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Mapping the Current Legal Basis and Governance Structures of the EU's CFSP

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ENVISIONING A NEW GOVERNANCE ARCHITECTURE FOR A GLOBAL EUROPE

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Executive Summary

The EU's Common Foreign and Security Policy (CFSP) is subject to "specific rules and procedures" that seem to stand in the way of its effectiveness. This Working Paper assesses the special legal nature of the CFSP and explores the legal possibilities to enhance decision-making procedures. It argues that current EU Treaties should not necessarily be amended to achieve better outcomes. In fact, the Treaty on European Union (TEU) provides for some "sleeping beauties" that have rarely been used. In particular if there is (political) willingness, the Treaties enable the wider use of qualified majority voting in CFSP matters. Moreover, with the entry into force of the Lisbon Treaty, a group of willing Member States could also use enhanced cooperation, which enables the establishment of a new line of policy in CFSP matters.

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1 Introduction

This Working Paper[1] is part of a set of three papers that aim to provide a summary of the current legal and governance structure for the European Union's (EU) external relations.[2] By addressing the ground rules, the three papers aim not merely to address the boundaries for proposals to enhance the functioning of the EU as a global actor, but also – or perhaps mainly – to reveal the possibilities that are offered by the existing legal framework. Specifically, this paper, as part of Work Package 5 of the H2020 ENGAGE ("Envisioning a New Governance Architecture for a Global Europe") project, provides a complete overview of the existing legal basis and governance structures of the Common Foreign and Security Policy (CFSP). It also identifies unused or underused possibilities (so-called 'sleeping beauties') and assesses reform proposals in this policy area. As the first Working Paper in Work Package 5 of the H2020 ENGAGE project, it should serve as the basis for future discussions on the EU's CFSP performance.

Despite the further integration of the CFSP into the EU's legal order, it still remains "subject to specific rules and procedures" that seem to stand in the way of its effectiveness (Wessel et al., 2021). In particular, the requirement of unanimity is often associated with less efficient decision-making procedures and, as recent developments have demonstrated, may give the impression that the EU is held hostage when Member States exercise their veto power. A group of willing Member States may act outside the Treaty framework but, in the case of a Member State veto, the EU as such is prevented from acting as a unitary actor. As will be shown in this Working Paper, however, current Treaty provisions allow the use of instruments that could enhance the functioning and effectiveness of the CFSP, including the (wider) use of qualified majority voting (QMV) or the establishment of enhanced cooperation. More generally, the effectiveness of EU external actions is also hampered by the continued co-existence of CFSP and non-CFSP issues: foreign and security policy is legally separated from e.g., trade or development policy that might also lead to incoherent actions.[3]

The Working Paper is structured as follows: after a brief overview of the development of the CFSP in the EU's legal system (Section 2), the paper turns to the legal nature of this policy area (Section 3). In this latter part, the paper shows how the separation of the CFSP from other external policies and the "specific rules and procedures", as defined by Article 24(1) TEU, affect the functioning of the CFSP. The paper then shifts the focus to the governance structure in the CFSP (Section 4) and highlights the unique features of the policy cycle, including the

[1] The authors thank Alexandru Ursu for his vital research assistance. Special thanks go to the reviewers for helpful comments and to Chad Damro for his careful language check. Any remaining mistakes lie solely with the authors.

[2] See the other two related works: D4.1 on the legal basis and governance structures of the EU's defence activities and D6.1 on the legal basis and governance structures of the EU's 'External Action Plus'.

[3] On the separation of CFSP and non-CFSP issues and their interaction, please see D6.1 on the legal basis and governance structures of the EU's 'External Action Plus'.

Commission's lack of exclusive right to submit proposals or the (often) overlooked binding nature of CFSP Decisions. Finally (in Section 5), the paper examines the legal possibilities of the wider use of QMV (including the use of CFSP *passerelle* clause) and the activation of enhanced cooperation.

2 A Brief Historical Overview of the CFSP

A brief historical overview of the CFSP allows us to better understand the current EU legal framework in this policy area. Indeed, the fundamental features of the CFSP, including the requirement of unanimity or the dominant roles of the European Council and the Council, all tell us something about how Member States perceive and protect their prerogatives in matters of foreign, security and defence policy. In fact, an ever-present tension lies between the willingness to strengthen Europe's voice in international relations – an objective which seemingly becomes Europe's main *raison d'être* (De Burca, 2013) – and the continued persistence of State prerogatives in foreign, security and defence policy. This tension was evident in the strict intergovernmental nature of European Political Cooperation (EPC) and was also 'visible' in Maastricht where EU Member States decided to create the CFSP through the establishment of separate pillars, each with its own distinct features. And although we can clearly witness the further integration of the CFSP into the EU's legal order (Wessel, 2018a), the "specific rules and procedures" (Article 24(1) TEU) still separate it from the other external policies that are defined by the Treaty on the Functioning of the European Union (TFEU).

The current EU legal framework thus reflects how the above-mentioned tension has been eased – surely, always with a series of compromises which have sometimes led to less efficient solutions coupled with incoherence in the Union's external actions. The original Treaty on the European Community (EC Treaty) did not contain any provision on foreign policy cooperation between the Member States. In the early days of European integration, EC Member States focused on their international economic relations with third states, mainly through the establishment of the Common Commercial Policy (CCP). And while the opportunity for cooperation in matters of foreign and security policy was visible in the 1950s through the formation of the European Defence Community, the failure of the latter put an end to any ambition to include foreign and security policy provisions in primary EC law at the time. The issue of foreign policy cooperation was again put on the agenda in the late 1960s: the 1969 Hague Summit instructed EC foreign ministers to "study the best way of achieving progress in the matter of political unification" (Hillion & Smith, 2000, p. 74). In response, the Davignon Report – also known as the Luxembourg Report – established the so-called EPC the main objective of which was to "co-operate in the sphere of foreign policy […] to ensure, through regular exchanges of information and consultations, a better mutual understanding on the great international politics" (Hillion & Smith, 2000). Rather than by rules of European law, the EPC was mainly governed by political rules and was guided by the principles of consensus, confidentiality and consultation. EC Member States were careful in adopting formal commitments but were more open to advance foreign policy cooperation through 'gentlemen's agreements' that could be easily renegotiated or even denounced if circumstances changed (Bono, 2006). The EPC ran in parallel to the EC, but was kept apart from Community legal instruments (Butler, 2019, p. 22). This was a practical solution in terms of upholding Member State sovereignty in the field of foreign and security policy, but created problems of coherence, coordination and consistency (Allen, 2012).

The subsequent development of EPC was slow and gradual. Until the 1974 creation of the European Council, it had no institutional links with Community institutions. Formal and informal working methods of EPC were adopted by the 1976 Danish Presidency which became the 'EPC common law' but failed to produce significant change due to the lack of legally binding commitment or legal obligations (Bono, 2006). The EPC was only codified in treaty provisions by the 1987 Single European Act (SEA) under Title III of the Treaty, which later developed into the so-called second pillar of the European Union (Nuttall, 1992, p. 249). Despite their legal nature, the EPC provisions were formulated in soft law terms: the Member States had no legally binding obligations but rather decided to keep the EPC as a framework of a political nature. Yet, the SEA improved the EPC in many ways: common foreign policy declarations multiplied, trade sanctions were adopted against South Africa in 1986 and Yugoslavia in 1991 and EPC decisions became part of the acquis with which candidate states were to comply (Bono, 2006; Portela, 2012, pp. 19-20). Altogether, however, the Community was primarily engaged with non-EPC issues, including trade and development policy issues in the 1980s (Eeckhout, 2008, p. 323).

The 1992 Maastricht Treaty created the CFSP and placed it in its well-known pillar-structure: the second pillar was separated from Community policies and continued to have clear intergovernmental traits. Although the CFSP was thus 'disconnected' from the Community method, substantive provisions were included by the Maastricht Treaty: the CFSP was integrated within the EU institutional framework and became a 'Union' policy alongside other policies, the General Affairs and External Relations Council became the working forum for foreign ministers, the legal provisions on CFSP were particularly detailed and the new framework was guided by the rules of the treaties. With its special provisions for specific policy areas, the EU was even compared to a cathedral where the main door was the Community while CFSP matters were the smaller entrances (Gormley, 1999, p. 58). And while the Maastricht TEU enabled the Council to use legal instruments (joint actions and common positions), these did not take the shape of established instruments of Community law (such as Regulations and Directives), and their (legal) enforcement was missing from Treaty provisions. Due to the lack of case law, it was also unclear whether EU constitutional principles – such as direct effect or supremacy – extended to CFSP (Eeckhout, 2011, pp. 467–468).

During the early 2000s, the question of coherence (and effectiveness) of EU external actions featured prominently on the agenda. In fact, in the area of EU external action, the Convention on the Future of Europe proposed to close the gaps between CFSP and non-CFSP areas by putting the Union's external actions under a single Title in the Treaty establishing a Constitution for Europe. As Marise Cremona put it: "[t]he underlying feature of the draft Treaty [was] perhaps its attempt at integration: the integration of the EC and European Union Treaties, the integration of the pillar structure, the integration of the policy under one rubric […] and the integration of that action into the overall perspective of the Union's objectives". However, the draft Constitutional Treaty failed due to two negative referenda in two Member States. The process leading to the Lisbon Treaty sought to reflect this and the Treaty drafters decided to keep the old distinction between CFSP and non-CFSP areas.

3 The Legal Nature of the CFSP

3.1 Main Legal Changes After Lisbon

The Lisbon Treaty abolished the pillar structure in an attempt to unify the EU's legal order. This 'depillarisation' led to the further integration of the CFSP into the unitary EU framework and rendered the European Community a thing of a past (Koutrakos, 2012, p. 188). This unification is best exemplified by the creation of a single legal personality under Article 47 TEU. The EU replaced and succeeded the Community and the TEU and the TFEU now have equal legal weight (Article 1(3) TEU).[4] The CFSP no longer "supplements" other EU policies: instead, the CFSP is now an integral and equivalent part of EU external action and former EC (now TFEU) policies do not enjoy priority over the CFSP.

> **Article 1(3) TEU**
>
> The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.

In addition, separate CFSP and non-CFSP objectives ceased to exist and instead a bridge was created by including unified principles and objectives for all EU external relations policies. Article 3(5) and 21 TEU apply to both CFSP and non-CFSP areas and give a double response to the question as to what kind of international actor the EU is and how it relates to the international order. On the one hand, these provisions in the TEU impose substantive requirements on EU international relations by stating that there are certain fundamental objectives which shall guide its internal and external policies. On the other hand, these provisions also impose a strong methodological imperative upon EU international action: it must pursue its action through a multilateral approach based on the rule of law. It is then also clear that the scope of objectives which EU action in the world must pursue is extraordinarily broad. Aside from perhaps issuing a declaration of war, there is very little that does not fall within the purview of these objectives (Wessel & Larik, 2020, p. 11). Indeed, "[t]he 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 […]" as Article 24(1) TEU clearly provides. Furthermore, Article 21(3) TEU establishes a legal connection between all EU internal and external policies (Wessel, 2018a, pp. 345–346).

Over the last decades, EU Member States have accepted significant forms of legalisation and institutionalisation. This is apparent in many ways: for instance, the objectives and principles governing EU external relations, including the CFSP, were brought within the same section of

[4] Although the simplified revision of the Treaties only applies to the TFEU which, in some aspects, shows an imbalance between the two legal texts.

the Treaty the aim of which was to promote coherence in EU external actions. The High Representative is also Vice-President of the Commission who ensures the consistency of EU external action. The establishment of the European External Action Service (EEAS) also serves the objective of ensuring coordination and consistency in EU external relations. The expanding – although still limited – role of the Court is also pointing towards the trend that the EU system of judicial protection applies to its full extent.[5] Finally, the use of sanctions has also facilitated the legalisation process due to the EU ever more frequent use of restrictive measures which are particularly legalised forms of instruments (Cardwell, 2015, p. 288). Taking into consideration all these novelties, the Lisbon Treaty is a further step in the evolution of the CFSP "from a purely intergovernmental system based on consensus and international law into a fully-fledged system based on treaty law which includes institutions that operate under the rule of law and which have been given law-making powers" (Bono, 2006, p. 393).

Despite these significant novelties and efforts to make the EU a more coherent and effective actor in its international presence, the CFSP, even after Lisbon, continues to hold a certain distinctiveness. This 'tradition of otherness' (Cardwell, 2013, p. 445) is present in a number of Treaty provisions. In particular, one of the key legal features of EU external relations has been the separation of CFSP and CSDP from other external relations policies, including trade and development policy or humanitarian aid.[6] Indeed, the CFSP (alongside the CSDP) remains the only substantive policy area that is codified by the TEU. The CFSP continues to be 'ring-fenced' (Cardwell, 2013) largely implying that there is still a legal and procedural duality between CFSP and non-CFSP external actions (Ramopoulos & Odermatt, 2013, p. 21; Wouters, 2021, p. 285). EU foreign policy remains peculiar due to the "lack of a uniform legal framework in the overall scheme of EU external relations" (Butler, 2019, p. 4). As Van Elsuwege correctly points out, the reorganisation of EU external competences contributes to a more coherent international actor but, in legal terms, the Lisbon Treaty provisions "do not solve the complex dichotomy between CFSP and non-CFSP actions and even increase the potential for inter-institutional conflicts" (Van Elsuwege, 2010, p. 988). And although external actions cannot be separated in the sense that, for instance, foreign and trade issues are often interlinked and that, in some cases, trade measures are used to advance the EU's foreign and security policy objectives (e.g., dual-use goods), the drafters of the Treaty clearly opted to continue the separation of CFSP and non-CFSP issues in terms of decision-making procedures, mainly due to sovereignty reasons. Indeed, foreign policy is regarded the territory of executives where parliaments are often side-lined or even neglected.

[5] See details on the role of the Court in CFSP matters in section 3.2.3.

[6] See also D6.1 on this issue.

3.2 The Main Legal Characteristics of the CFSP

3.2.1 A Special Category of EU Competence

Even though the CFSP is a clear Union competence that is taken out of the hands of the Member States,[7] the same Member States still have a large role to play as the Council has remained the main decision-making organ. In fact, the difficult balance between the choice to effectively keep foreign and security policy in the hands of the Member States and the widespread belief that "Europe's *raison d'être* [nowadays is] to counterbalance the influence of other existing and rising powers" (De Burca, 2013) results in a peculiar division of competences between the EU and its Member States in the field of foreign, security and defence policy and the still different legal bases needed for decisions in the various policy areas. In fact, the EU's competence in the area of CFSP/CSDP (also) shows its distinctiveness. The different categories of EU competences are set out in Articles 2-6 TFEU. Article 2 TFEU defines three types of competences: exclusive (Article 2(1) TFEU), shared (Article 2(2) TFEU) and 'supporting, coordinating and supplementing' competence (Article 2(5) TFEU). The CFSP is certainly missing from the lists of exclusive (Article 3 TFEU), shared (Article 4 TFEU) and supporting competences (Article 6 TFEU). In addition to these areas, the TFEU also defines two other policy-specific competences which do not fall in any of the three general categories of competences listed above. Article 2(3) TFEU provides that the Union shall have competence to provide arrangements for the coordination of the economic and employment policies of the Member States. And, more importantly for this paper, Article 2(4) TFEU provides that 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, including the progressive framing of a common defence policy". Hence, alongside the well-known categories of competences, a special category was created for CFSP. While the nature of this competence thus remains undefined, the same provision does underline that it is indeed *the Union* that has this competence. The CFSP has thus clearly become a policy for which the Union institutions bare responsibility, albeit alongside the foreign policies of the Member States.

Given the 'parallel' EU and Member State actions in the field of foreign and security policy and since Article 4(1) TEU provides that the Union has shared competence in areas in which it does not have either exclusive or supporting competence, the question is sometimes raised whether the CFSP could qualify as a shared competence. However, and despite the clear loyalty obligations in the Treaty, the CFSP is often believed to be 'non-pre-emptive' on Member State actions in the field of foreign and defence policy,[8] which means that any decisions taken by the Union would not pre-empt Member States to adopt policies in the same areas. Moreover, the Union's specific competence under Article 2(4) TFEU also suggests that the residual

[7] See further below.

[8] Note that some legal scholars highlight the obligations of the Member States under CFSP framework (see for example Wessel (2020, p. 286)).

allocation by Article 4(1) TFEU does not apply to CFSP. Its 'non-shared' nature is also supported by the guarantee that the CSDP "shall not prejudice the specific character of the security and defence policy of certain Member States" under Article 42(2) TEU and shall respect the obligations of the Member States within NATO (Cremona, 2018, pp. 6–7). Moreover, Declarations 13 and 14 were further meant to reassure Member States that their responsibilities will not be affected by the provisions of the Lisbon Treaty and that pre-emption will not apply to the CFSP (Cremona, 2008, p. 65) despite the fact that the CFSP Decisions clearly have the intention to restrain Member States in their activities.[9]

13. Declaration concerning the common foreign and security policy

The Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, including the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

It stresses that the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security.

14. Declaration concerning the common foreign and security policy

In addition to the specific rules and procedures referred to in paragraph 1 of Article 24 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the United Nations.

The Conference also notes that the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.

[9] See further below.

> The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

Irrespective of the Declarations, Marise Cremona also points out that "the CFSP is intended as a policy of the Union, distinct from (although in harmony with) the foreign policies of its Member States. It is not simply a coordination of Member State policy; rather, the Member States are to support the Union's policy. The Union itself is envisaged as a 'cohesive force in international relations' with its own strategic interests" (Cremona, 2018, p. 6). Indeed, Article 2(4) TFEU itself shows that the CFSP has moved beyond intergovernmentalism – the *Union does have the competence* to conduct a common foreign and security policy (Wessel, 2020, p. 285). So, contrary to popular belief, the CFSP is indeed a Union competence, which even allows the Union to conclude international agreements on CFSP and CSDP issues as 'EU-only', rather than as 'mixed' agreements to which the Member States would also become a party.

The nature of the EU's competence in the field of CFSP/CSDP is further defined, quite exceptionally, in the TEU (rather than in the TFEU where we find the other policy areas). As noted above, based on Article 24(1) TEU, the CFSP covers 'all areas' of foreign policy and 'all questions' relating to the Union's security. While this points to a very (in fact extremely) broad scope of CFSP topics, this definition does not help to decide which Union actions may fall within CFSP competence given the current integration of foreign/external policy objectives in Article 21(2) TEU. In this regard, the pre-Lisbon situation offered a clearer delimitation between EU external policies given the separate CFSP objectives in the Treaty. The scope of the CFSP – especially in comparison with the detailed scope of CSDP under Articles 42(1), (2) and 43(1) TEU[10] – seems to remain "totally undefined" (Eeckhout, 2011, p. 168). Legal scholarship, however, rightly concluded that the provision of 'all areas' of foreign policy and 'all questions' relating to Union security should be understood in a way that the EU has competence to act within the framework of the CFSP if there is no other EU external competence for a particular EU action (Cremona, 2008, p. 46; Eeckhout, 2011, p. 189; Wessel, 2016, p. 449).

3.2.2 A Different Institutional Setting

The nature of the CFSP is further elaborated in the second indent of Article 24(1) TEU. It provides:

> **Article 24(1) TEU (second indent)**
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> 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

[10] See more on D4.1 on CSDP.

> Parliament and of the Commission in this area is defined by the Treaties. 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.

The CFSP, according to Article 24(1) TEU, remains subject to the already mentioned "specific rules and procedures". However, this does not mean that the CFSP is completely exempted from the general rules of EU law. Rather, in the words of Marise Cremona, "it means that the general rules and principles will apply by default, subject to exceptions and specific provisions" (Cremona, 2018, p. 8). Indeed, as the Court case law developed on CFSP matters, these 'special rules and procedures' should not be overestimated.[11]

The European Council and the Council are the key decision-makers in the CFSP. The European Council adopts strategic decisions whereas the Council, (in principle) based on the Conclusions of the European Council, adopts decisions defining either actions or positions to be undertaken by the Union. They principally act by unanimity (which is reiterated in Article 31(1) TEU) but the possibility to vote by QMV has been extended since Lisbon (see next section on the possibility to use QMV in CFSP context). The 'exclusion of legislative acts' means the exclusion of *legislative procedures* which lead to the regular EU types of decisions: Regulations, Directives and Decisions under Article 288 TFEU. In this sense, CFSP acts cannot be adopted through the ordinary or special legislative procedures (Cremona, 2018, p. 10). At the same time, CFSP Decisions are 'legal' in the sense that they form part of the Union's legal order (on the binding nature of CFSP decisions see next section) (Wessel, 2019).

The roles of the European Parliament and the Commission remain limited, at least on the basis of the formal procedures. The limited role of the Commission, for instance, is manifested in its inability to use its exclusive right to initiate CFSP decisions. However, already pre-Lisbon, the Commission was involved in CFSP matters: former External Relations Commissioner Chris Patten said that he devoted much of his time to CFSP issues. Moreover, the new inter-institutional agreement between the EP and the Commission foresees that the latter should better involve the EP in CFSP which would be useless if the Commission had no role in post-Lisbon CFSP (Cardwell, 2013). The active role of the Commission can be seen in its representation at all levels in the CFSP structure: the Commission is represented at all levels of the Council, including at Political and Security Committee (PSC) level and the President of the Commission attends European Council meetings. Its role is explained by its Treaty obligations to safeguard the acquis and to ensure the consistency of Union actions other than CFSP (Wessel, 2016).

The role of the European Parliament (EP) is, in principle, defined by Article 36 TEU. Based on this provision, the Parliament is unable to take decisions together with the Council as would

[11] On the evolving case law on this matter, see the next sections.

be the case in most other Union policy areas. Its role is limited to 'the main aspects and the basic choices' in CFSP matters (Wessel, 2018b). Despite the formally weak competences in the CFSP, the EP is extremely active in adopting resolutions in relation to the CFSP and in particular in issues having human rights, democracy or rule of law dimensions. As Kleizen correctly notes: "[t]he high amount of EP resolutions in the CFSP can potentially be explained by the lack of hard powers that the EP entertains in this policy field […]. The interesting implication […] is that the EP does not seem to readily accept the institutional position accorded to it by the Treaty drafters in the CFSP" (Kleizen, 2016, p. 32).

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.

3.2.3 Judicial Review in CFSP Matters

Despite the fact that the role of the Court in CFSP matters has been booming over the past years,[12] Article 24(1) TEU specifies that the Court "shall not have jurisdiction" in the area of the CFSP which is one of the most significant of the 'special rules' under Article 24(1) TEU (Cremona, 2018, p. 10). The Treaty determines two exceptions. First, the choice for the correct legal basis continues to hold great importance even in the post-Lisbon era due to the fact that CFSP remains subject to special legal rules and procedures. The legal and procedural duality requires policymakers to carefully choose the legal basis for EU actions. Pre-Lisbon, choices for the correct legal basis were to be made on the basis of (old) Article 47 TEU. This so-called 'non-affect clause' had as its main purpose to 'protect' the *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 was *ECOWAS (or Small Arms and Light Weapons)*.[13] Former Article 47 TEU was inserted into the Treaties due to fears that intergovernmental modes of governance might affect supranational decision-making and was intended to protect the primacy of EC competences. The result of the *ECOWAS* case was that the Council's CFSP Decision was annulled because it also included aspects of

[12] See further below.
[13] Case C-91/05 Commission of the European Communities v Council of the European Union.

development cooperation, an area that was not covered by the CFSP legal basis (Hillion & Wessel, 2009; Wessel, 2021b). In the words of Peter Van Elsuwege, "the EU's pillar structure did not lead to a potential subordination of Community policies to CFSP decision-making but rather reduced the CFSP to a narrowly defined, residual category of external relations activities" (Van Elsuwege, 2010, pp. 1002–1003).

CFSP and non-CFSP areas continue to be separated after Lisbon, though not only by the Treaties but also by (new) Article 40 TEU (see box below). Article 40 TEU continues to underline the distinction between the CFSP and other EU external action. At the same time, 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. 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 CCP. This may seriously limit the freedom of the Member States in the area of restrictive measures 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 (and hence the applicable decision-making procedure) is chosen on the basis of the centre of gravity test (Wessel, 2020, pp. 287–289).

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.

The introduction of a single set of objectives under Article 21 TEU seemingly complicated the choice of correct legal basis (Cremona, 2008, p. 42; see also Lonardo, 2018). However, the dynamics of legal proceedings have changed in the last couple of years. Pre-Lisbon, the Commission defended the Community method against any encroachment from the CFSP pillar under Article 47 TEU which resulted in several Commission versus Council cases. Post-Lisbon, the double-hatted position of the High Representative (HR, Vice-President of the Commission and president of the Foreign Affairs Council) was expected to decrease the likelihood of Commission versus Council cases. Instead, the EP was projected to take over the role of the Commission due to its continued absence in CFSP matters. In this new legal and political context, it was not surprising that the first inter-institutional conflict was initiated by the EP

against the Council and Commission on the difficult borderline between the internal and external aspects of the EU's security policy (Van Elsuwege, 2014b, p. 119). The EP asked for an annulment of a sanctions regulation which was adopted to fight against international terrorism. The EP complained that the regulation should not have been adopted only by the Council, as Article 215 TFEU suggests, but through the ordinary legislative procedure as regulated under Article 75 TFEU. The Court, however, held that: "recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other"[14] and that the use of Article 215 TFEU was correct due to the fact that the international dimension of terrorism bears relevance under CFSP objectives.[15]

Second, although Article 275 TFEU excludes the jurisdiction of the Court "with respect to the provisions relating to the [CFSP]" and "with respect to acts adopted on the basis of those provisions", the same provision makes an exception in the field of sanctions and provides that the Court can review the legality of decisions providing for restrictive measures against natural or legal persons. The fundamental reason for this exception is that CFSP sanctions directly affect the rights of individuals in a very severe manner and even interfere with their fundamental rights. The increase in ruling in sanctions matters is substantial: until mid-2017, 181 cases were decided by the Court, 94 of which were successful while 64 additional cases were pending before the General Court. Most of the sanctions have been annulled due to the inability of the Council to substantiate the reasons for listings (Eckes, 2018; see also Zelyova, 2021). In the case of the sanctions against Russia alone, several dozens of annulment actions were dealt by the Court (Challet, 2020, p. 4). The consequence of these de-listing procedures is that the Council nowadays provides more detailed reasons why certain individuals or entities are listed.

The limited role of the Court in CFSP matters should not be overstated. Indeed, recent case law has demonstrated that the CFSP is a fully integrated part of EU law, despite the fact that limitations on the role of the Court continue to exist. First, in a dispute between the EP and the Council related to a CFSP mission combatting piracy, a CFSP Council Decision was adopted on the basis of Article 37 TEU. While in this case the Court rejected the Parliament's claim that it should have given its consent on the basis of Article 218(6) TFEU, the Court, on the basis of Article 218(10) TFEU, deemed the right of information all the more important in areas in which the Parliament had only a limited role, including the CFSP.[16]

Case C-263/14 Parliament v. Council

68 In accordance with the Court's case-law, the obligation imposed by Article 218(10) TFEU, under which the Parliament is to be 'immediately and fully informed at all stages of the procedure' for negotiating and concluding international agreements, applies to any procedure for concluding an

[14] Case C-130/10 European Parliament v Council of the European Union, para 45.
[15] Ibid., para 78.
[16] Case C-263/14 Parliament v. Council.

international agreement, including agreements relating exclusively to the CFSP. Article 218 TFEU, in order to satisfy the requirements of clarity, consistency and rationalisation, lays down a single procedure of general application concerning the negotiation and conclusion of international agreements by the European Union in all the fields of its activity, including the CFSP which, unlike other fields, is not subject to any special procedure.

70 In that regard, it must be borne in mind that participation by the Parliament in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly. As regards the procedure for negotiating and concluding international agreements, the information requirement laid down in Article 218(10) TFEU is the expression of that democratic principle, on which the European Union is founded.

84 Since the Parliament was not immediately and fully informed at all stages of the procedure in accordance with Article 218(10) TFEU, it was not in a position to exercise the right of scrutiny conferred on it by the Treaties with regard to the CFSP and, where appropriate, to state its position with respect to, in particular, the correct legal basis on which the act at issue should be based. Disregard for that information requirement, in those circumstances, is detrimental to the ability of the Parliament to perform its duties in the area of the CFSP and therefore constitutes an infringement of an essential procedural requirement.

This broad interpretation of Article 218(10) TFEU is understood as a compensation for the weak parliamentary position in CFSP-context and an indication that the Court interprets Treaty provisions affecting the CFSP broadly in light of transversal constitutional principles, such as democracy (Verellen, 2016).

A second case concerned the deployment of an Italian magistrate seconded to the EU Mission in Bosnia and Herzegovina.[17] The main question was whether the Court was competent to hear an action for annulment directed against decisions taken by the Head of an EU mission established under the CFSP. Suffice to say here that the Court emphasised that the contested decisions on the issue of secondment constitute acts of staff management relating to the operation of the mission and thus the EU judicature had jurisdiction in the case. The Court confirmed that the CFSP is a fully integrated part of EU law and is subject to the EU's constitutional values and norms. The right to effective judicial review also applies within the CFSP context. Thus, the CFSP is no longer immune to judicial intervention but the Court can ensure that the general principles of EU law are guaranteed which is a major change, compared to the pre-Lisbon era (Van Elsuwege, 2017).

[17] C-455/14 P H v. Council and Commission.

Case C-455/14 H. v. Council

42 In the present case, the contested decisions are admittedly set in the context of the CFSP. Those decisions, taken by the Head of the EUPM in Bosnia and Herzegovina, which was established on the basis of Article 28 TEU and Article 43(2) TEU, in order to fill, by redeployment, a position in a regional office of that mission, indeed relate to an operational action of the European Union decided upon and carried out under the CFSP, an action which, as is apparent from the first paragraph of Article 2 of Decision 2009/906, has, in essence, the objective of supporting the law enforcement agencies in Bosnia and Herzegovina in their fight against organised crime and corruption.

43 However, such a circumstance does not necessarily lead to the jurisdiction of the EU judicature being excluded.

44 In the present case, it must thus be noted that, as the Council itself stated at the hearing before the Court, the EU judicature has jurisdiction, in accordance with Article 270 TFEU, to rule on all actions brought by EU staff members having been seconded to the EUPM. They remain subject to the Staff Regulations during the period of their secondment to the EUPM and, therefore, fall within the jurisdiction of the EU judicature, in accordance with Article 91 of those regulations.

Third, in the *Rosneft* case,[18] the underlying question was whether the Court has powers to include the possibility to give a preliminary ruling on the validity of an act within the sphere of the CFSP to ensure the uniform interpretation and application of EU law. Under Article 275 TFEU, together with the conditions laid down in Article 263 TFEU, the Court can review the legality of EU restrictive measures, but its literal reading suggests that direct actions for annulment are the only actions allowed by EU law. The Court, however, rejected such understanding and upheld that:

Case C-72/15 Rosneft

70 Neither the [TEU] nor the [TFEU] indicates that an action for annulment brought before the General Court […] constitutes the role means for reviewing the legality of decisions providing for restrictive measures against natural or legal persons, to the exclusion, in particular, of a reference for a preliminary ruling on validity. In that regard, the last sentence of the second subparagraph of Article 24(1) TEU refers to the second paragraph of Article 275 TFEU in order to determine not the type of procedure under which the Court may review the legality of certain decisions, but rather the type of decisions whose legality may be review by the Court, within any procedure that has as its aim such a review of legality.

The case confirmed that the EU system of judicial protection fully applies in relation to CFSP sanctions. National courts or tribunals cannot adjudicate on the validity of EU acts themselves

[18] Case C-72/15 PJSC Rosneft Oil Company v Her Majesty's Treasury and Others.

but are under a legal obligation to issue a reference for a preliminary ruling to review the legality of contested decisions. As Peter Van Elsuwege notes, "[a]s far as the judicial review of restrictive measures against natural or legal persons is concerned, the coherence of the EU system of judicial protection is preserved and there is no difference in comparison to other areas of EU law. Only measures of general application, such as the basic principle to affect a partial interruption of the EU's economic and financial relations with Russia, are excluded from judicial review. However, as soon as the persons and entities targeted by the sanctions are defined, the EU system of judicial protection applies to its full extent" (Van Elsuwege, 2014a). Moreover, *Rosneft* was the first case in which the Court ruled on its scope of jurisdiction over a CFSP Decision establishing a sanctions regime and one of the few rulings – similarly to *H. v. Council* – in which the Court addressed the scope of its jurisdiction in CFSP issues in a more general way (Eckes, 2018).

4 Governance Structure

4.1 Decision-Making Procedures

The policy cycle in EU foreign policy is rather different compared to other EU policy areas. As will be demonstrated, the agenda-setters, the decision-makers and those responsible for policy implementation, let alone the (judicial) enforceability of foreign policy decisions, are quite different in the context of CFSP. Article 30 TEU regulates two interconnected rights: the right to submit proposals (in other words: set the agenda) and the right to convene an extraordinary Council meeting in cases of 'emergency'. This provision, together with Article 31 TEU on voting procedures, clearly shows the distinct nature of CFSP. One of the special aspects of the CFSP lies, among other things, in the different set of actors that can submit proposals. Indeed, the Commission, a traditional agenda-setter in the EU, lacks the exclusive right of initiative in the context of the CFSP. This does not mean that the Commission would be a non-competent actor in this regard: as the pre-Lisbon period already demonstrated, the Commission did have a shared right to submit proposals. The Commission, however, saw foreign and security policy as a matter of the Council and did not want to intervene in that policy area. The Lisbon Treaty has reformed the right of initiative and, based on Article 30(1) TEU, three actors can submit proposals: the Member States, the HR and the HR with the support of the Commission. The right conferred upon the HR is a logical consequence of its position as a (permanent) chair of the Foreign Affairs Council (FAC).

> **Article 30 TEU**
>
> 1. Any 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, respectively, initiatives or proposals.
>
> 2. In cases requiring a rapid decision, the High Representative, of his own motion, or at the request of a Member State, shall convene an extraordinary Council meeting within 48 hours or, in an emergency, within a shorter period.

The limited role of the Commission is in line with Article 24(1) TEU where its 'special role' is confirmed in the area of the CFSP. The involvement of the HR implicitly contributes to the increased role of the EEAS which is responsible for drafting most CFSP Decisions (Marquardt, 2018, p. 31). The EP, just like in other policy areas, lacks a formal right of initiative but, according to Article 36(2) TEU, can address questions and make recommendations to the Council or the HR who is then under the legal obligation that the EP's views "are duly taken into account" (Wessel & Böttner, 2013a). Article 30(2) TEU, which is closely related to the right of initiative, was designed in a way that the EU could respond to sudden changes of regional or global security challenges. Given the busy schedule of foreign ministers it is less surprising that these extraordinary meetings may not be attended by each foreign minister – as the case of the extraordinary Council meeting on Haiti demonstrated, where only 11 foreign ministers

attended the Foreign Affairs Council. The competence to convene such meetings has shifted from the Presidency (based on the Constitutional Treaty) to the HR (Wessel & Böttner, 2013a).

The CFSP is the only area where 'specific provisions' for decision-making apply (Cardwell, 2013, p. 447). The general rule for decision-making in the context of the CFSP is set out in Article 24(1) TEU and Article 31(1) TEU. The former provides that "[the CFSP is] defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise". The unanimity requirement is reiterated by Article 31(1) TEU which provides that the European Council and the Council act, in principle, unanimously (which stands in stark contrast with other EU policies where QMV is the basic rule). In the words of Piet Eeckhout: "foreign policy is common only if, when, and where Member State governments unanimously decide so" (Eeckhout, 2008, p. 326). One of the novelties introduced by the Lisbon Treaty is that Article 31 TEU now applies not only to the Council but also to the European Council given the latter's transformation into a Union institution. Unanimity, however, does not mean that every Member State should vote affirmative. The second indent of Article 31(1) TEU provides for the so-called constructive abstention which gives the possibility to a (small group of) Member State(s) to refuse the application of certain decisions while allowing others to take collective actions in EU institutions (Wessel & Böttner, 2013b). In fact, the CFSP has remained the only policy area in which the Member States may invoke the 'Luxembourg compromise' (Cardwell, 2013, p. 447; Schütze, 2012, p. 207).

Article 31(1) TEU (second indent)

When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted.

It should be noted that EU Member States abstaining remain under the legal obligation not to take actions that would run contrary to the EU's position. Therefore, apart from making a political statement, there is little legally relevant reason to use constructive abstention because the Member State concerned would still have to respect the adopted decision. The obligation not to impede Union actions also follows from the loyalty provision of Article 24(3) TEU, according to which Member States 'shall refrain from any action likely to conflict with or impede Union action on that decision'. This provision, alongside the similarly worded Article 4(3) TEU,[19] seriously constrains Member State freedom even in the case of abstention as

[19] Article 4(3) TEU provides: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the

national actions cannot conflict with Union actions. The duty of loyal cooperation also presupposes that the Member State concerned should contribute to the administrative and operative cost of CFSP Decisions (Wessel & Böttner, 2013b). As the case of Cyprus demonstrated, constructive abstention has already been used once when it abstained on the occasion of establishing the EURLEX Kosovo crisis management mission (Marquardt, 2018, p. 30).

4.2 The Binding Nature of CFSP Decisions

The Lisbon Treaty stopped using the initial concepts of 'joint actions' and 'common positions' but instead prescribes the adoption of 'decisions'. This does not mean that this old distinction is completely neglected. Article 25 TEU (still) provides that the Union adopts decisions which either define actions or positions to be taken by the Union. This distinction is reflected in Articles 28 and 29 TEU: the former covers "operational actions" while the latter concerns "decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature". The old distinction between joint actions and common positions to some extent has made its way into the Lisbon Treaty (Eeckhout, 2011, pp. 469–471).

Decisions adopted on the basis of Article 28 TEU may be used to implement decisions on strategic interests and objectives adopted by the European Council. They can cover a wide range of activities, including financial expenditure, sending missions, consultations, démarches, ratification of international conventions or the setting up of institutions with legal personality. Due to the rather ill-defined nature of these types of decisions, they virtually allow any type of activity, with the exception of creating rights and obligations for citizens (Eeckhout, 2011, pp. 471–473).

> **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.

The Union, on the basis of Article 29 TEU, can adopt a range of activities: it can impose sanctions, determine objectives or priorities towards third countries, adopt broad policy documents on international issues (e.g., human rights or good governance), support democratic and peace processes, intervene in conflict prevention and non-proliferation, etc. In

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obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

practice, Article 29 TEU is increasingly used to establish EU sanctions regimes (Eeckhout, 2011, pp. 473–475; Wessel et al., 2021).

> **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.

The – at least alleged – intergovernmental nature of the CFSP often gives the impression that its operation does not affect Member States' freedom in the conduct of national foreign and security policy. In other words, "somehow 'intergovernmentalism' is often connected to the absence of binding norms" (Wessel, 2015, p. 134). Even during the pre-Lisbon period, however, certain obligations existed within the Treaty framework that restrained Member States' freedom (Hillion & Wessel, 2008). Post-Lisbon, almost the same obligations persist. First, under Article 32 TEU, "Member States shall inform and consult one another within the European Council and the Council on any matter of foreign and security policy of general interest". While the definition of "general interest" completely depends upon the Member States, there is a clear obligation to inform and consult one another. And while there is a wide Member State discretion on what counts as "general interest", rarely, if ever, does a foreign policy issue concerns only a single Member State. However, sensitive policy issues (e.g., Libya in 2011 or Syria in 2012-2013) show that big Member States continue to take individual positions (Wessel, 2020, pp. 292–293).

The impression that CFSP does not affect a Member State's freedom is further negated by Article 28(2) TEU, which provides that CFSP Decisions "shall commit the Member States in the positions they adopt and in the conduct of their activity". In other words, once Member States agreed on a common line of policy (based on Article 28 TEU), they are limited in their freedom to implement individual policies. In the *Segi* case, the Court already underlined the committing nature of Common Positions: "[a] common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular to ensure fulfilment of their obligations under European Union law".[20] The binding nature of CFSP Decisions is also reflected in Article 29 TEU that provides: "Member States shall ensure that their national policies conform to the Union positions".

More recently, the binding nature of CFSP acts was also underlined by the Advocate General's Opinion in the *H*-case in which AG Wahl argued: "[…] it has to be acknowledged that, in the field of the CFSP, the Union has the power to adopt acts that are legally binding not only on its institutions, but also on the Member States. The wording of Articles 24(3) (13) and 31(1) (14) TEU is particularly informative in that regard. On the other hand, the Union is not meant, in the

[20] Case C-355/04 P Segi and Others v. Council.

field of the CFSP, to adopt acts that lay down general abstract rules creating rights and obligations for individuals. That explains why, in essence, the CFSP has been conceived, since its creation with the Treaty of Maastricht, as a set of rules which I would define as lex imperfecta […]".[21]

[21] Opinion of AG Wahl delivered on 7 April 2016, case C-55/14, H v. Council of the European Union and European Commission, paras 37-38.

5 Sleeping Beauties in the Treaties

5.1 The Use of QMV in CFSP

It is often forgotten that current Treaty provisions provide for the possibility to use QMV in certain cases.[22] And although QMV is being used to some extent in the CFSP, some of the possibilities under Article 31(2) TEU have not been 'awakened'. Based on Article 31(2) TEU, the Treaty enables/requires the use of QMV in four cases:

Table 1: The Use of QMV in CFSP

Treaty provision	Explanation	Old or new provision?
"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)" (Art. 31(2) TEU first indent).	This provision offers the European Council the possibility to adopt a unanimous Decision, setting out the EU's strategic interests and objectives in one or more specific areas of CFSP. Once the European Council sets the strategic objectives and principles of the envisaged action or position, the Council would then adopt by qualified majority all decisions implementing the European Council's strategic decisions.	In substance, this option was available in a pre-Lisbon context where the (old) TEU provided that legal acts implementing a common strategy adopted by the EUCO could be adopted by QMV. Until today, there has been one case when such decision was made: in 1999, the Council established the EU Cooperation Programme for Non-proliferation and Disarmament in response to the EU Common Strategy on Russia. Although common strategies no longer exist, the European Council can now adopt decisions on the EU's strategic interests whose implementation by the Council could be adopted by QMV. This has not happened so far (Marquardt, 2018, p. 30).
"when adopting a decision defining a Union action or position, on a proposal which the High Representative of the	This provision allows the European Council (either on its own initiative or further to a proposal by the High	This is one of the innovations of the Lisbon Treaty but has never been used.

[22] Based on Article 16(4) TEU "qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained".

Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative" (Art. 31(2) TEU second indent).	Representative) to unanimously request the High Representative to submit a proposal to the Council for a decision defining a Union action or position. In such cases, the Council would decide by qualified majority. The potential content of such request of the European Council is not defined in the Treaties and could thus encompass all areas of Common Foreign and Security Policy.	
"when adopting any decision implementing a decision defining a Union action or position" (Art. 31(2) TEU third indent).	This concerns the situation following the adoption by the Council of an initial action or position by unanimity, it would adopt all further implementing decisions by qualified majority.	Existed before Lisbon. In practice, the Council regularly adopts implementing decisions in the context of the CFSP, especially in the field of sanctions on the basis of Article 31(2) TEU. Approximately 30 percent of all CFSP decisions are based on this provision to amend existing EU sanctions regimes.
"when appointing a special representative in accordance with Article 33"[23] (Art. 31(2) TEU fourth indent).	The special representatives have a mandate in relation to particular Common Foreign and Security Policy issues. Qualified majority has worked well in practice leading to speedy decisions, without even having to resort to formal voting. As in other areas of qualified majority decision-making, the appointment of special representatives has	Existed before Lisbon.

[23] Article 33 TEU provides: "The Council may, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, appoint a special representative with a mandate in relation to particular policy issues. The special representative shall carry out his mandate under the authority of the High Representative".

	always been decided by consensus.	

Source: European Commission (2018)

Another novelty of the Lisbon Treaty is the special CFSP *passerelle* clause under Article 31(3) TEU which provides that "[t]he European Council may unanimously adopt a decision stipulating that the Council shall act by qualified majority in cases other than [the cases showed above in the table]" (see also Wessel et al., 2021). However, Article 31(4) provides that QMV shall not apply to decisions having military or defence implications. At the same time, the European Commission proposed to increase the use of QMV in the context of the CFSP, and in particular by using the *passerelle* clause. Already under the previous Commission, Jean-Claude Juncker expressed the desire in his State of the Union speech of 2017 to "look at which foreign policy decisions could be moved from unanimity to [QMV]. The Treaty already provides for this, if all Member States agree to do it. We need qualified majority decisions in foreign policy if we are to work efficiently" (European Commission, 2017). Following this speech, the European Commission indicated three areas where the European Council should use the *passerelle* clause under Article 31(3) TEU and move from unanimity to the use of QMV: (1) positions on human rights questions in international fora, (2) decisions to establish sanctions regimes, (3) decision to launch or implement civilian missions in response to crises abroad (European Commission, 2018). Similarly, in her first State of the Union speech in 2020, Ursula von der Leyen called for qualified majority voting in two areas, including human rights and sanctions implementation (European Commission, 2020b). Some Member States, and in particular France and Germany also declared in the 2018 Meseberg Declaration "to explore possibilities of using majority voting in the field of the [CFSP]" (Elysée, 2018). In November 2021, Germany's centre-left Social Democrats (SPD), the Greens and the pro-business Free Democratic Party announced a coalition deal in which, among other things, they propose a shift from unanimity to QMV in the CFSP (SPD, 2021).

QMV is, in fact, used in other areas of external action where the Union promotes its values through different instruments. Examples include the EU's legal framework concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.[24] This Regulation was adopted on the basis of Article 207(2) TFEU[25] but is clearly used to promote the EU's foreign policy objectives and, according to the Commission, "has been instrumental in promoting respect for human life and fundamental human rights [and has filled] an identified gap in EU human rights-based trade

[24] Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

[25] Article 207 TFEU provides: "The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy".

controls" (European Commission, 2020a). The absolute ban on torture and ill-treatment is enshrined in core UN human rights conventions and is reflected at EU level in the Charter of Fundamental Rights which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Another example is the area of dual-use goods which are products that can be used for both civil and military application. As such, the regulation of their export is a matter of trade as well as foreign and security policy (Koutrakos, 2015). The Regulation setting up the legal framework for the control of dual-use items[26] is also based on Article 207(2) TFEU but is explicitly and regularly updated, among other things, to "respond to shifting foreign policy considerations and keep pace with new approaches to security" (European Commission, 2014, p. 5). The manufacturing of trafficking in firearms, which can spur political instability or support the emergence of terrorist organisations, is also regulated under Article 207 TFEU.[27]

QMV is also possible on the basis of other Treaty provisions. Notably, Article 41(3) TEU foresees the establishment and financing of a start-up fund for military and defence operations. Article 45(2) TEU provides that the Council adopts the European Defence Agency's statute, seat and operational rules by QMV. Finally, the Council adopts a decision establishing permanent structured cooperation and determines the list of participating Member States by QMV (Article 46(2) TEU) as well as the suspends Member States that no longer fulfils the criteria (Article 46(4) TEU) (Wessel & Böttner, 2013b).

Despite the possibility to use QMV in certain cases in the context of the CFSP, Article 31(2) TEU continues to provide – although using slightly different wording than the old TEU – the option of an 'emergency brake'. Accordingly, a Member State may notify that for "vital and stated reasons" (which is the codification of the 1966 Luxembourg Compromise) it does not wish to adopt a certain decision with QMV even if the possibility would be there. In such cases, the HR should look for compromise solution after which the Member State concerned either accepts QMV or its reservations will be moved at the level of EU Heads of State and Government (Wessel & Böttner, 2013b). This is one of the clearest provisions contributing to the 'ring-fenced' nature of the CFSP since it allows national veto against a decision taken by majority voting that does not exist elsewhere in the Treaty (Cardwell, 2013, p. 448).

[26] Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance and transfer of dual-use goods.
[27] Regulation (EU) No 258/2012 of the European Parliament and of the Council of 14 March 2012 implementing Article 10 of the United Nations' Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against Transnational Organised Crime (UN Firearms Protocol), and establishing export authorisation, and import and transit measures for firearms, their parts and components and ammunition.

Article 31(2) TEU

If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.

Although the wider use of QMV may lead to more efficient and speedy decision-making, this shift could also bring two major disadvantages. First, QMV could dismantle the already established informal norms of consensus-building and the willingness to justify a position if it goes against every other Member State. Moreover, the example of 2015 Relocation Decision in migration, although it was a non-CFSP issue, shows that even if an act can be adopted by QMV, Member States with strong reservations may not implement a legally binding Union decision. Second, the wider use of QMV might easily decrease the ownership of this policy by the Member States. This does not mean that there are no short-term solutions: for example, constructive abstention could be combined with the possibility for Member States to articulate their reservations in a Declaration (Pomorska & Wessel, 2021).

5.2 Enhanced Cooperation

Enhanced cooperation allows a group of Member States to advance integration and cooperation in a particular domain of EU policymaking. It aims to reconcile the interests of those Member States wishing to keep the *status quo* and those that see further integration in one specific area as an opportunity to advance the objectives of the EU. As the Rome Declaration of 2017 stated: "[w]e will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later. Our Union is undivided and indivisible" (European Council, 2017). Enhanced cooperation, originally introduced in primary EU law by the Amsterdam Treaty, is the institutionalisation of previously existing ad hoc arrangements, such as the Economic and Monetary Union or the Schengen Agreement. Enhanced cooperation may be applied in the EU's CFSP since the Nice Treaty. At that time, it only enabled the implementation of already implemented policies by a group of Member States (Wessel, 2021a).

The Lisbon Treaty has reformed its scope and enhanced cooperation can also be used to establish a new line of policy in CFSP (not merely an implementation of already implemented policy) and covers military and defence issues as well. The aim of enhanced cooperation "[is] to further the objectives of the Union, protect its interests and reinforce its integration process" (Article 20(1) TEU). With regard to its initiation, on the one hand, the Treaties continue to require a minimum number of Member States (one-third) to be involved; on the other hand, the procedure for authorising enhanced cooperation has been tightened in CFSP given the requirement of unanimity in the Council (Article 329(2) TFEU). In the field of CFSP, requests to establish enhanced cooperation should be addressed to the Council. This request is forwarded

to the HR, who gives an opinion on whether the proposal is consistent with the EU's CFSP, and to the Commission, which examines whether the proposal is consistent with other Union policies. The EP is merely informed. Enhanced cooperation should be open to all Member States but their admission will be 'subject to compliance with any conditions of participation laid down by the authorising decision' (Article 328(1) TFEU) (Cremona, 2009; Wessel et al., 2021).

The Treaty of Lisbon has opened the possibility to use enhanced cooperation as a procedural passerelle. The Treaty provides that "where a provision […] which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously […], may adopt a decision stipulating that it will act by a qualified majority" (Article 333(1) TFEU). Similarly, where the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously, can adopt a decision stipulating that it will act under the ordinary legislative procedure (Article 333(2) TFEU). These paragraphs cannot apply to decisions having military or defence implications (Article 333(3) TFEU) (Cremona, 2009; Wessel et al., 2021).

Later participation is possible and should be notified to the Council, the HR and the Commission. The new member is expected to fulfil certain conditions and, in certain cases, to adopt certain transnational measures. The Council acts unanimously in its enhanced cooperation format. Acts adopted within the enhanced cooperation format only bind the participating Member States but non-participants are under obligation not to impede the implementation of the acts adopted within the framework of enhanced cooperation. Thus, in areas covered by enhanced cooperation, non-participants may have restricted possibilities to take autonomous actions (Cremona, 2009, pp. 10-11).

One of the reasons why enhanced cooperation has not yet been activated in the EU's CFSP may be that differentiated integration, although without necessarily relying on specific Treaty legal bases, has been the norm in this policy field. In fact, the current EU legal framework, discussed mainly in sections 3 and 4, allows Member States to act outside the EU framework in certain conditions. Regional groups (e.g., Benelux, Nordic or Visegrad countries), ad hoc contract groups or lead groups (e.g., E3 on Iran or the Normandy format in Ukraine) may take joint measures to tackle international issues (Grevi et al., 2020, pp. 8-9; Moret, 2016).

6 Conclusion

This Working Paper explored the current legal basis and governance structures of the EU's CFSP. The latter is (still) "subject to specific rules and procedures" that seem to stand in the way of its effectiveness (Wessel, 2021). This 'distinctiveness', as argued by the paper, is present in a number of ways in the Treaties. Indeed, primary EU law, in the area of CFSP, provide for a different type of EU competence, different institutional setup, different policy cycle, different (non-)legislative instruments and, perhaps more importantly, different decision-making procedures.

The Working Paper showed that, contrary to the popular belief, current Treaty provisions offer the possibility to use (more widely) QMV in CFSP matters. On the one hand, QMV is being used in CFSP matters: for instance, as shown by section 5.1, approximately one-third of all CFSP decisions are based on Article 31(2) TEU which is used to amend existing sanctions regimes. Of course, even if Treaty provisions allow the use of QMV, Member States in practice may decide, in accordance with the informal norm of consensus building, not to adopt a decision until everyone is on board. On the other hand, QMV is clearly not fully used: in particular, the first and second indents of Article 31(2) TEU have hardly been activated. Also, the *passerelle* clause could provide the possibility to further enlarge the Union's flexibility to use QMV in CFSP matters. One commonality of these underused possibilities is that their activation mainly depends on the Heads of State and Government. In these three cases (first and second indents of Article 31(2) TEU and the use of *passerelle* clause), it is up to the European Council to agree on the wider use of QMV. In other words, the expansion of QMV in CFSP matters is a highly political issue which should be decided by an EU institution at the top of the 'hierarchy'.

While improvements could be achieved under the current Treaty provisions, other major developments (including the integration of the HR with the office of the President of the Commission or the merging of the Commission and European Council Presidencies) can only be achieved through Treaty change. However, the reality is that the on-going Conference on the Future of Europe does not intend to change the current Treaties. In a way that is a missed opportunity as the option of moving CFSP to the TFEU and applying a variant of the legislative procedure would not only solve many of the problems we now face, but given the 'normalisation' of CFSP (Wessel et al., 2021), would also form an opportunity to get rid of some anachronisms that are still part of the patchwork that resulted from combining elements of the Maastricht Treaty, the (failed) Constitutional Treaty and the Lisbon Treaty.

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