

# Legal Aspects of Parliamentary Oversight in EU Foreign and Security Policy

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## 1. Introduction

For a long time, the relatively limited role of the European Parliament (EP) in relation to the European Union's foreign, security and defence policy was not really an issue. Most Member States (MS) continued to see (or at least present)<sup>1</sup> the Common Foreign and Security Policy (CFSP) as a policy area that has not developed beyond the intergovernmental European Political Cooperation of the 1970s and 1980s and oversight was believed to be in the safe hands of the national parliaments. Recent studies, however, revealed that these days CFSP is less to be seen as 'the odd one out', and that European integration (and even competence transfer) also took place in that policy field.<sup>2</sup> Indeed, a less visible integration perhaps – as CFSP is much less used as a legal basis for policy making than other external relations provisions – but nevertheless one that has changed the position of CFSP in the EU and hence the commitments of the MS, the role of the Institutions and the way the EU is perceived by other states in relation to its role in global governance.<sup>3</sup>

With the changing nature of CFSP in mind, this contribution aims to revisit the classic question of how parliamentary control over this policy area is regulated. It aims to contribute to the main goal of the present Volume not only by taking the multilevel constitutional structure

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<sup>1</sup> Although primarily made for domestic consumption, the following representation of CFSP by the UK Foreign Secretary while explaining the result of the 2007 Lisbon negotiations to Parliament is striking: 'Common foreign and security policy [CFSP] remains intergovernmental and in a separate treaty. Importantly (...) the European Court of Justice's jurisdiction over substantive CFSP policy is clearly and expressly excluded. As agreed at Maastricht, the ECJ will continue to monitor the boundary between CFSP and other EU external action, such as development assistance. But the Lisbon treaty considerably improves the existing position by making it clear that CFSP cannot be affected by other EU policies. It ring-fences CFSP as a distinct, equal area of action'. See Secretary of State for Foreign and Commonwealth Affairs (David Miliband), HC Deb 20 February 2008, col 378. Similar views were reported to have been shared by the France's Prime Minister François Fillon and the Spanish Foreign Minister Miguel Moratinos: European Parliament, 'Debate on the European External Action Service, European Parliament', CRE 07/07/2010-12 (Strasbourg, 7 July 2010) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20100707?+ITEM-012+DOC+XML+V0//EN>>.

See more extensively: PJ Cardwell, 'On 'Ring-Fencing' the Common Foreign and Security Policy in the Legal Order of the European Union' (2015) 64 Northern Ireland Legal Quarterly 443–463.

<sup>2</sup> More extensively: Cardwell (n 1) and RA Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy' (2016) 2 European Papers: A J on Law and Integration 439–468.

<sup>3</sup> See more extensively on the external perception of the EU: C Eckes and RA Wessel, 'The European Union: An International Perspective' in T Tridimas and R Schütze (eds), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (OUP 2017) (forthcoming; available as Amsterdam Centre for European Law and Governance Research Paper no 2017-01).

of the Union as a starting point to assess possibilities for parliamentary oversight at different levels, but it also points to an integrationist undercurrent in CFSP allowing for the application of EU principles across the board, including CFSP.

While the question of parliamentary oversight has been addressed extensively by political science literature – in particular with a view the policy’s legitimacy<sup>4</sup> – legal studies have so far only addressed the issue to a limited extent as far as the post-Lisbon era is concerned;<sup>5</sup> a few of them addressing the role of the EP in EU external relations more in general.<sup>6</sup> The exclusion of ‘legislative acts’ – and in particular the ‘legislative procedure’ – in the area of CFSP (art 24 TEU) may form the basis for the traditional view that the EP has no role to play in CFSP. Yet, the question is whether this completely rules out a role for the Parliament in the decision-making procedures that lead to the adoption of ‘non-legislative acts’.<sup>7</sup> The Court of Justice of the European Union (CJEU) has clarified the position of the EP in relation to CFSP in a number of recent cases. At the same time, the current treaties underline the role of national Parliaments; but the relevance of these arrangements for the EU’s foreign and defence policy (as well as its security and defence policy) is less clear. The present Chapter will take all of this into account and aim for a legal analysis of the current state of affairs in relation to parliamentary oversight in the area of CFSP including its sub-category, the Common Security and Defence Policy (CSDP). According to the 2010 European External Action Service (EEAS) Decision, ‘The European Parliament will fully play its role in the external action of the Union’.<sup>8</sup> Yet, this role is not easily defined on the mere basis of Treaty provision; other instruments and practice need to be taken into account.

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<sup>4</sup> See for instance C Lord, ‘The Political Theory and Practice of Parliamentary Participation in the Common Security and Defence Policy’ (2011) 18 J of European Public Policy 1134; H Sjørnsen, ‘Not So Intergovernmental After All? On Democracy and Integration in European Foreign and Security Policy’ (2011) 18 J of European Public Policy 1092; B Crum, ‘Parliamentarization of the CFSP through Informal Institution-Making? The Fifth European Parliament and the EU High Representative’ (2006) 13 J of European Public Policy 399; U Diedrichs ‘The European Parliament in CFSP: More than a Marginal Player?’ (2004) 39 The Intl Spectator 45; P Bajtaj, ‘Democratic and Efficient Foreign Policy? Parliamentary Diplomacy and Oversight in the 21st Century and the Post-Lisbon Role of the European Parliament in Shaping and Controlling EU Foreign Policy’ (2015) EUI Working Paper RSCAS 2015/11; A Herranz-Surrallés, ‘The Contested “Parliamentarisation” of EU Foreign and Security Policy: The Role of the European Parliament Following the Introduction of the Treaty of Lisbon’ (2011) PRIF-Report no 104; A Duff, ‘Executive Privilege Reaffirmed? Parliamentary Scrutiny of the CFSP and CSDP’ (2015) West European Politics 396–415.

<sup>5</sup> For instance, D Thym, ‘Beyond Parliament’s Reach? The Role of the European Parliament in the CFSP’ (2006) 11 European Foreign Affairs Review 127; L Rumrich, ‘The CFSP Within the Institutional Architecture: The Role of the European Parliament’ (2006) 2 Hanze Law Review 211-218; and more recently B Kleizen, ‘Mapping the Involvement of the European Parliament in EU External Relations – a Legal and Empirical Analysis’ (2016) CLEER Papers 2016/4.

<sup>6</sup> See recently for instance D Jančić, ‘World Diplomacy of the European Parliament’ (2016) The Hague J of Diplomacy 121-143; as well as R Passos, ‘The External Powers of the European Parliament’ in P Eeckhout and M Lopez-Escudero (eds), *The European Union’s External Action in Times of Crisis* (Hart Publishing 2016) 85-128; C Eckes, ‘How the European Parliament’s Participation in International Relations Affects the Deep Tissue of the EU’s Power Structures’ (2014) 12 Intl J of Constitutional Law 904-929; RA Wessel and T Takács, ‘Constitutional Aspects of the EU’s Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament’ (2017) European Business Law Review 103-117.

<sup>7</sup> This term was recently used by AG Bot in his Opinion in Cases C-643/15 and C-647/15 *Slovakia, Hungary v Council*, ECLI:EU:C:2017:618.

<sup>8</sup> Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30 (EEAS Decision).

In that respect, Section 2 will re-assess the existing Treaty provisions dealing the parliamentary oversight in relation to CFSP. It will look into the ways in which the EP is involved in CFSP decision-making and will point out to what extent recent case law of the Court has clarified things in that respect. Moving from Treaty provisions to practice, Section 3 will assess the ways in which the EP attempted to make full use of its powers, *inter alia* through Interinstitutional Agreements (IIA) and Inter-Parliamentary cooperation. Section 4, finally, will be used to draw some general conclusions on the state of affairs with regard to Parliamentary involvement in CFSP and present a short assessment of the democratic legitimacy in that area.

## **2. Parliamentary Oversight in CFSP on the Basis of the Treaties**

### *2.1 Parliament's Role in CFSP Decision-Making*

Given the special nature of CFSP, the EP operates under the 'specific rules and procedures' that were foreseen by the TEU. Along similar lines, art 24 TEU refers to the 'specific role of the European Parliament and of the Commission' in the area of CFSP. This role is 'defined by the Treaties', for instance in art 36 TEU, which provides:

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.

Indeed, the differences with respect to most other Union policy areas are obvious. The main difference lies in the fact that with regard to CFSP, parliamentary influence 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 institution, which actually takes the decision (the Council) that is to consult the EP, but the High Representative. The formal influence of the EP is therefore limited to the general policy lines and does not include formal influence on the actual decisions, which are the result of the general policy lines. This has generally led authors to conclude that 'the democratic element of decision-making in CFSP and CSDP remains lacking'.<sup>9</sup> Some influence was gained by the appointment of the HR/Commissioner for External Relations on the basis of art 17(7) TEU, which grants the EP a vote of consent as to the entire Commission, including the HR-function. And, as further elaborated in Section 2.2 below, the combination of CFSP and other external objectives in art 21 TEU strengthened the link between the different EU external policy fields and may have made it easier for the Parliament to indirectly influence CFSP.

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<sup>9</sup> Jančić (n 6) 128.

Despite the limited scope of its formal competences, the EP seems to have been able to maximize the use of its powers and has proven to be a very active player in relation to the EU's external action. In doing so, it was assisted by a number of provisions in the current Treaties, that – in addition to art 36 TEU that was referred to above – will be mentioned shortly as they do have an express or implicit link with CFSP:<sup>10</sup>

- For all international agreements, the Parliament is required to give consent before the agreement can be concluded by the Council (art 218(6)(a) TFEU).
- The TFEU foresees a Multiannual Financial Framework for at least a period of five years (art 312 TFEU), which is adopted by the Council but following consent of the EP. The latter has now a say, as has the Council, on expenses related to the EU external relations, in particular concerning CFSP.<sup>11</sup>
- A specific section of the EU budget (Section X) relates to the EEAS, which implies that the EP has to agree with this part of the budget. It also has competence to decide on the discharge of the EEAS, which provides a degree of political control on how the EEAS is organized. The EP Committee on budgetary control is particularly concerned in verifying how the EU budget is spent on external relations, in particular regarding CFSP.<sup>12</sup>
- ‘The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament’ (art 17(7) TEU).
- The EP has a right to be immediately and fully informed on negotiations, suspension or positions on (CFSP) agreements (art 218(10) TFEU).
- It has a right to be consulted before the Council adopts a decision establishing the specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the CFSP (art 41(3) TEU).
- And, finally, it gives its consent or its advice prior to the conclusion of international agreements by the Council except where agreements ‘relate exclusively’ to the CFSP as laid down in art 218(6) TFEU.

Beyond these formal aspects, the EP has committees such as the AFET (foreign affairs) or DEVE (development) Committees, which are very proactive in commissioning studies, adopting non-binding Resolutions, organizing hearings, carrying out fact-finding missions and so on, to place a parliamentary stamp on EU external relations.

Admittedly, many of these powers relate to EU external relations in general<sup>13</sup> and do not necessarily include all CFSP aspects. Yet, post-Lisbon it is less easy to distinguish between CFSP and other external action and combinations are sometimes necessary. The well-known example of a necessary combination of CFSP and other EU-rules is formed by the regulation

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<sup>10</sup> Based on B Van Vooren and RA Wessel, *EU External Relations Law: Text, Cases and Materials* (CUP 2014).

<sup>11</sup> While highly interesting and relevant, the scope of the present contribution does not allow to go into the budgetary powers of the EP in relation to CFSP. See quiet extensively on that issue Kleizen (n 5).

<sup>12</sup> Budgetary powers were also used at the time of the creation of the EEAS: see further below. On the financial accountability of EU external action, see the contribution by ML Sánchez Barriaco in this Volume.

<sup>13</sup> See more extensively some other Chapters in this Volume, including the one by J Santos Vara.

of restrictive measures. In fact, legislative decisions taken by the Union in this area depend on a prior CFSP decision. At the same time, it is clear that this does only partially help the Parliament as art 215(1) TFEU merely mentions a right of the EP to be informed. In addition, art 40 TEU provides that in adopting CFSP decisions the Council should be aware of the external policies in the TFEU, and *vice versa*. Yet, while the consistency requirement hints at a combination of legal bases, the different CFSP procedures and instruments seem to continue to preclude that,<sup>14</sup> which implies that the role of the EP in the end depends on the (single) legal basis that was chosen.

A specific role for the EP was established on the basis of the Decision to establish the EEAS.<sup>15</sup> Parliamentary influence could already be witnessed during the establishment of the EEAS.<sup>16</sup> As briefly alluded to above, the Preamble of the Decision confirms that the EP ‘will fully play its role in the external action of the Union, including its functions of political control as provided for in art 14(1) TEU, as well as in legislative and budgetary matters as laid down in the Treaties’. The Preamble also underlines that the HR will regularly consult the EP on CFSP matters, that the latter’s views will duly be taken into consideration, and that right of access to documents for Members of the EP (MEP) should be regulated. These procedural rights are not that clearly represented in the Treaties, which has led one observer to see this as ‘a surprisingly powerful statement in favour of procedural rights of Parliament in the external sphere, especially considering that the legal basis for the Council Decision on the EEAS falls within the scope of the CFSP’.<sup>17</sup> It is also noteworthy that the EP is mentioned explicitly in art 3(4) of the EEAS Decision, which deals with support for the EU institutions and bodies. A similar specific reference is made in art 5(7), which singles out the EP in relation to the role of Union delegations responding to the needs of the institutions of the Union. Other references to the EP include, the yearly report by the High Representative to the EP and the Council on the occupation of posts in the EEAS (art 6(9)), and the role of the EP in relation to the EEAS budget (art 8).

Finally, the role of the EP in relation to the conclusion of international agreements deserves to be mentioned. On the basis of art 218(6) TFEU, parliamentary consent is needed

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<sup>14</sup> Yet, see the more nuanced view of the AG Wahl in Case C-455/14P *H v Council and Commission*, ECLI:EU:C:2016:212, para 70: ‘I would point out that the Court has, so far, not yet taken a definitive position on whether an EU act may have dual or multiple substantive legal bases combining CFSP and non-CFSP provisions. It would seem to me that, at least in most cases, a CFSP provision and a non-CFSP provision would not be compatible, as the procedures provided for their adoption are too different to be reconciled. In those circumstances, a CFSP act which includes non-CFSP components which are not ancillary to the main CFSP component, or which may produce effects on other areas of EU law which are not merely incidental, is arguably unlawful since two separate acts should have been adopted in its place’; as well as the somewhat inconsistent practice of the Council in this respect. For instance, the Association Agreements with Ukraine, Moldova and Georgia were concluded on the basis of both art 217 TFEU and art 35 TEU.

<sup>15</sup> EEAS Decision (n 8). See in general about the EEAS for instance M Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (Brill/Nijhoff 2016); and J Batora and D Spence (eds), *The European External Action Service: European Diplomacy Post-Westphalia* (Palgrave MacMillan 2015).

<sup>16</sup> This particularly happened in relation to budgetary issues: ‘Concerning the case of the EEAS, “hard powers” are held by the Council, but the Parliament threatened to veto the general budget if Ashton’s Draft were adopted without meeting parliamentary demands. This competence has helped the Parliament to generate real influence on the set-up of the EEAS’. See E Wisniewski, ‘The Influence of the European Parliament on the European External Action Service’ (2013) 18 *European Foreign Affairs Review* 100; Cf also K Raube, ‘The European External Action Service and the European Parliament’ (2012) 7 *The Hague J of Diplomacy* 65-80.

<sup>17</sup> Kleizen (n 5) 15.

for the most important types of agreements and it needs to be consulted in other cases.<sup>18</sup> Yet, this procedure applies ‘except where agreements relate exclusively to the common foreign and security policy’. So, ‘pure’ CFSP agreements can be concluded without consent or consultation of the EP. However, this does not imply that other paragraphs of art 218 TFEU are not relevant or that agreements that would include CFSP elements would be fully excluded from the regular procedures. As will be further elaborated below, art 218(10) TFEU in particular has already proven its value: ‘The European Parliament shall be immediately and fully informed at all stages of the procedure’. And:

the Parliament contends that the *ratio legis* of this provision is not to allow the Parliament to passively take note of the actions of the other institutions during the negotiations; but to afford it the opportunity of bringing some influence to bear on the Commission and the Council as regards the content of the agreement (...).<sup>19</sup>

In fact, it seems to imply an obligation for the EEAS (in the case of CFSP agreements) to already inform the parliamentary committees at the stage of the opening of the negotiations as ‘it may happen that the Parliament considers that the negotiations are premature or inopportune’, in which case ‘the Parliament may adopt a resolution explicitly asking the Council not to authorise the opening of negotiations’<sup>20</sup> (see further below; section 2.2).

At the same time, the use of these procedures has also been criticised as:

the Council and the Commission often find ways to circumvent the European Parliament, especially regarding access to information, which is a vital condition for the exercise of democratic control. The Council continued to classify negotiating mandates as ‘restraint’ documents, which MEPs may only access in person on the Council’s premises.<sup>21</sup>

Yet, also here new developments took place, in particular on the basis of the 2014 IIA and negotiations on an even newer IIA (see below section 3.1).<sup>22</sup>

As the Treaty presents the CSDP as a sub-category of CFSP, the general rules apply. At the same time one may argue that in the area of security and defence, including the establishment of military missions, oversight by the Parliament becomes more essential as integration in that area progresses. From the outset, the EP has claimed a role in CSDP.<sup>23</sup> In the first annual report on the ‘main aspects and basic choices of the CFSP’, the Parliament even claimed that ‘in order to enhance the democratic legitimacy of the CFSP, Parliament’s

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<sup>18</sup> See more extensively the chapter by J Santos Vara.

<sup>19</sup> Passos, ‘The External Powers of the European Parliament’ (n 6) 87.

<sup>20</sup> Ibid 101.

<sup>21</sup> Jančić (n 6) 130. See also in more detail D Curtin, ‘Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?’ (2013) 50 *Common Market Law Review* 423-458; R Passos, ‘The European Union’s External Relations a Year after Lisbon: A First Evaluation from the European Parliament’ in P Koutrakos (ed), *The European Union’s External Relations a Year After Lisbon* (2011) CLEER Working Papers 2011/3, 52.

<sup>22</sup> See more extensively the chapter by V Abazi.

<sup>23</sup> See European Parliament, ‘Report on the new European security and defence architecture – priorities and deficiencies’ (2002/2165(INI), 27 March 2003).

competent bodies should be consulted on the launch of CSDP missions and that decisions should where appropriate take into account, and contain references to, the positions adopted by Parliament'.<sup>24</sup> While practice does indeed reveal a more extensive role for the EP as it is more frequently informed and allowed to assess policy plans 'in camera', practice does not seem to deviate much from other areas of CFSP.<sup>25</sup>

## 2.2 *With a Little Help From the Court*

Given the quite often sensitive nature of foreign and security policy, the Council may have a tendency to be somewhat restrictive in sharing detailed information (see also below, Section 3.1). Since the entry into force of the Lisbon Treaty in particular, the Court of Justice was provided with a number of opportunities to clarify its role in relation to CFSP (-related) issues. Over the years, this role of the Court has been subject to legal analysis,<sup>26</sup> yet the impact of the changes by the Lisbon Treaty have only partly been recognized in literature. More recent studies, however, do argue that the view that the Court is not competent at all in the area of CFSP can no longer be upheld.<sup>27</sup> These studies highlight that the CFSP exceptions are interpreted restrictively, allowing the Court to play a role in relation to the application of general principles of EU law, even in a CFSP context. Indeed, as phrased by Cremona, 'this allows the Court – while granting the CFSP full scope as a policy field – to ensure that “CFSP exceptionalism” with respect to its own jurisdiction does not creep beyond its proper bounds’.<sup>28</sup> The Court’s general jurisdiction is not limited by the fact that a certain act was adopted in the context of the CFSP. This role of the Court should not come unexpected, given the intertwinement of CFSP and other external Union policies. Recently, the principle of consistency was quite clearly connected by the Court to the principles of democracy and institutional balance.<sup>29</sup> This is indeed in line with the major change initiated by the Lisbon

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<sup>24</sup> European Parliament, 'Report on the annual report from the Council to the European Parliament on the main aspects and basic choices of the Common Foreign and Security Policy (CFSP) in 2008' (2009/2057(INI), 1 March 2010), para 5.

<sup>25</sup> See more extensively Herranz-Surrallés, 'The Contested “Parliamentarisation” of EU Foreign and Security Policy' (n 4).

<sup>26</sup> S Griller, 'The Court of Justice and the Common Foreign and Security Policy' in A Rosas, E Levits and Y Bot (eds), *Court of Justice of the European Union - Cour de Justice de l'Union Européenne, The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC Asser Press 2013) 675-692; G De Baere and P Koutrakos, 'The Interactions between the Legislature and the Judiciary in EU External Relations' in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 243-273; L Saltinty, 'Jurisdiction of the European Court of Justice Over Issues Relating to the Common Foreign and Security Policy under the Lisbon Treaty' (2010) 119 *Jurisprudence* 261; A Hinarejos, *Judicial Control in the European Union – Reforming Jurisdiction in the Intergovernmental Pillars* (OUP 2009).

<sup>27</sup> C Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in M Cremona and A Thies, *The European Court of Justice and External Relations Law* (Hart Publishing 2014) 47-70; RA Wessel, 'Lex Imperfecta' (n 2); as well as 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 on EU Common Foreign and Security Policy* (Edward Elgar Publishing 2017) (forthcoming).

<sup>28</sup> M Cremona, '“Effective Judicial Review is of the Essence of the Rule of Law”: Challenging Common Foreign and Security Policy Measures before the Court of Justice' (2017) 2 *European Papers: A J on Law and Integration* (forthcoming).

<sup>29</sup> Case C-263/14 *European Parliament v Council (Tanzania)*, ECLI:EU:C:2016:435, para 72. See more extensively SR Sánchez-Taberero, 'The Choice of Legal Basis and the Principle of Consistency in the Procedure for Conclusion of International Agreements in CFSP Contexts: Parliament v. Council (Pirate-Transfer Agreement with Tanzania)' (2017) 54 *Common Market Law Review* 899-920.

Treaty: no longer is the Court's role explicitly excluded in relation to CFSP; rather the general rule seems to be that the Court is competent unless its role is excluded in a specific situation.<sup>30</sup>

Over the past few years, the Court has also been quite helpful in clarifying the position and the role of the EP in relation to CFSP, albeit not always in the interest of the Parliament when the choice of legal basis was at stake. A first example is formed by Case C-130/10 *European Parliament v Council*, where the Court was given a first chance to develop an approach towards the function of art 40.<sup>31</sup> Being confronted with the question of the appropriate legal basis for 'restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban',<sup>32</sup> the Court held that art 215 TFEU (following a previous CFSP decision) rather than art 75 TFEU (in the Area of Freedom, Security and Justice – AFSJ) was the correct choice, despite the limited role of the EP in relation to the CFSP/art 215 procedure. The context of peace and security proved to be decisive for the Court's conclusion,<sup>33</sup> but one may argue that this was done at the expense of a role of the EP in relation to sanctions, where prior to Lisbon Parliament at least had a right to be consulted (on the basis of former arts 60 and 301 EC).

The choice for 'context over content' also became clear also when the Court had a chance to revisit the issue in the so-called *Mauritius* case.<sup>34</sup> The Court argued that the EU-Mauritius Agreement, concluded in the framework of operation Atalanta, was rightfully based within CFSP:<sup>35</sup> while a part of the agreement fell under the TFEU, art 37 TEU (CFSP) was considered to provide a sufficient legal basis. Indeed, again at the expense of the larger role the EP would have had under the TFEU.<sup>36</sup> Yet, this does not limit the application of procedural EU rules and principles.<sup>37</sup> Indeed, the cases on international agreements in the area of CFSP proved to be at least partly profitable for the EP. CFSP international agreements are concluded on the basis of the general EU provisions in this regard (art 218 TFEU), despite some specific procedural rules.<sup>38</sup> And, as we have seen, art 218(10) TFEU is framed in very general terms ('The European Parliament shall be immediately and fully informed at all stages of the

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<sup>30</sup> Cf Hinarejos (n 26) 150. Recently, the Court confirmed its competence to answer preliminary questions raised by domestic courts, even in relation to CFSP Decisions. See Case C-72/15 *Rosneft*, ECLI:EU:C:2017:236.

<sup>31</sup> Case C-130/10 *Parliament v Council*, ECLI:EU:C:2012:472.

<sup>32</sup> Council Regulation (EU) no 1286/2009 of 22 December 2009 amending Regulation (EC) no 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban [2010] OJ L 346/42.

<sup>33</sup> Cf Hillion (n 27), who also notes that this 'is one of, if not the first time that the all-encompassing character of the CFSP is evoked in the case law'.

<sup>34</sup> Case C-658/11 *European Parliament v Council (Mauritius)*, ECLI:EU:C:2014:2025. See C Matera and RA Wessel, 'Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements – Case C-658/11, *European Parliament v. Council (Mauritius Agreement)*' (2014) *Revista de Derecho Comunitario Europeo* 1047–1064.

<sup>35</sup> A similar conclusion was drawn by AG Kokott in the more recent *Tanzania* case, Case C-263/14 *European Parliament v Council (Tanzania)*, ECLI:EU:C:2015:729.

<sup>36</sup> At the same time, agreements that mainly relate to TFEU policies should be based on a single TFEU legal basis. Cf also Passos, 'The External Powers of the European Parliament' (n 6) 124.

<sup>37</sup> See also S Peers, 'The CJEU Ensures Basic Democratic and Judicial Accountability of the EU's Foreign Policy' (*EU Law Analysis*, 24 January 2014) <<http://eulawanalysis.blogspot.nl/2014/06/the-cjeu-ensures-basic-democratic-and.html>>.

<sup>38</sup> T Tridimas, 'The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order. Vol 1: Constitutional and Public Law. External Relations* (Hart Publishing 2004) 128; G De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 190.

procedure’) and does not seem to exclude EU agreements that relate ‘exclusively or principally’ to the CFSP from the Court’s scrutiny.<sup>39</sup> As held by the Court:

If the Parliament is not immediately and fully informed at all stages of the procedure (...), it is not in a position to exercise the right of scrutiny which the Treaties have conferred on in in relation to the CFSP or, where appropriate, to make known its views as regards, in particular, the correct legal basis for the act concerned. The infringement of that information requirement impinges, in those circumstance, on the Parliament’s performance of its duties in relation to the CFSP, and therefor constitutes an infringement of an essential procedural requirement.<sup>40</sup>

In Case C-658/11 on the EU-Mauritius Agreement (and confirmed in Case C-263/14 on the Tanzania Agreement), the Court thus underlined its jurisdiction in relation to CFSP-related agreements where the EP’s right to be informed is concerned as it sees this as an essential procedural requirement that applies irrespective of the subject matter of the agreement. In *Tanzania*, the Court even adds the argument that the Parliament will have to be able to ‘exercise its own powers with full knowledge of the EU’s external action as a whole’ (para 71), thus hinting at a role for the EP to ensure consistency and coherence in EU external relations.<sup>41</sup> Violation of the obligation to keep Parliament involved at all stages could thus result in invalidity of the Council decision adopting the international agreement,<sup>42</sup> something that was recognized by the High Representative in her promise to keep Parliament better informed.<sup>43</sup>

These cases can be seen as underlining that CFSP is part and parcel of the Union’s constitutional set-up, including a role of the EP in situations where it was not excluded by the Treaties in any express manner.

### 3. Additional Instruments for Parliamentary Oversight in CFSP

With these clarifications provided by the Court in mind, it is still safe to conclude that parliamentary oversight over CFSP can less be founded on Treaty provisions than is the case in other policy areas. The next question is to what extent this has discouraged the EP to play a role in CFSP. Political science studies have already noticed that ‘in particular the Commission’s but

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<sup>39</sup> Hillion (n 27); as well as P Eeckhout, *EU External Relations Law* (OUP 2011) 498.

<sup>40</sup> *Mauritius* case (n 34), para 86.

<sup>41</sup> *Tanzania* case (n 29). See the chapter by SR Sánchez-Tabernero elsewhere in this Volume.

<sup>42</sup> This was also suggested by AG Kokott in her opinion on *Tanzania* case (n 35); see also Kleizen (n 5) 10.

<sup>43</sup> ‘To achieve this, I will instruct the services – and Chief Negotiators in particular – to consistently and proactively offer to the European Parliament (by means of a letter to the AFET Committee as the competent Committee and focal point) to brief and inform the EP in the appropriate and agreed format. This will apply at the beginning of negotiations (including prior to the start of negotiations), during the conduct of negotiations (after each negotiating round or when significant developments occur) and upon the finalisation of negotiations (whenever negotiations are completed, an agreement is initialed, provisional application is proposed or there is the intention to suspend or modify an agreement). During the implementation phase of an agreement, I will instruct the EEAS competent services to accept the requests from the Parliament to discuss the implementation and the state-of-play of the agreement. The services will brief and regularly inform specific “ad hoc parliamentary monitoring groups” on important agreements, if so requested by the EP’. See ‘Answers to the European Parliament Questionnaire to the Commissioner-Designate  
Federica Mogherini’,  
<[https://ec.europa.eu/commission/sites/cwt/files/commissioner\\_ep\\_hearings/mogherini-reply\\_en.pdf](https://ec.europa.eu/commission/sites/cwt/files/commissioner_ep_hearings/mogherini-reply_en.pdf)>.

also the EP's role go beyond what the formal procedures of the policy-domain would suggest'.<sup>44</sup> Legal studies have devoted less attention to the question of how the EP acted in practice on the basis of its CFSP competences and, in particular to what extent this has been institutionalised. Yet, it has been held that, at least in external relations in general, Parliament has made full use of the powers at its possession. In the words of Jančić:

The European Parliament does so by a crafty application of its Treaty rights, by means of non-legislative instruments – such as inter-institutional agreements, resolutions, reports, debates, hearings, inquiries, fact-finding and election observation missions – and by establishing bilateral and multilateral diplomatic contacts with both parliamentary and executive bodies worldwide. These activities are carried out through value-oriented and region-oriented diplomacy, which form the thrust of the European Parliament's world diplomacy.<sup>45</sup>

The present section will briefly explore some of these avenues.

### 3.1 *Interinstitutional Agreements*

In addition to the Treaty provisions, Parliamentary powers may be derived from IIAs.<sup>46</sup> In 2002 an IIA was drafted to allow the EP's president and a specially formed committee to have limited access to classified Council information.<sup>47</sup> This Agreement was the first one on access to classified information and specifically dealt with the area of foreign and security policy. It lays down detailed procedures on the basis of which information can (or cannot) be shared with a special committee of the EP and was followed by an internal Decision of the Parliament,<sup>48</sup> as well as further implementing Decisions by the Bureau of the EP on the overall handling and management of sensitive information.<sup>49</sup> It is clear, however, that the rules do not apply to documents classified as 'TOP SECRET' (which do form part of the procedure for *non*-CFSP areas).<sup>50</sup> The 2010 EEAS Decision underlines that:

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<sup>44</sup> M Riddervold and G Rosén, 'Beyond Intergovernmental Cooperation: The Influence of the European Parliament and the Commission on EU Foreign and Security Policies' (2015) 20 *European Foreign Affairs Review* 399, 417.

<sup>45</sup> Jančić (n 6) 126.

<sup>46</sup> See more extensively G Rosén, 'EU Confidential: The European Parliament's Involvement in EU Security and Defence Policy' (2015) 53 *J of Common Market Studies* 384.

<sup>47</sup> See Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy [2002] OJ C298/1, art 3(3).

<sup>48</sup> Decision of the European Parliament of 23 October 2002 on the implementation of the Interinstitutional Agreement governing European Parliament access to sensitive Council information in the sphere of security and defence policy [2002] OJ C298/4, 4–5. See also D Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' (2013) 50 *Common Market Law Review* 423-458.

<sup>49</sup> Decision of the Bureau of the European Parliament of 6 June 2011 concerning the rules governing the treatment of confidential information by the European Parliament [2011] OJ C190/2; Decision of the Bureau of the European Parliament of 15 April 2013 concerning the rules governing the treatment of confidential information by the European Parliament [2013] OJ C96/1. See more extensively the Chapter by V Abazi.

<sup>50</sup> See the Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy [2014] OJ C95/1 (Agreement on Forwarding and Handling of Classified Information)..

Specific arrangements should be made with regard to access for Members of the European Parliament to classified documents and information in the area of CFSP. Until the adoption of such arrangements, existing provisions under the Interinstitutional Agreement of 20 November 2002 (...) will apply.<sup>51</sup>

While new rules were indeed agreed upon in the 2014 IIA between the EP and the Council concerning the forwarding to and handling by the EP of classified information held by the Council, this IIA expressly deals with ‘matters *other* than those in the area of the common foreign and security policy’.<sup>52</sup> This implies that access and handling of classified information remains based on the CFSP-specific 2002 arrangements, occasionally leading to the Parliament having to rely on ‘leaked’ documents, as became apparent in 2014 in relation to possible abuse and corruption the EU’s CSDP mission in Kosovo, EULEX.<sup>53</sup>

Yet, apart from these specific IIAs on access to classified documents, other instruments do seem to have provided the EP with some possibilities for oversight or influence. Thus, the 2006 IIA<sup>54</sup> regulates the EP’s influence on the CFSP budget. Art 43 lays down a number of detailed rules on the way in which and the period within the Parliament is to be informed. In addition, the 2010 Framework Agreement, seems to have improved the position of the EP at least in relation to the Commission where the negotiation of international agreements is concerned.<sup>55</sup> While some of the provisions come close to what is already in the Treaties, they do put some more flesh on, *inter alia*, the procedural information obligation in art 218(10) TEU. A specific reference to CFSP can be found in art 10, which provides that ‘Within its competences, the Commission shall take measures to better involve Parliament in such a way as to take Parliament’s views into account as far as possible in the area of the Common Foreign and Security Policy’. Obviously, this provision may be put into perspective given the limited competences of the Commission in the area of CFSP, but given that this provision is part of the Chapter of ‘Constructive Dialogue and Flow of Information’, the Commission at least does not seem to have the right to withhold information. Subsequent provisions add new rules on the facilitation of the involvement of Parliament in the workings of the negotiation delegations. Moreover, Annex II of the Agreement ensures that Parliament is given access to confidential information, including – subject to some restrictions – access to ‘top secret’ documents,<sup>56</sup> and

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<sup>51</sup> EEAS Decision (n 8) (emphasis added).

<sup>52</sup> Agreement on Forwarding and Handling of Classified Information (n 50).

<sup>53</sup> A Rettman, ‘MEPs Ask Tough Questions on EU mission in Kosovo’ *Euobserver* (Brussels, 6 November 2014). See more extensively the Chapter by V Abazi.

<sup>54</sup> Interinstitutional Agreement of 17 May 2006 between the European Parliament, the Council and the Commission on Budgetary Discipline and Sound Financial Management [2006] OJ C139/1.

<sup>55</sup> Framework Agreement on Relations between the European Parliament and the European Commission [2010] OJ L304/47 (Framework Agreement). The original version dates from 2000 and was revised in 2006.

<sup>56</sup> See Annex II to the Framework Agreement (n 55), art 1(2)(2) on the different categories: ‘EU classified information’ (EUCI) shall mean any information and material, classified as “TRÈS SECRET UE/EU TOP SECRET”, “SECRET UE”, “CONFIDENTIEL UE” or “RESTREINT UE” or bearing equivalent national or international classification markings, an unauthorised disclosure of which could cause varying degrees of prejudice to Union interests, or to one or more Member States, whether such information originates within the Union or is received from Member States, third States or international organisations’; and art 2(5)(1) on the conditions: ‘Access to information classified as “TRÈS SECRET UE /EU TOP SECRET”, “SECRET UE” and “CONFIDENTIEL UE” may only be granted to Parliament officials and those employees of Parliament working for political groups to whom it is strictly necessary, who have been designated in advance by the parliamentary body/office-holder as having a need to know and who have been given an appropriate security clearance’.

Annex III lays down detailed rules on the negotiation and conclusion of international agreements. Given the general nature of the information obligation in art 218(10) TFEU (see *supra*), these rules during the process of negotiations equally apply to agreements exclusively relating to CFSP.

Finally, in 2010 the High Representative issued a Declaration on political accountability, which also has relevance for the involvement of the EP in CFSP.<sup>57</sup> Indeed, it is not an IIA and hence is more difficult to enforce. Yet, the Declaration purports to streamline the cooperation between the EEAS and the EP. Most rules relate to budgetary issues, but the Declaration also introduces the possibility of including EEAS staff at briefings of the EP's Committee on Foreign Affairs (AFET) and the Committee on Budgets (COBU) and aims to facilitate the appearance of Heads of Delegations, EU Special Representatives to third countries, Heads of CSDP missions and senior EEAS officials in relevant parliamentary committees and sub-committees. At the same time, the question has been left open to what extent the EP can request any of these people to be present during informative sessions.

While the set of IIAs and arrangements can be said to strengthen the information position of the EP, in many cases Parliament will have to take the initiative and it has to rely on the willingness of the Council and the Commission (and the EEAS) to share all information. In that sense, CFSP is still seen as 'special' and the regular rules only apply to a certain extent and are hardly applied on an automatic basis. For that reason, it has rightfully been argued that there may be a need for a more comprehensive IIA between the EP, the Council and the Commission on how the Parliament is to be involved and consulted in CFSP/CSDP matters, and which would be binding on all the institutions involved under art 295 TFEU.<sup>58</sup>

### 3.2 Institutionalised (Inter-)Parliamentary Cooperation on Foreign Policy

Also in relation to foreign policy (or perhaps in particular in that less supranational policy area), cooperation with and among national parliaments may be helpful.<sup>59</sup> It goes beyond the scope of the present contribution to assess the role of the individual national parliaments in relation to CFSP.<sup>60</sup> It is clear, however, that with the further integration of CFSP into the Union's legal order it has also become more difficult for domestic parliaments to influence specific EU policies in that area. Moreover, it has been noted that the national parliaments and the EP do not necessarily agree on the division of their tasks in the CFSP/CSDP area, which further complicates their effective influence.<sup>61</sup>

In 2012, interparliamentary cooperation was largely institutionalised through the establishment of the Interparliamentary Conference (IPC) for CFSP and CSDP, partly as a

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<sup>57</sup> Draft Declaration by the High Representative on political accountability [2010] OJ C210/01.

<sup>58</sup> See Kleizen (n 5) 26.

<sup>59</sup> See also N Lupo and C Fasone (eds), *Inter-Parliamentary Cooperation in the Composite European Constitution* (Hart Publishing 2016) and the chapter by J Wouters and K Raube elsewhere in this Volume.

<sup>60</sup> See for an interesting empirical study Duff (n 4). One of the outcomes of that study is that it is not so much the formal powers parliaments may have, but rather the wish and the interest to use them.

<sup>61</sup> A Herranz-Surrallés, 'The EU's Multilevel Parliamentary (Battle)Field: Inter-Parliamentary Cooperation and Conflict in the Area of Foreign and Security Policy' (2014) 37 *West European Politics* 957-975; and J Wouters and K Raube, 'Europe's Common Security and Defence Policy: The Case for Inter-Parliamentary Scrutiny' (2012) Global Centre for Global Governance Studies Working Paper no 90.

reaction to the end of the Assembly of the Western European Union.<sup>62</sup> It:

provides a framework for the exchange of information and best practices in the area of CFSP and CSDP, to enable national Parliaments and the European Parliament to be fully informed when carrying out their respective roles in this policy area. It may by consensus adopt non-binding conclusions on CFSP and CSDP matters related to the agenda of the Conference.

The IPC is composed of delegations of the national Parliaments of the EU MSs and the EP. National Parliaments are represented by six Members each. The EP is represented by sixteen Members. National Parliaments of EU candidate countries and European member countries of NATO can be represented by a delegation composed of 4 observers. The IPC convenes once every six months in the country of the Presidency Parliament or in the EP in Brussels. It is presided over by the Presidency Parliament, in close cooperation with the EP. The Secretariat is provided by the Presidency Parliament, in close cooperation with the EP and with the previous and next Presidency Parliaments. Practice has revealed numerous problems, in particular in the cooperation between the national parliaments and the EP and the IPC is generally seen as not very successful due to its internal struggles.<sup>63</sup>

Apart from this EU-MS cooperation, EU foreign policy may be influenced by the EP's participation in other Inter-parliamentary assemblies, such as the ACP-EU Joint Parliamentary Assembly, the Parliamentary Assembly of the Union for the Mediterranean (PA-UfM), the EuroNest Parliamentary Assembly (involving the EP and parliaments of the EU's eastern neighbours),<sup>64</sup> and the Euro-Latin American Parliamentary Assembly (EuroLat).<sup>65</sup> In addition, cooperation takes place with other parliamentary assemblies, such as the Parliamentary Assembly of the North Atlantic Treaty Organization (NATO-PA). In particular in relation to the EP's role in CSDP this relationship is seen as important and even allows the EP delegation to participate in the meetings and to table documents (obviously without being allowed to vote).<sup>66</sup> Yet, overall, political science studies have argued that this form of institutionalised cooperation is of limited value: 'It is a necessary but not a sufficient (or panacea for that matter) solution to a key question for the future of democratic control and legitimacy of EU foreign policy'.<sup>67</sup>

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<sup>62</sup> See also Herranz-Surrallés, 'The Contested "Parliamentarisation" of EU Foreign and Security Policy' (n 4); and RA Wessel, 'The EU as Black Widow: Devouring the WEU to Give Birth to a European Security and Defence Policy' in V Kronenberger (ed), *The European Union and the International Legal Order – Discord or Harmony?* (TMC Asser Press 2001) 405-434.

<sup>63</sup> For an extensive assessment see Herranz-Surrallés, 'The Contested "Parliamentarisation" of EU Foreign and Security Policy' (n 4).

<sup>64</sup> See I Petrova and K Raube, 'Euronest: What Drives Inter-Parliamentary Cooperation in the Eastern Partnership?' (2016) 21 *European Foreign Affairs Review* 35-56.

<sup>65</sup> See more extensively A Cofelice and S Stavridis, 'The European Parliament as an International Parliamentary Institution (IPI)' (2014) 19 *European Foreign Affairs Review* 165.

<sup>66</sup> Information can be found at <[https://polcms.secure.europarl.europa.eu/cmsdata/upload/1029485c-96da-475a-86e9-fae4bc36afd5/att\\_20091023ATT63114-2992850082496707298.pdf](https://polcms.secure.europarl.europa.eu/cmsdata/upload/1029485c-96da-475a-86e9-fae4bc36afd5/att_20091023ATT63114-2992850082496707298.pdf)>.

<sup>67</sup> S Stavridis, 'Why the New Inter-Parliamentary Conference on CFSP/CSDP is a Positive – Yet Insufficient – Step Forward in the Post-Lisbon Democratic Control and Legitimacy of EU Foreign Policy' (2014) 14 *Jean Monnet/Robert Schuman Paper Series* no 12,13.

### 3.3 *Parliamentary Resolutions on Foreign Policy*

Apart from its relation with other parliaments, the EP may issue unilateral statements to make its views known. In general, the instruments used most by the EP are resolutions. In legal terms these are certainly to be seen as ‘decisions’ taken by an organ of an international organization and in that sense, they can be seen as forming part of the Union’s legal order.<sup>68</sup> Yet, obviously, their purpose differs from the legislative decisions (eg in the form of Regulations) that are taken by the EP together with the Council. Many of the resolutions relate to the global ‘normative’ role of the Union (as for instance reflected in arts 21 and 3(5) TEU) and are often related to human rights, democracy and the rule of law. Indeed, ‘the European Parliament acts as a “guarantor of values” by ensuring that the EU political discourse matches the actual policies enacted and foreign policy pursued’.<sup>69</sup> In fact, this normative role of the Parliament in relation to EU foreign policy is not new as has developed over the last twenty years or so.<sup>70</sup>

Resolutions are used by the EP in the area of CFSP for various reasons. They may provide a tool to make a statement on an international situation, or they have a more internal function and for instance reflect the EP’s position on a certain issue during international negotiations. Interestingly enough, Kleizen found that resolutions related to CFSP make up the largest part of the subjects addressed by resolutions in foreign affairs, albeit that the focus is more on human rights than on security and defence.<sup>71</sup> As observed by the same author:

The 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. As mentioned earlier, the EP is largely reliant on informal methods of involvement and information/consultation rights in the CFSP, and the large amount of resolutions seems to be an expression of this dependence. The interesting implication of this argument is that the EP does not seem to readily accept the institutional position accorded to it by the Treaty drafters in the CFSP.<sup>72</sup>

## 4. Conclusion

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<sup>68</sup> See also the European Parliament Rules of Procedure (January 2017), which *inter alia* allow for resolutions to be adopted on any activity falling within the sphere of the Union’s activities (Rule 133) and provide for the possibility to adopt a resolution after a debate on a statement made by the European Council, the Council of Ministers or the Commission before the Parliament (Rule 123(2)).

<sup>69</sup> Jančić (n 6); see also L Felu and F Serra, ‘The European Union as a “Normative Power” and the Normative Voice of the European Parliament’ in S Stavridis and D Irrera (eds), *The European Parliament and Its International Relations* (Routledge 2015) 22.

<sup>70</sup> Already fifteen years ago this was recognized by the Commission: ‘The European Parliament is active in tabling questions, holding debates, and passing resolutions on human rights issues. It undertakes regular missions to third countries. Through its inter-parliamentary delegations, it has a significant role to play in encouraging the development of democratic parliamentary institutions in third countries. It maintains regular contact with human rights organizations and human rights defenders’. See Commission, ‘The European Union’s role in promoting human rights and democratization in third countries’ (Communication) COM (2001) 252 final, 5; see also Jančić (n 6).

<sup>71</sup> Kleizen (n 5) 39.

<sup>72</sup> *Ibid.* See also B Crum, ‘Parliamentarisation of the CFSP through Information Institution-Making? The Fifth European Parliament and the EU High Representative’ (2006) 13 *J of European Public Policy* 386, 399.

This contribution aimed to assess the institutional and procedural role of the EP in the area of CFSP. The conclusion seems to be two-fold. On the one hand, the increasing formal influence of the EP we have witnessed with the most recent Treaty modifications is not mirrored by anything similar in the area of CFSP. There is no denying in the fact that the EP is far from being a co-decider in CFSP. On the other hand, and acknowledging the still special position of CFSP, the EP has found ways to increase its influence in other ways; occasionally assisted by interpretations by the Court of Justice which allow for a more general application of information rights. The latter – the Union-wide application of art 218(10) TFEU – cannot be overestimated and Passos even held that ‘This role of the Parliament during the negotiations (...) may, to a certain extent, be compared to its position in legislative procedures, where the Parliament is called upon to give consent (...)’.<sup>73</sup> The Parliament has furthermore made use of its budgetary powers, but has also been active in issuing its opinions through an extensive number of CFSP resolutions. Moreover, the IIAs as well as more informal arrangements such as the Declaration by the HR have made the somewhat abstract Treaty provisions much more concrete and allow the Parliament to claim concrete rights. This is particularly valuable in relation to the right to be informed during all stages on international negotiations, even when agreements are concluded in a CFSP context.

There can be no doubt, that the EP is a very active player in EU foreign policy<sup>74</sup> and that it seems to have stretched the borders of its competences to the full extent.<sup>75</sup> At the same time, the post-Lisbon legal regime (and its interpretations by the Court) seems to lead to a somewhat mixed evaluation of the powers of the Parliament in relation to CFSP. This has to do with the ambiguous position of the policy area within the EU’s constitutional framework. On the one hand, CFSP is increasingly ‘normalised’, which for instance lead to single CFSP legal bases to be used for agreements which also partly cover TFEU policies. On the other hand, this had not *per sé* improved the overall position of the EP as its role in CFSP is still far less than in other EU policy areas, despite the general application of some constitutional principles and procedural rules. In fact, the possibility to use CFSP legal basis for issues that go beyond CFSP proper and the impossibility to combine TEU and TFEU procedures may in the long run have a negative effect on the powers of the Parliament to scrutinise the EU’s external action.

What does this tell us about the democratic legitimacy of the CFSP? In their Introduction to this book, the Editors point out that in area such as CFSP:

the Council has remained as a relevant source of legitimacy and (...) the key decision-maker in foreign policy *strictu sensu* in the EU. However, *sensu lato*, the European Parliament has gained increasing powers that can even appear unparalleled to national or

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<sup>73</sup> Passos, ‘The External Powers of the European Parliament’ (n 6) 87.

<sup>74</sup> Similar conclusions can often be found in political science studies. See for instance Wisniewski (n 16) 100: ‘The European Parliament is increasingly recognized as an important policy actor by the other European institutions despite a lack of power, since parliamentary influence is accepted. This has translated into powers of the Parliament even further than the Treaties intended (...)’.

<sup>75</sup> Indeed, ‘stretched’ is the correct term as the competences of the EP in relation to CFSP were not substantively changed by the Treaty of Lisbon. Cf also Declaration no 14 annex to the Treaties: ‘The provisions concerning 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’.

federal democracies, where the executive traditionally had a primary role in the course of foreign affairs.

It is this latter point that should not be underestimated. Compared to national Parliaments the EP is far more active with respect to issues of foreign policy. Its contributions may be informal, and may take the form of for instance policy papers, but it is an active participant in all debates on the EU's foreign policy and may therefore very well be more influential in practice.<sup>76</sup> National parliaments continue to struggle with what has been termed an 'information asymmetry', resulting in the lack of expertise or access to sensitive information necessary for effective scrutiny of government.<sup>77</sup> As argued by Duff:

Events may move quickly, leaving parliaments able only to question their governments after actions have already been taken. (...) These problems are magnified in the case of CFSP/CSDP, where the urgency, opacity and secrecy of the 'complex bargaining games' involved in decision-making hinder the capacity of parliaments to control and oversee their governments' decisions at European level.<sup>78</sup>

Despite the continuing struggle for a better regime on access to information held by the Council and the Commission,<sup>79</sup> the EP remains close to the various policies that are initiated. Not only based on the expertise and the active involvement of the EP, but perhaps also because of the fact that the very idea of CFSP is that it is a policy that goes beyond the national interests, one may indeed argue that democratic control should primarily take place at EU level.<sup>80</sup> The continuing 'normalisation' of CFSP as well as the ongoing cooperation between the Institutions may further enhance the *de facto* control possibilities of the EP, which might, in time, lead to a further consolidation of and codification in legal Treaty provisions.

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<sup>76</sup> Cf Eckes (n 6) 919-920. Cf also Duff (n 4) 399, in her comparison of national parliaments in relation to the CFSP: 'For example, based on a more simplistic and absolute conception of "strength" as formal power and "scrutiny" as control, the Folketing clearly emerges as much stronger in CFSP scrutiny than the relatively powerless House of Lords. Yet although this concept of strength cannot be ignored altogether, within the context of the Lords' role in the British political system as an arena for debate and provider of expert advice to government, the House should arguably be seen as "stronger" than its lack of formal authority would suggest'.

<sup>77</sup> B Kesgin and J Kaarbo, 'When and How Parliaments Influence Foreign Policy: The Case of Turkey's Iraq Decision' (2010) 11 Intl Studies Perspectives 19-36.

<sup>78</sup> Cf Duff (n 4) 397. See also G Bono 'National Parliaments and EU External Military Operations: Is There Any Parliamentary Control?' (2005) 14 European Security 203-229.

<sup>79</sup> See the express exclusion of CFSP in the 2014 Agreement on Forwarding and Handling of Classified Information (n 50).

<sup>80</sup> Cf C Timmermans, 'Intégration européenne, démocratie et rôle de la Cour de justice: quelques remarques éclectiques' in A Tizzano and others (eds), *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015)* (Bruylant 2015), 633, 642-643.