policy ...

While this is indeed a very broad obligation, Article 32 TEU immediately puts this into perspective by adding a few important extra words (emphasis added):

Article 32 TEU

... on any matter of foreign and security policy *of general interest*.

The European Council has not provided any further specification of ‘general interest’ in Article 32 TEU. This seriously limits the strong information and consultation obligation in the first part of this Article. On the one hand, Member States are obliged to inform and consult one another, whereas, on the other hand, they are given the individual discretion to decide whether a matter is of ‘general interest’. Hence, once Member States do not agree that a matter is of general interest (eg, because one Member State considers it to be of national interest only) it becomes very hard for the Union to develop a policy in that area.

However, today there are very few foreign policy issues that really do only concern a single Member State. Therefore, it can be asserted that the Member States are indeed under a broad obligation to inform and consult one another. Through the information and consultation obligation the Member States ordered themselves to use it as one of the means to attain the CFSP objectives in Article 24 and 21 TEU. The procedures stipulated in Article 32 TEU only reflect the methods by which the Member States implement CFSP. Moreover, as we have seen, the content of the norm does not provide any other conditions than that the issue should be of general interest.

Taking into account the nature of the information and consultation obligation, it is rather unfortunate that the Treaty does not further define the obligation. Yet, there

³ See the Single European Act (1986), Art 30, para 2(a).

are no reasons to assume that the notion of consultation as used in Article 32 TEU deviates from more general definitions, which leads us to conclude that the EU Member States are to refrain from making national positions on CFSP issues of general interest public before they have discussed these positions in the framework of the CFSP cooperation. Informing and consulting one another should take place ‘within the European Council and the Council’ (Article 32 TEU). Keeping in mind the requirement of *systematic* cooperation, this should not be interpreted as only being within those institutions. Cooperation within the preparatory organs (Political and Security Committee, COREPER, and working parties – see below), as well as bilateral and multilateral consultations and cooperation (both in Brussels, in third states, or international organisations such as the UN) are equally covered by this obligation. In fact, as we will see, it is in these bodies that the actual systematic cooperation takes place. A second reason not to limit the cooperation to meetings of the Member States in the Council, may be found in Article 34 TEU. According to this provision, Member States shall coordinate their action in international organisations and at international conferences as well. Even when not all Member States are represented in an international organisation or an international conference, those that do participate are to keep the absent states informed of any matter of common interest (see also Chapter 6).

Over the years, CFSP cooperation at all levels has become more intense, automatic and systematic. The flipside, however, is that the larger Member States tend to ignore the information and consultation procedures whenever sensitive policy issues are at stake (eg, in Libya in 2011 and in Syria in 2012–2013). In these cases they take individual positions and diplomatic initiatives or opt for cooperation in the framework of another international organisation. This paradoxical situation reveals that CFSP may have become part of the day-to-day policy making in the national ministries as well as in Brussels, but that important or sensitive issues may also still be dealt with nationally or in other fora.

B. The Loyalty Obligation

The conclusions in the previous section bring us to the so-called ‘loyalty obligation’, which clearly formulates what is expected of Member States in this regard:

Article 24(3) TEU

The Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the

interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council and the High Representative shall ensure compliance with these principles.

To further define the kinds of action this requires of the Member States, we may find inspiration in the comparable and more general provision in Article 4(3) TEU, which lays down the ‘duty of sincere cooperation’ (see Chapter 2). Like Article 4(3) TEU, the specific CFSP provision contains a *positive* obligation for the Member States to actively develop the Union’s policy in the indicated area. In addition, the loyalty obligation contains the *negative* obligation not to undertake ‘any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations’ (Article 24(3) TEU). The comparison of the CFSP loyalty obligation with the duty of sincere cooperation in Article 4(3) TEU reveals its potential impact. The latter Article is often seen as part of the basis of the constitutional nature of Union law and has been frequently used by the Court of Justice in its case law. As seen in Chapter 2, the Commission has utilised the duty of sincere cooperation very effectively to ensure that Member States do not deviate from ‘the Union interest’ in their own external relations.⁴

IV. CFSP Decision Making and the Role of the Institutions

The institutions responsible for CFSP do not differ from those in other policy areas (see Chapter 1). Indeed, the preamble of the TEU refers to a ‘single institutional framework’ and Article 13 TEU on the institutions does not exclude any policy area. Yet, the role of the institutions and the balance between them is clearly different in CFSP.

The provision in Article 24(1)(2) TEU that ‘the adoption of legislative acts shall be excluded’ implies that CFSP decisions are not adopted on the basis of the legislative procedure, which is, *inter alia*, characterised by the Commission’s right of initiative, co-decision by the European Parliament, and qualified majority voting (QMV) in the Council as a default rule. As we will see, neither of these elements form part of CFSP decision-making.

A. The European Council

Apart from its general role described in Article 15 TEU, the European Council has a leading role in the formulation of CFSP.

⁴See also RA Wessel, ‘General Principles in CFSP Law’ in V Moreno Lax, P Neuvonen, K Ziegler (eds) *Research Handbook on General Principles of EU Law* (Cheltenham, Edward Elgar, 2020).

Article 22(1) TEU

... the European Council shall identify the strategic interests and objectives of the Union ...

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

Article 26(1) TEU

The European Council shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions ...

The competences of the European Council in implementing CFSP are thus indirect: they make possible or facilitate the decision-making by the Council. Its strategic decisions form the basis for the CFSP decisions taken by the Council.

The permanent President of the European Council, an office introduced by the Lisbon Treaty, has an important role to play in CFSP.

Article 15(6) TEU

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

This person may convene an extraordinary meeting of the European Council to define the strategic lines of the Union's policy if international developments so require (Article 26(1) TEU).

B. The Council

The Council can be regarded as the main CFSP decision-making institution.

Article 26(2) TEU

The Council shall frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council.

More specific provisions (Articles 28 and 29 TEU) stipulate that '[t]he Council shall adopt decisions'. Furthermore, the Council decides on the voting procedures and reviews the national positions and actions Member States take pursuant to a CFSP decision. Usually CFSP decisions will be taken by the Foreign Affairs Council (FAC), consisting of the Ministers for Foreign Affairs of the Member States and chaired by the High Representative (see below).

Unanimity continues to form the basis for CFSP decisions, 'except where the Treaties provide otherwise' (Article 24(1) TEU). Yet, a number of exceptions are provided by the TEU, allowing for the use of qualified majority voting under CFSP. Some exceptions already existed pre-Lisbon and reappear in Article 31(2) TEU, which allows for QMV:

- when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article 22(1) TEU;
- when adopting any decision implementing a decision defining a Union action or position; or
- when appointing a special representative in accordance with Article 33 TEU.

In addition, it is possible for the Council to adopt measures by QMV following a proposal submitted by the High Representative (Article 31(2) TEU). Such proposals should, however, follow a specific request from the European Council, in which, of course, Member States can foreclose the use of QMV. Moreover, QMV may be used for setting up, financing, and administering a start-up fund to ensure rapid access to appropriations in the Union's budget for urgent financing of CFSP initiatives (Article 41(3) TEU). This start-up fund may also be used for crisis management initiatives, which would potentially speed up the financing process of operations. Overall, however, it is clear that any action on the part of the EU will in the end continue to depend on the consent of its Member States.

In most cases CFSP Decisions are adopted without any debate in the Council; they have been prepared by the Council's subsidiary organs and a consensus has already been established between the representatives of the Ministers for Foreign Affairs. When decisions are taken by the Council, the issues do not appear on the agenda out of the blue. In most cases the draft decisions have already followed a long path through the various subsidiary organs of the Council. Some of these preparatory and implementing organs have an express treaty basis, others have been set up by the Council itself. According to Article 240 TFEU, the Committee of Permanent Representatives

of the Member States (Coreper)⁵ is responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council. Regardless of the fact that Coreper is not explicitly mentioned in the provisions on CFSP, its competences in this area are beyond any doubt since Article 38(1) TEU provides that the Political and Security Committee shall act '[w]ithout prejudice to Article 240 TFEU'. As we have seen in Chapter 1, there are two Coreper configurations. While Coreper I consists of deputy heads of mission and deals largely with social and economic issues, Coreper II consists of EU Member State representatives at ambassadorial level and deals with political, financial and foreign policy issues.

Over the years, the Political and Security Committee (PSC) has developed into the key preparatory and implementing organ for CFSP and CSDP. This body has its origin in European Political Cooperation (EPC), where a 'Political Committee' was created.⁶ The PSC is a standing committee, composed of representatives from the Member States.

Article 38(1) TEU

... a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or of the High Representative of the Union for Foreign Affairs and Security Policy or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative.

The PSC is also a key actor in the Union's security and defence policy (see below).

As in all other areas, CFSP decisions are prepared in working groups or working parties (composed of representatives of the Member States and the Commission). These preparatory bodies are installed by the Council and have an important function during the first phase of the decision-making process. According to Article 19(3) of the Council's Rules of Procedure, the main task of the working groups is to carry out certain preparatory work or studies defined in advance. These may include all possible 'CFSP output', ranging from *démarches* to decisions in the form of Joint Actions. The Council secretariat prepares reports of the discussions of the working group meetings, which are circulated to all delegations through the so-called COREU/CORTESY network. On all CFSP matters the working groups report to the PSC.

⁵This French abbreviation (*Comité des représentants permanents*) is used in English texts as well.

⁶The Political Committee was introduced by the *Davignon Report* in 1970 and gained a legal treaty basis in the Single European Act (1986) Art 30, para 10(c). Usually the French abbreviation of *Comité Politique* is used.

C. The High Representative and the EEAS

As indicated in Chapter 1, unlike other Council configurations, in its configuration as ‘Foreign Affairs Council’ the Council is chaired not by Member State representatives, but by the High Representative (Article 18(3) TEU). Mitigating the original dominant role of the Member States in CFSP, Article 30(1) TEU lays down the general rule that ‘[a]ny Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission’s support, may refer any question relating to the common foreign and security policy to the Council and may submit to it initiatives or proposals as appropriate’.

Article 27 TEU

1. The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals to the development of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.
2. The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union’s behalf and shall express the Union’s position in international organisations and at international conferences.
3. In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

The pivotal position of the HR is strengthened by the fact that the person holding the position at the same time acts as a vice-president of the Commission (Article 17(4) and (5)). The potential impact of this combination on the role of the EU in international affairs lies in the fact that there could be more coherence between the different external policies, in particular where borders between policies are fuzzy, such as in crisis management. At the same time – as indicated above – the continued separation between CFSP and other Union issues may very well lead to a need for different procedures and hence for the use of distinct CFSP and other Union instruments. This holds true not only for the outcome of the decision-making process, but also for the process itself, in which sincere cooperation between the Council and the Commission,

supported by the HR/VP and the hybrid European External Action Service (see Chapter 1), will remain of crucial importance. While extensively referring to the role of the EEAS in relation to CFSP, the 2010 EEAS Decision is clearly aimed at combining the different dimensions of the EU's external relations.

Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30

Article 2 – Tasks

1. The EEAS shall support the High Representative in fulfilling his/her mandates as outlined, notably, in Articles 18 and 27 TEU:
 - in fulfilling his/her mandate to conduct the Common Foreign and Security Policy ('CFSP') of the European Union, including the Common Security and Defence Policy ('CSDP'), to contribute by his/her proposals to the development of that policy, which he/she shall carry out as mandated by the Council and to ensure the consistency of the Union's external action ...

Indeed, a successful CFSP depends on effective leadership and the position of the High Representative has clearly been strengthened by the Lisbon reform (see also Chapter 1). The EEAS – a sort of 'EU Foreign Ministry' in all but name – has proven its value in consolidating the EU's external relations, but functions at the 'service' of the EU institutions, the rotating Presidency, and the Member States.

Mauro Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (Leiden, Brill/Nijhoff, 2017) 304

Overall, the analysis shows that the legislator designed the EEAS in a way that should enable it to effectively discharge its function, ie promoting coherence. This does not mean that the Service can single-handedly ensure synergy among the different foreign policies of the EU and of its Members. The EEAS operates in cooperation (and integration) with other administrations. Even when it can impose its views *de facto* – for instance, in the management of certain international cooperation instruments – it cannot entirely ignore the views of other actors ... In summary, the EEAS is a useful tool for the promotion of coherence in the present institutional framework of the Union, but its power is limited.

D. The European Commission

The limited formal competences of the Commission in the CFSP area have not led to the Commission being completely passive in this field. From the outset, the Commission

has been represented at all levels in the CFSP structures. Within the negotiating process in the Council, the Commission is a full negotiating partner as in any working party or Committee (including the PSC). The President of the Commission attends European Council and other *ad hoc* meetings at that level. The Commission can be considered another ‘Member State’ at the table; it safeguards the *acquis communautaire* and ensures the consistency of the action of the Union other than CFSP. In the implementation of CFSP Decisions, however, the Commission’s role is formally non-existent as delegation of executive competences from the Council to the Commission is prevented by the fact that CFSP acts are not legislative acts (Article 29 TFEU). Nevertheless, practice from the outset showed an involvement of the Commission in the implementation of CFSP Decisions, not least because other measures were, in some cases, essential for an effective implementation of CFSP policy decisions. Regardless of these competences of the Commission under CFSP, it is not difficult to conclude that this institution is nowhere near the pivotal position it occupies in the other policy areas of the Union. Although it is not formally excluded by Article 17 TEU, the Commission lacks its classic function as a watchdog under CFSP. The absence of an exclusive right of initiative also denies the Commission the indispensable role it has in other areas.

E. The Role of the European Parliament: A Democratic Deficit in CFSP?

The Single European Act (1986) already provided for the right of Parliament to be closely associated with European Political Cooperation and to be informed by the Presidency.⁷ This provision found its way into the post-Lisbon TEU:

Article 36 TEU

The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration.

Special representatives may be involved in briefing the European Parliament.

The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.

Here, too, the differences with regard to most other Union policy areas are obvious. The main difference lies in the fact that, with regard to CFSP, parliamentary influence

⁷Single European Act (1986), Art 30(4).

is not directed towards a concrete decision (as is the case in other procedures), but only towards ‘the main aspects and the basic choices’ of CFSP. Moreover, it is not the decision-making institution (the Council) that is ordered to consult the EP, but the High Representative.

Yet, as outlined in Chapter 1, the European Parliament is an active player in CFSP and external relations in general and is perhaps the single most active parliament in foreign policy given the many reports it produces in this area. Through these reports, debates and crucially, by using its budgetary powers, it has been able to influence CFSP on critical occasions.⁸ Even more important, perhaps, is that the European Parliament’s role in relation to CFSP was clarified by the Court of Justice in a number of cases. The Treaty provides the EP with an important right in the procedure to conclude international agreements:

Article 218(10) TFEU

The European Parliament shall be immediately and fully informed at all stages of the procedure.

Despite the limited role of the Court in relation to CFSP (see the following section), it held that democratic scrutiny is essential in the case of a CFSP international agreement. In other words, the CFSP context cannot form a reason to deprive the European Parliament of one of its essential functions. With regard to Article 218(10) the Court argued the following:

Case C-658/11 *Parliament v Council (Mauritius)*, ECLI:EU:C:2014:2025, para 81

That rule is an expression of the democratic principles on which the European Union is founded. In particular, the Court has already stated that the Parliament’s involvement in the decision-making process is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly (see, to that effect, Case 138/79 *Roquette Frères v Council* ECLI:EU:C:1980:249, paragraph 33, and *Parliament v Council* ECLI:EU:C:2012:472, paragraph 81).

F. The Court of Justice of the European Union

The role of the Court has proven to be essential in underlining that, despite its special nature, the CFSP is part of the Union’s legal order. However, some powers of the

⁸J Santos Vara and SR Sánchez-Tabernero (eds) *The Democratisation of EU International Relations through EU Law* (Abingdon, Routledge, 2018).

Court of Justice are excluded by Treaty provisions. The reason is that most Member States argued that foreign policy be shielded from what some perceived to be ‘judicial activism’, which resulted in a partial denial of the Court’s competences in the area of CFSP. *Prima facie*, Articles 24 TEU and 275 TFEU seem to fully exclude the Court’s role in CFSP:

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 of the Treaty on the Functioning of the European Union ...

Article 275 TFEU

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 ...

The exclusion of the Court has been part and parcel of CFSP from the outset.⁹ This is not to say that today the CFSP provisions are not at all relevant for the Court of Justice. The second part of Article 275 TFEU mentions two situations in which the Court shall have jurisdiction.

Article 275 TFEU

...

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union [the specific provisions on CFSP].

⁹It was affirmed by the Court almost immediately in Case C-167/94 *Grau Gomis and Others*, ECLI:EU:C:1995:113.

In addition, as we have seen above, Article 40 TEU regulates the relation between CFSP and the other areas of external action.

Irrespective of the focus on demarcation, earlier cases have already made clear that, in certain constitutional areas, the Court opted for a Union-wide application of certain fundamental rules and principles. The Court made clear that wherever access of information is concerned, no distinction is made on the basis of the content of the requested document (*Swedish Union of Journalists* case).¹⁰ Similarly, the Court argued that judicial protection was to be applied Union-wide. It referred to Article 6 TEU and concluded: ‘the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles ... It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.’¹¹ These cases underline the possibility of what may be termed ‘indirect scrutiny’ (we addressed this in Chapter 5 in discussing the *Kadi* case).

The Treaties also provide for an additional situation in which the Court enjoys jurisdiction in relation to CFSP. It is competent to rule on proceedings brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal person.

Article 263(4) TFEU

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

This provision, which gives the Court the possibility to *directly* scrutinise a CFSP measure, is the result of the proliferation of sanctions targeted at individuals in the (global) fight against terrorism. The implication is that, even if the restrictive measure are only laid down in CFSP measures, the Court has jurisdiction once the applicant is directly and individually concerned.

More recent case law confirms the notion that the exclusion of the Court’s jurisdiction in relation to CFSP is to be put in perspective and is perhaps to be seen as the exception rather than as the rule. The case law that has developed since the entry into force of the Lisbon Treaty displays the Court’s broader conception of its CFSP-related jurisdiction.

¹⁰Case T-174/95 *Svenska Journalistförbundet v Council*, EU:T:1998:127. More implicitly, this had already been accepted by the Court in Case T-194/94 *Carvel and Guardian Newspapers v Council*, ECLI:EU:T:1995:183.

¹¹Case C-355/04 *P Segi and Others v Council*, EC:C:2007:116, para 51.

Case C-658/11 *Parliament v Council (Mauritius)*, ECLI:EU:C:2014:2025, para 70

[T]he 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* [emphasis added].¹²

Articles 24(1) TEU and 275(2) TFEU are thus not interpreted as establishing a distinct jurisdiction of the Court for the purpose of CFSP. Rather, the judicial control the Court intends to perform in relation to that policy appears to be the same as the one it exercises generally, as envisaged in Article 19 TEU, albeit within the specific limits spelled out for CFSP.

This ‘generalist’ conception of the Court’s jurisdiction in the area of CFSP led it to consider that its legality control over CFSP restrictive measures is not limited to annulment proceedings envisaged in Article 263(4) TFEU, but includes the possibility for it to give a preliminary ruling on their validity.

Case C-72/15 *Rosneft*, ECLI:EU:C:2017:236

75 Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made by Article 24(1) TEU ...

76 In those circumstances, provided that the Court has, under Article 24(1) TEU and the second paragraph of Article 275 TFEU, jurisdiction *ex ratione materiae* to rule on the validity of European Union acts, that is, in particular, where such acts relate to restrictive measures against natural or legal persons, it would be inconsistent with the system of effective judicial protection established by the Treaties to interpret the latter provision as excluding the possibility that the courts and tribunals of Member States may refer questions to the Court on the validity of Council decisions prescribing the adoption of such measures.

¹² 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.

While *Rosneft* does not perhaps open the preliminary procedure to all kinds of CFSP questions – as it relates to economic sanctions that were already singled out in the Treaty – recent case law points to an interesting observation, keeping in mind the distinctive nature of CFSP as highlighted in the introduction to this chapter: in principle, the Court’s legality control over certain CFSP acts is similar to the one it exercises over other EU acts whenever fundamental EU rules and principles are at stake. It is an expression of its general mandate as established in Article 19 TEU; it is governed by the same principles, in particular the principle of effective judicial remedies enshrined in Article 47 of the Charter of Fundamental Rights. The application of the general EU rules on legality control to the CFSP context illustrates that the Court considers CFSP as firmly embedded in the EU legal order, despite its procedural specificity mentioned in Article 24(1) TEU.

This development is further illustrated by several cases with a CFSP dimension. First – as we have seen in relation to the European Parliament – the Court has made clear that since international agreements in the area of CFSP are concluded on the basis of the general provisions of Article 218 TFEU, albeit subject to some specific arrangements, the Court would exercise judicial control to ensure compliance with the terms of that procedure. Second, and in the same vein, the Court has considered that it would have jurisdiction to control the legality of a decision awarding a public service contract in the context of an EU CSDP Mission given that the contract concerned involved an expenditure to be allocated to the EU budget, and thereby subject to the provisions of the EU Financial Regulation.¹³ Third, the EU judicature has applied a similar approach in *H v Council and Commission* – a case brought by a staff member of the EU Police Mission in Bosnia and Herzegovina (EUPM), established under CFSP.

Case C-455/14P *H v Council*, ECLI:EU:C:2016:569, para 55

[T]he scope of the limitation, by way of derogation, on the Court’s jurisdiction ... cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions.

The above-mentioned rulings confirm that the Court of Justice considers CFSP as part and parcel of the Union’s constitutional set-up.¹⁴ Yet, it remains clear that the current regime regarding legal protection reveals several shortcomings. The most obvious

¹³ Case C-439/13P *Elitaliana*, ECLI:EU:C:2015:753, para 49.

¹⁴ C Hillion and RA Wessel, ‘The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP’, in S Blockmans and P Koutrakos (eds) *Research Handbook in EU Common Foreign and Security Policy* (Cheltenham, Edward Elgar, 2018) 65–87.

lack of judicial control is apparent when competences and decision-making procedures *within* the CFSP legal order are at stake. Keeping in mind the Member States' preference for 'intergovernmental' cooperation where CFSP is concerned, it may be understandable that they had the strong desire to prevent a body of 'CFSP law' coming into being by way of judicial activism on the part of the Court of Justice. However, it is less understandable that they were also reluctant to allow for judicial control over the *procedural* arrangements they explicitly agreed upon, although it is acknowledged that it may be difficult to unlink procedures and content and that political questions easily emerge. Similarly, it remains unclear why the CJEU should not have general jurisdiction to rule on the question of whether CFSP acts respect human rights.¹⁵

V. The CFSP Instruments

Article 26(2) TEU entails a general competence for the Council to 'frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council'. A combination of this provision and the more specific legal bases allows the Council to adopt different CFSP legal and political instruments.

Article 25 TEU

The Union shall conduct the common foreign and security policy by:

- (a) defining the general guidelines;
- (b) adopting decisions defining:
 - (i) actions to be undertaken by the Union;
 - (ii) positions to be taken by the Union;
 - (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii);

and by

- (c) strengthening systematic cooperation between Member States in the conduct of policy.

The *general guidelines* are adopted by the European Council to lay down the strategies of the Union in relation to a particular third state, region, or theme (Article 26(1) TEU). Based on the same provisions, Decisions may also be adopted

¹⁵See 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* (The Hague, TMC Asser Press, 2012) 100.

by the European Council, but in relation to CFSP issues these usually take the form of ‘Conclusions’.

A. Informal Instruments

CFSP is often shaped based on ‘Declarations’, which are often issued on behalf of the European Union by the HR. Declarations are usually reactions to world events (natural disasters, conflicts, or serious human rights violations) and are relatively easy to draft and to agree on. Although they lack a specific legal basis, the Council confirmed that the political impact of Declarations may go beyond that of formal decisions. The difference with some generally phrased decisions is not always easy to establish. Although Declarations may be used for policy orientations *vis-à-vis* a third state, they lack an operational framework, which ultimately calls for a formal legal act to implement that policy. At the same time, Declarations are often used to present the EU’s view on a certain situation and to call on others to support that view.

Declaration by the High Representative Federica Mogherini on behalf of the EU on the support to the UN facilitated political process in Libya, 2 August 2019

The European Union and its Member States are united in demanding that all Libyan parties commit to a permanent ceasefire and return to a UN facilitated political process. The European Union and its Member States welcome the proposal by Special Representative of the Secretary-General of the United Nations Ghassan Salame for a truce on the occasion of the Eid al-Adha as an important step in this regard. These measures could constitute a first step towards peace ...

The European Union and its Member States urge all parties to protect civilians, including migrants and refugees, by allowing and facilitating a safe, rapid and unimpeded delivery of humanitarian aid and services to all those affected, as stipulated under International Humanitarian Law and International Human Rights Law. The indiscriminate attacks on densely populated residential areas may amount to war crimes and those breaching International Humanitarian Law must be brought to justice and held to account. The European Union and its Member States demand all parties to cease the targeting of humanitarian workers and medical staff as well as hospitals and ambulances and protect national infrastructure.

In practice, CFSP systematic cooperation has also proved important with regard to the so-called ‘political dialogues’ with third countries. Political dialogues as such cannot be found in the Treaty on European Union but are established on the basis of general association treaties, decisions, declarations, or simply on the basis of an exchange of letters. Political dialogues take place in the framework of CFSP.

B. Legal Acts

(i) CFSP Decisions as Legal Acts?

The adoption of CFSP legal acts is a relatively rare phenomenon. In many cases the minutes of the Council meetings contain the decisions of the Council, without these being adopted as formal CFSP Decisions. CFSP legal acts cannot be adopted in the form of Regulations or Directives, but indeed only as ‘Decisions’. This is again a striking difference compared to other Union policy areas. Although they are qualified as ‘legal acts’ (or ‘actes juridiques’ in, for instance, the CFSP Annual Reports), unlike the ‘Decisions’ in Article 288 TFEU, they cannot be adopted on the basis of a legislative procedure.

Article 25 TEU makes a distinction between decisions defining: (i) actions to be undertaken by the Union; and (ii) positions to be taken by the Union. Hence, both actions and positions can be laid down in the form of a CFSP Decision. At the same time Decisions can be used for ‘(iii) arrangements for the implementation of the decisions referred to in points (i) and (ii)’. Again, this follows the practice that all implementing, modifying, or repealing decisions take the shape of a CFSP Decision.

Over the years, CFSP Decisions have been used to regulate various issues. Regardless of some failed attempts to include a list of possible issue areas to be covered by CFSP in the text of the Treaty, the ‘common interests’ which were to be a source of CFSP Decisions, were to some extent defined by the European Council in the early days of CFSP.¹⁶ These days, a substantive orientation can perhaps best be derived from the EU’s ‘Global Strategy for the European Union’s Foreign and Security Policy’, which was adopted in 2016, but is followed up by yearly reports.¹⁷ When we take a first look at the contents of actual CFSP Decisions, the main objectives seem to be ‘political’ (eg, reinforcing democracy and respect for human rights) and ‘diplomatic’ (eg, preventing and solving conflicts, coordinating emergency situations). ‘Economic’ objectives (eg, support of economic reforms, regional development) and ‘legal’ objectives (eg, supporting the development of the rule of law and good governance) can also be found.

From the outset, the binding nature of CFSP Decisions has puzzled academics and practitioners alike. Yet, their normative force is quite clear, even if the text does not use the word ‘bind’ but rather ‘commit’:

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.

¹⁶ Lisbon European Council (1992), 26 and 27 June, Annex 1.

¹⁷ Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union’s Foreign and Security Policy, Brussels, June 2016.

Hence, CFSP Decisions, once adopted, limit the freedom of Member States in their individual policies. Member States are not allowed to adopt positions or otherwise act contrary to the Decisions. They have committed themselves to adapting their national policies to the agreed Decisions. Apart from Article 28(2) TEU, their binding nature may be derived from Article 29 TEU, which forms the legal basis for most CFSP 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* [emphasis added].

The nature of Article 29 TEU Decisions as specific norms of conduct demanding a certain unconditional behaviour from the Member States, is underlined by the strict ways in which exceptions are allowed. A first possibility to depart from adopted CFSP Decision is offered by Article 28(1) TEU and concerns a change in circumstances.

Article 28(1) TEU

Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They 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.

If there is a change in circumstances having a substantial effect on a question subject to such a decision, the Council shall review the principles and objectives of that decision and take the necessary decisions.

Consequently, even if the original circumstances constitute an essential basis of the consent of the parties to be bound, or the effect of the change is radically to transform the extent of obligations still to be performed, Member States may not invoke the change in circumstances as a ground for not living up to the particular Decision.

The idea that CFSP Decisions, which are adopted by the Council, can only be modified or terminated by that institution, is further emphasised by the subsequent paragraphs of Article 28 TEU.

Article 28(3) TEU

Whenever there is any plan to adopt a national position or take national action pursuant to a decision as referred to in paragraph 1, information shall be provided by the Member State concerned in time to allow, if necessary, for prior consultations within the Council. The obligation to provide prior information shall not apply to measures which are merely a national transposition of Council decisions.

The rationale behind this provision is obvious: it creates a procedure to identify potential conflicting national policies at an early stage. The procedure is in the interest of the Member States themselves; it prevents the adoption of national policies which, because of a conflict with a CFSP Decision, would run the risk of being in violation of Article 28(2) TEU.

Member States are not obliged to refer national implementation measures to the Council. However, when they have major difficulties in implementing a CFSP Decision, paragraph 5 stipulates that these should be referred to the Council, which shall discuss them and seek appropriate solutions.¹⁸ The inviolability of adopted CFSP Decisions is underlined by the rule, formulated in the last sentence of paragraph 5, that '[s]uch solutions shall not run counter to the objectives of the decision ... or impair its effectiveness'. While the wording of paragraph 5 is in general quite clear, the question emerges why this procedure is related to 'major' difficulties only. What if a Member State encounters problems with the implementation of a minor part of the Decision only? Obviously, there would be no obligation to refer the case to the Council. Nevertheless, we have seen that a Decision commits the Member States; there is no ground for reading paragraph 2 as 'Decisions commit the Member States to the largest possible extent'. This, together with the loyalty obligation discussed above, leads to the conclusion that the discretion offered to the Member States to decide whether their implementation problems need to be brought to the attention of the Council, is limited. In case of any controversy concerning this issue, it seems to be up to the Council, to seek an appropriate solution.

Does it follow from the fact that CFSP Decisions are binding that Member States may *never* avoid the obligations laid down in the Decision in question? The CFSP provisions include one quite explicit exception:

Article 28(4) TEU

In cases of imperative need arising from changes in the situation and failing a review of the Council decision as referred to in paragraph 1, Member States

¹⁸The United Kingdom initially proposed a withdrawal clause in case of vital national interests. The majority of the Member States, however, were against such a clause, which would certainly erode the very nature of the Joint Action. The provision in the Luxembourg Draft Treaty of 1991 already reflected the current provision (Art K, para 4).

may take the necessary measures as a matter of urgency having regard to the general objectives of that decision. The Member State concerned shall inform the Council immediately of any such measures.

(ii) International Agreements

To engage in legal relationships with *third* states or international organisations, the European Union needs to conclude international agreements. As we have seen in Chapter 4 these agreements can also be concluded in relation to CFSP issues. Whereas the Treaties reveal one procedure only, Article 218 TFEU lists several modifications to the standard procedure that apply to agreements that ‘relate exclusively to the CFSP’. Such CFSP agreements are authorised, adopted and concluded by unanimity, rather than by QMV (the default voting procedures for other agreements). Secondly, in case of CFSP agreements, the role of the European Parliament is limited to being informed, its increased role in relation to other international agreements notwithstanding. Thirdly, the opening of negotiations is not recommended by the Commission but proposed by the High Representative. And, finally, the CJEU’s jurisdiction in relation to CFSP agreements is limited to situations where they influence non-CFSP provisions and where they are called upon to check the role of the EP in the procedure to conclude international agreements (see above).

These diverging procedural requirements make it difficult for the Union to combine CFSP and other issues in one single international agreement. At the same time, as underlined by, for instance, *Kazakhstan* (above), it is possible for international agreements to include CFSP elements without having to add a CFSP legal basis.

Most international agreements in the area of foreign policy fall under the Common Security and Defence Policy (see below).

(iii) Restrictive Measures

Article 215 TFEU

1. 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.
2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive

measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

Restrictive measures – usually referred to as ‘sanctions’ – form a classic example of substantive CFSP and form the bulk of the CFSP Decisions. They are a combination of economic and political policies in the sense that a political goal is being achieved by economic means. The two-step system is reflected in the wordings of Article 215 TFEU: first a CFSP Decision is adopted, providing for sanctions. This is then (to be) followed by a measure adopted by the Council, following the procedure in Article 215. While this procedure involves many other actors (the High Representative, the Commission, and the European Parliament) it is interesting to note that the Council nevertheless seems to be under an obligation to deliver (‘the Council shall adopt’). This may put a certain pressure on those involved, but obviously there may be some freedom to decide on the exact content of the ‘measures’.

Article 215 TFEU makes clear that sanctions can be directed both towards states and towards natural or legal persons, and groups or non-State entities. If sanctions against non-state entities or persons are envisaged, this should already be made clear in the CFSP Decision (see Article 215(2) TFEU).

Apart from these types of sanctions, the Treaty foresees another situation in Article 75 TFEU, which relates to the Area of Freedom, Security and Justice (AFSJ, see Chapter 12).

Article 75 TFEU

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

This provision explicitly relates to ‘the objectives set out in Article 67’, which lists the goals and background of the AFSJ (see Chapter 12). Furthermore, Article 75 makes

clear that the sanctions are directed at natural or legal persons, groups or non-state entities, in other words: not towards states. The provision is therefore the correct legal basis for financial or administrative sanctions against (potential) terrorists or individuals or groups facilitating terrorism. The available separate procedure allows for anti-terrorism measures to be adopted fast and without delay (based on a one-step procedure).

The distinction between Article 75 and Article 215 TFEU was clarified by the Court in 2012 when it held that Article 215(2) may constitute the legal basis of restrictive measures, including those designed to combat (international) terrorism, taken against natural or legal persons, groups or non-State entities by the Union when the decision to adopt those measures is part of the Union's action in the sphere of CFSP.¹⁹

VI. Common Security and Defence Policy

During the 1950s and 1960s far-reaching proposals were tabled to establish a common defence policy with supranational features. These proposals were never accepted and a security and defence policy developed partly as part of the Common Foreign and Security Policy (CFSP) and partly autonomously. Since 2003, the EU has launched over 30 civilian missions and military operations on three continents, deployed in response to crises ranging from post-tsunami peacebuilding in Aceh, to protecting refugees in Chad, to fighting piracy in and around Somalian waters. The Common Security and Defence Policy (CSDP) has developed into a major policy area in EU external relations. Like CFSP, it is formed on the basis of specific rules and procedures but, at the same time, we have witnessed a development from a largely intergovernmental policy area to a 'Brussels-based' cooperation in which EU preparatory organs play a leading role and Member States increasingly accept commitments.

The 'Provisions on the Common Security and Defence Policy' are laid down in Section 2 of Chapter 2 TEU on the 'Specific Provisions on the Common, Foreign and Security Policy'. This underlines that CSDP can be seen as forming part of CFSP.

Since the first drafts of the TEU the objectives included a reference to the eventual framing of a defence policy, this strengthens the idea that the security concept is also directed at security between the Member States. After all, this security would be ultimately guaranteed by a common defence policy. This holistic approach to security seems to be confirmed by the Treaty.

Article 24(1) TEU

The Union's competence in matters of common foreign and security policy shall cover ... all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

¹⁹Case C-130/10 *Parliament v Council (Smart Sanctions)*, ECLI:EU:C:2012:472.

In light of this broad, yet vague, definition by the Treaties, practice reveals that CFSP is linked mostly to the practice of ‘Foreign Affairs Ministries’ which includes diplomacy, political dialogues and the like, whereas CSDP would be the responsibility of the Defence Ministries. This would also draw a relative clear line of division between ‘military security’ (CSDP) and other forms of security (CFSP).

A. The Substantive CSDP Treaty Provisions

Title V, Chapter 2, Section 2 of the TEU lists the ‘Provisions on the Common Security and Defence Policy’. The ‘external’ nature of this policy is underlined by the first provision in this section.

Article 42(1) TEU

The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.

The way CSDP functions, is that Member States provide the Union with certain civil and military assets, which may then be used for missions outside the Union. CSDP is thus intended to allow the Union to play a distinct role as a regional and global security actor, separate from that of the Member States. This is underlined by Article 43 TEU, which outlines more specifically for what the CSDP can be used. The references to ‘joint disarmament operations’, ‘military advice and assistance tasks’, ‘post-conflict stabilisation’, and ‘the fight against terrorism’ in Article 43(1) TEU were introduced by the Lisbon Treaty and allow the Union to further develop its security and defence policy beyond what was previously possible. Though some of this terminology is relatively wide, it is clear that the purposes for which the Union may use military assets are limited and are by no means equal to that of a State.

Article 43(1) TEU

The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks

may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.

Crisis management may also be needed in response to an attack on the Union itself. However, with regard to the ‘defence’ part of CSDP, the Treaty remains ambiguous.

Article 42(2) TEU

The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides.

Despite the careful wording of this provision in line with earlier versions, the Treaty does offer reasons to conclude that something has changed. First of all – and despite the claim that a ‘common defence’ is not yet included in CSDP – another paragraph in this Article is suddenly quite clear on the defence dimension of CSDP.

Article 42(7) TEU

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States. ...

Taking into account that according to the Helsinki (1999) and Laeken (2001) Declarations by the European Council ‘the development of military capabilities does not imply the creation of a European army’, it is unclear what the European Council will have to decide on (Article 42(2) TEU). After all, Article 42(7) comes quite close to what is usually understood by ‘common defence’.

Yet, these provisions also need to be read in the context of the notion that the development of the Union’s CSDP is not meant to duplicate NATO:

Article 42(7) TEU

... Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

While this would indeed allow the certain states (Austria, Finland, Ireland, and Sweden) not to participate in measures of collective self-defence taken in accordance with Article 51 UN Charter, the EU's collective defence obligation does not really differ from Article 5 of the NATO Treaty.²⁰ The special position of Member States with a neutrality/non-alignment history is also reflected in Article 42(2), which provides that CSDP 'shall not prejudice the specific character of the security and defence policy of certain Member States'.

Article 42(7) TEU was invoked by France after the Paris terrorist attacks in 2015.²¹ Interestingly enough, France did not choose to invoke the so-called 'solidarity clause', which could have been more appropriate. This clause flowed from the 'Declaration on Solidarity Against Terrorism',²² which was issued by the European Council after the Madrid terrorist attacks in March 2004, although the Declaration does not refer to a role for the Union as such, but to the 'Member States acting jointly'. It is somewhat peculiar that this solidarity clause is separated from the collective defence clause and is included in the TFEU rather than together with the CSDP provisions in the TEU. The solidarity clause does not restrict common defence to 'armed aggression', but in fact extends the obligation to terrorist attacks.

Article 222 TFEU

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
 - (a)
 - prevent the terrorist threat in the territory of the Member States;
 - protect democratic institutions and the civilian population from any terrorist attack;
 - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
 - (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

²⁰ Art 5 of the North Atlantic Treaty reads: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area ...'

²¹ 3426th Council meeting Foreign Affairs, Brussels, 16 and 17 November 2015.

²² Brussels European Council 25–26 March 2004, Presidency Conclusions.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.
3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.

While the wording of the solidarity clause leaves room for both the Member States and the Council regarding the type and scope of their reaction, it may be seen as an innovation to the previous legal regime, where no obligations for the Member States or competences of the Council formed part of the Treaties.

B. The Institutionalisation of CSDP

As CSDP can be seen as forming part of CFSP, the decision making takes place along similar lines. Decisions are taken by the Council.

Article 42(4) TEU

Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State. The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate.

Both the HR and the Member States may take the initiative for a decision. A difference with CFSP is that the HR cannot work together with the Commission on an initiative; nor is it possible to decide on the basis of QMV (not even in the case of implementing decisions). These rules underline the preference of most Member States to keep CSDP as intergovernmental as possible. Yet, the role of some organs no doubt points to a serious institutionalisation of this policy area. Apart from the HR, which according to Article 43(2) TEU ‘shall ensure coordination of the civilian and military aspects of [the Petersberg] tasks’, the Political and Security Committee (PSC) has been granted

a pivotal role in CSDP. Irrespective of the fact that it is hardly mentioned in the CSDP section, the PSC has developed into the centre around which all CSDP actions converge. It meets at the ambassadorial level as the preparatory body for the Council to keep track of the international situation, help to define policies within CFSP and CSDP, and prepare a coherent EU response to a crisis.

AE Juncos and C Reynolds, 'The Political and Security Committee: Governing in the Shadow' (2007) 12 *European Foreign Affairs Review* 127, 136

In the event of ... a crisis, the PSC constitutes the key strategic actor leading the formulation and implementation of a [CSDP] operation. According to the EU's crisis management procedures, all available information relating to the ongoing crisis should be forwarded to the PSC which will subsequently be convened in order to agree on a Crisis Management Concept. At this stage, coordination with the Member States, NATO, the Commission and other institutional actors such as the EU Military Committee is crucial. The PSC is also at the core of the process leading to the drafting of the relevant Decision, Concept of Operations and Operational Plan which together constitute the key documents guiding the implementation of the operation on the ground. Given the nature of crisis management, these phases often take place simultaneously. Once agreed at the PSC, these documents are forwarded to the Council essentially to be rubber-stamped since it is rare that the Council will reopen issues that have been already approved by the PSC.

The institutionalisation of CSDP included the creation of several specific organs, some of which do not have an explicit Treaty basis. The European Council (Nice, December 2000) decided to establish permanent political and military structures. Apart from the PSC, CSDP depends on a number of other bodies, which are partly embedded in the EEAS.

The European Union Military Committee (EUMC) is the highest military body set up within the Council. It is composed of the Chiefs of Defence of the Member States, who are regularly represented by their permanent military representatives. The EUMC provides the PSC with advice and recommendations on all military matters within the EU.

In parallel with the EUMC, the PSC is advised by a Committee for Civilian Aspects of Crisis Management (CIVCOM) which provides information, drafts recommendations and gives its opinion to the PSC on civilian aspects of crisis management.

The Crisis Management and Planning Directorate (CMPD) contributes to the objectives of the European External Action Service, the Common Security and Defence Policy and a more secure international environment by the political-strategic planning of CSDP civilian missions and military operations, ensuring coherence and effectiveness of those actions as part of the EU comprehensive approach to crisis management and developing CSDP partnerships, policies, concepts, and capabilities.

The European Union Military Staff is a Directorate-General at the EEAS and composed of both military and civilian experts seconded to the EEAS by Member States and officials of the EEAS. The EUMS is the source of military expertise within the EEAS and works under the direction of the Military Committee and Member States' Chiefs of Defence and under the direct authority of the High Representative/Vice-President of the European Commission.

The Civilian Planning and Conduct Capability (CPCC), which is also part of the EEAS, is the permanent structure responsible for an autonomous operational conduct of civilian CSDP operations. Under the political control and strategic direction of the Political and Security Committee and the overall authority of the High Representative, the CPCC ensures the effective planning and conduct of civilian CSDP crisis management operations, as well as the proper implementation of all mission-related tasks.

Apart from these bodies, the Satellite Centre and the Institute for Security Studies were taken over from the Western European Union by taking over the personnel contracts and the agreements with other organisations. The Satellite Centre (in Torrejón de Ardoz, Spain) supports CSDP by supplying satellite images; the Institute for Security Studies (EUISS in Paris) does academic research on topics relevant for the development of CSDP.

One body is explicitly mentioned in the Treaty, the European Defence Agency (EDA). Its role is defined as follows:

Article 42(3) TEU

The European Defence Agency shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities.

It is further defined in Protocol No 10 On Permanent Structured Cooperation Established by Article 42 TEU and has been given a central role in defining and coordinating the available military capabilities.

C. CSDP Decisions and International Agreements

In legal terms, CSDP takes shape in the form of decisions and international agreements. As according to Article 42(1) TEU '[t]he common security and defence policy shall be an integral part of the common foreign and security policy', most CFSP rules apply to CSDP as well and Article 28 TEU can be used as a legal basis for CSDP Decisions.

Article 28(1) TEU

Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They 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 ...

In addition, the adoption of CSDP Decisions is regulated in Articles 42(4) and 43(2) TEU, which serve as specific legal bases.

Article 42(4) TEU

Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State. The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate.

Article 43(2) underlines the role of the Council and point to a specific task of the HR.

Article 43(2) TEU

The Council shall adopt decisions ... defining their objectives and scope and the general conditions for their implementation. The High Representative of the Union for Foreign Affairs and Security Policy, acting under the authority of the Council and in close and constant contact with the Political and Security Committee, shall ensure coordination of the civilian and military aspects of such tasks.

As CSDP is part of CFSP it is clear that other EU legal instruments such as Regulations and Directives cannot be used for CSDP issues. Yet – as in CFSP – the legal nature of CSDP Decisions is beyond any doubt and all Decisions are published in the L (Legislation) version of the Official Journal of the EU.

As CSDP is mainly intended to establish missions outside the EU (and so far, no CSDP mission has operated in one of the Member States), many Decisions have the purpose of adopting international agreements. For the conclusion of agreements, the CFSP procedures apply (see above), which implies that not only Article 37 TEU serves

as the general legal basis, but also that the procedure in Article 218 TFEU applies to the negotiation and conclusion of the agreements.

CSDP agreements are concluded for a variety of different purposes. Most agreements concern the *participation of third states in CSDP operations*. These not only regulate the legal issues surrounding the participation of non-EU members but also ensure the autonomy of the Union's decision making. Thus, irrespective of the participation of third states (ranging from Switzerland to New Zealand and the USA) the operations remain a true EU mission which are covered by the EU legal order and follow the specific CSDP procedures. With a limited number of third states (including Ukraine, Canada, Bulgaria, Iceland, Norway, Romania, Turkey, Montenegro, the USA, Serbia, New Zealand and Albania), so-called *Framework Participation Agreements* have been concluded. These agreements facilitate the participation of those states in operations to which they are invited.

A second category concerns the Status of Forces Agreements (SOFAs) and Status of Missions Agreements (SOMAs). These agreements regulate the legal rights and duties of the forces/missions and their personnel in the third country where the operation is established. On the basis of these agreements, the CSDP mission enjoys the status of a diplomatic mission under the 1961 Vienna convention on Diplomatic Relations and privileges and immunities of personnel are unusually regulated in detail.

A Sari, 'Status of Forces and Status of Mission Agreements Under the ESDP: The EU's Evolving Practice' (2008) 19 *European Journal of International Law* 67, 97

The EU's practice in negotiating status agreements with third parties has evolved along two main lines over the past fifteen years. First, the status agreements concluded by the EU have become increasingly more sophisticated. The most recent agreements regulate a broader range of matters and do so in greater detail than most of their predecessors, including the first [CSDP] status agreement, the EUPM SOMA, *id.* Second, the process of concluding status agreements under the [CSDP] has been simplified. The experiences gained during the first few [CSDP] missions have clearly demonstrated that the procedures governing the conclusion of international agreements under [the former] Article 24 TEU were unwieldy and therefore unsuited for keeping up with the fast pace of international crisis management operations. In response, the Council adopted the EU Model SOFA and SOMA to eliminate the need to issue a fresh negotiating mandate to the Presidency in the course of future EU crisis management operations.

A specific set of agreements deal with security procedures for the exchange of information. EU operations depend on classified information which needs to be secured once it is shared with third states.

Finally, in the context of Operation Atalanta in Somalian waters, a new category of CSDP international agreements emerged: transfer agreements. Transfer agreements

have, inter alia, been concluded with Kenya, the Seychelles, Mauritius and Tanzania. The agreements are meant to lay down the conditions of transfer of suspected pirates and associated seized property from the EU force to the partner country as well as the treatment of the suspects.

D. Flexible and Permanent Structured Cooperation

Some of the shortcomings in early EU crisis management seemed to relate to the *ad hoc* implementation of CSDP. The current legal framework aims to counter this with the introduction of some form of institutionalisation of procedures, formats, and (civil and military) capabilities. First, the Lisbon Treaty introduced a new form of *ad hoc* flexibility:

Article 44(1) TEU

... the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. Those Member States, in association with the High Representative of the Union for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task.

This allows the Union to implement CSDP by sub-contracting it to so-called 'coalitions of the able and willing'. An example of this arrangement can be found in Operation Artemis, in which France took the initiative to form a group of EU Member States and other states to assist the UN operation MONUC in the Democratic Republic of Congo.

A second form of enhanced cooperation may be found in relation to the notion of 'permanent structured cooperation' or 'PESCO'.²³

Article 42(6) TEU

Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework.

²³S Biscop, 'Permanent Structured Cooperation and the Future of the ESDP: Transformation and Integration' (2008) 13 *European Foreign Affairs Review* 431.

The permanent structured cooperation is further elaborated upon by Article 46 TEU and by Protocol No 10. According to this Protocol, permanent structured cooperation can be seen as an institutionalised form of cooperation in the field of defence policy between able and willing Member States. In that sense it may be regarded as a special form of enhanced cooperation, although the term is not used.

Nowhere a reference is made to the creation of a ‘European army’. Any explicit hints in that direction would have been unacceptable for certain Member States (in particular Denmark). Nevertheless, PESCO was formally launched in 2017.

Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States [2017] OJ L 331/57

THE COUNCIL OF THE EUROPEAN UNION,

...

Article 1

Establishment of permanent structured cooperation

Permanent structured cooperation (PESCO) within the Union framework is hereby established between those Member States whose military capabilities fulfil higher criteria as referred to in Article 1 of Protocol No 10, and which have made commitments to one another in this area as referred to in Article 2 of that Protocol, with a view to the most demanding missions, and contributing to the fulfilment of the Union level of ambition.

...

On the basis of Article 2 of this Decision, the vast majority of Member States have agreed to participate. PESCO is implemented based on so-called ‘projects’ (Article 5), the first 17 of which were defined in 2018, ranging from the establishment of a European Medical Command, an EU Training Mission Competence Centre, Cyber Rapid Response Teams and Mutual Assistance in Cyber Security, to Military Disaster Relief and an upgrade of Maritime Surveillance.

S Blockmans, ‘The EU’s Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?’ (2018) 55 *Common Market Law Review* 1785, 1825

In light of the generally ad hoc nature of the CFSP/CSDP, the EU’s efficiency as an international actor in security and defence matters is being increased in function of the objective to contribute to the maintenance of international

peace and security (Art. 21(2)(c) TEU). At the same time, politicians and policy-makers should not promise to the public what PESCO cannot deliver: an *avant garde* able to carry out the most demanding missions. Both concepts have been diluted in the inception phase as a result of the drive to launch this unique form of differentiated integration in as inclusive a format as possible. In fact, the modular approach to structured cooperation may end up serving as a permanent vehicle for opt-outs and exemptions in the area of defence. Going by Member States' past experience in other EU policy fields, the 'Just do it!' attitude that many stakeholders and observers seem to rely on will simply not do, especially if the big Member States that should lead by example persist in their bad habits. The absence of legally binding commitments and supranational enforcement mechanisms imply that national sovereign decisions will remain the norm. And structural differences between Member States' strategic cultures (threat assessments, national postures to taking risks, operational experiences) and institutional preferences (NATO) are likely to impede the emergence of a 'common defence' in the sense of Article 24(1) TEU for some time to come.

VII. CSDP Missions and Operations

FRANCO-BRITISH SUMMIT

JOINT DECLARATION ON EUROPEAN DEFENSE

Saint-Malo, 4 December 1998

The Heads of State and Government of France and the United Kingdom are agreed that:

1. The European Union needs to be in a position to play its full role on the international stage. This means making a reality of the Treaty of Amsterdam, which will provide the essential basis for action by the Union. It will be important to achieve full and rapid implementation of the Amsterdam provisions on CFSP. This includes the responsibility of the European Council to decide on the progressive framing of a common defence policy in the framework of CFSP. The Council must be able to take decisions on an intergovernmental basis, covering the whole range of activity set out in Title V of the Treaty of European Union.
2. To this end, the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises ...

Both military and civilian missions may be established on the basis of the CSDP provisions. On 1 January 2003, the EU launched the European Union Police Mission in Bosnia and Herzegovina (EUPM) as its first-ever civilian crisis management operation within the framework of the CSDP.²⁴ On 31 March 2003, the EU deployed Operation Concordia, its inaugural military mission, to follow up on NATO's efforts to contribute to a stable and secure environment in FYROM.²⁵

The EU has never acted in the capacity of enforcer of the peace (eg, like NATO in Kosovo in 1999) nor in defence against an armed attack on its territory. While, as we have seen, Article 42(7) was invoked by France after the terrorist attacks in Paris in 2015, the implementation of the aid and assistance by other Member States very much took place on an *ad hoc* basis.

VIII. The Broader Picture of EU External Relations Law

The image of CFSP as a purely 'intergovernmental' form of international cooperation is not supported by the Treaty provisions. Regardless of the *prima facie* broad scope of CFSP on the basis of its objectives (which indeed seem to cover almost every conceivable area of foreign and security policy) it is not to be seen as a *common policy* in the same way as the concept is used in, for instance, the Common Commercial Policy. The non-exclusive nature of CFSP is paramount. The competences of the institutions, the obligations of the Member States, and the decision-making procedures all reflect the intention of the Member States to create a common policy that would not unconditionally *replace* the national policies of the individual states, but that would only emerge *where and when possible*. Despite specific obligations aiming at the establishment of a common policy, a number of vague notions ('important common interests', 'general interest', 'reasons of national policy') allow for a considerable margin of appreciation on the part of the Member States. Whenever a common policy does not prove possible, Member States are free to pursue their own national foreign policies.

This chapter further outlined the emergence and further development of the Union's security and defence policy. In a relatively short period, the EU has developed into a global security actor. While the number and size of civilian and military missions may not be that impressive, CSDP has become an important policy area and is a key element of the Union's foreign and security policy.

²⁴ See Council Decision 2002/968/CFSP of 10 December 2002 concerning the implementation of Joint Action 2002/210/CFSP on the European Union Police Mission [2002] OJ L335/1.

²⁵ See Council Decision 2003/202/CFSP of 18 March 2003 relating to the launch of the EU military operation in the Former Yugoslav Republic of Macedonia [2003] OJ L76/43. For an up-to-date list, see the website of the Council of the EU, CSDP operations. Available at: https://eeas.europa.eu/topics/military-and-civilian-missions-and-operations/430/military-and-civilian-missions-and-operations_en.

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