

# The Future of EU Foreign, Security and Defence Policy: Assessing Legal Options for Improvement

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## ABSTRACT

The EU's Common Foreign, Security and Defence Policy found its way into the Treaty 30 years ago, but it is still confronted with 'specific rules and procedures' that seem to stand in the way of its effectiveness. Against the background of the Conference on the Future of Europe, this contribution aims to identify ways to improve the CFSP's functionality, on the basis of both existing scholarly work and an empirical assessment of the last 10 years of the Union's foreign policy. By focussing on legal rather than political solutions, it aims to contribute to ongoing debates on the effectiveness of CFSP. Making use of the gradually accepted 'normalisation' of CFSP, we have identified a number of legal tools that could be used to improve CFSP and to allow it to meet its Treaty brief to 'cover all areas of foreign policy and all questions relating to the Union's security'.

## 1. Introduction

On January 3, the year 2020 started by delivering its first blow to the present-day world order with the assassination by US forces of the Iranian (military) leader Qasem Soleimani.<sup>2</sup> And as if there was not enough tension in world politics, the second month of the year started with an unprecedented challenge for the European Union (EU) - the withdrawal of one of its Member States,<sup>3</sup> just to be shortly followed by the emergence of a global pandemic of a novel virus which is still on the loose. This year, as no other, exposed all the fragility of the current global order and threatened concepts as crucial as fundamental rights, democracy and the rule of law. With violent

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<sup>2</sup> K. Zraick, 'What to Know About the Death of Iranian General Suleimani' *The New York Times* (3 January 2020) <<https://www.nytimes.com/2020/01/03/world/middleeast/suleimani-dead.html>>.

<sup>3</sup> For more on Brexit in the context of international and EU law see J. S. Vara and R. A. Wessel (eds) *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2020); J. Larik, 'EU external relations law and Brexit: 'When Pluto was a planet' (2020) 4(1) *Europe and the World: A law review* 1; J. Larik, 'Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-)Negotiations' (2020) 114(3) *American Journal of International Law* 443.

protests taking place in States such as the US and Belarus, police violence,<sup>4</sup> struggles for identity,<sup>5</sup> a new war declared between Armenia and Azerbaijan,<sup>6</sup> terrorist attacks within Europe<sup>7</sup>, natural and man-made disasters<sup>8</sup> and assassination attempts against opposition leaders,<sup>9</sup> 2020, more than any other year, demonstrated the vital necessity for a global, confident and assuring voice of reason advocating democratic ideals on the international diplomatic arena. In spite of everyone's hopes that 2021 would be a kinder year, it started with political unrest, the storming of the Capitol building in Washington<sup>10</sup> and a second impeachment of Donald Trump,<sup>11</sup> topped up by unprecedented political action of the Big Tech companies bordering censorship<sup>12</sup> and the detention of the Russian opposition leader.<sup>13</sup> The need for strong global leadership was never as pressing as it is today, with the EU having to at least partially take responsibility for leading us out of the chaos which now seems to have overtaken every aspect of our lives. In the words of the Commission:

The question Europe faces is a simple one: whether Europeans will decide on their common destiny, or whether that destiny will be decided by others. Whether the European

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<sup>4</sup> T. Thomas, A. Gabbatt and C. Barr, 'Nearly 1,000 instances of police brutality recorded in US anti-racism protests' *The Guardian* (29 October 2020) <<https://www.theguardian.com/us-news/2020/oct/29/us-police-brutality-protest>>; A. Abdurasulov, 'Belarus protesters battered, bruised but defiant after 100 days' *BBC* (17 November 2020) <<https://www.bbc.com/news/world-europe-54961111>>; L. Yapparova, 'The angry and the powerless: How the opposition protests in Belarus became a guerilla movement' *Meduza* (Minsk, 5 January 2020) <<https://meduza.io/en/feature/2021/01/05/the-angry-and-the-powerless>>; D. Brooks, 'The Culture of Policing Is Broken' *The Atlantic* (16 June 2020) <<https://www.theatlantic.com/ideas/archive/2020/06/how-police-brutality-gets-made/613030/>>.

<sup>5</sup> A. Maqbool, 'Black Lives Matter: From social media post to global movement' *BBC* (9 July 2020) <<https://www.bbc.com/news/world-us-canada-53273381>>.

<sup>6</sup> J. Hincks, 'War Crimes Committed by Both Azerbaijan and Armenia in Nagorno Karabakh, Amnesty Says' *Time* (10 December 2020) <<https://time.com/5919813/nagorno-karabakh-war-crimes/>>.

<sup>7</sup> Joint statement by the EU home affairs ministers on the recent terrorist attacks in Europe, European Union (13 November 2020) <<https://www.consilium.europa.eu/en/press/press-releases/2020/11/13/joint-statement-by-the-eu-home-affairs-ministers-on-the-recent-terrorist-attacks-in-europe/>>.

<sup>8</sup> J. Guy, 'Nearly three billion animals killed or displaced by Australia's fires' *CNN* (Updated 28 July 2020) <<https://edition.cnn.com/2020/07/28/asia/australia-fires-wildlife-report-scli-intl-scn/>>; M. Bloch, S. Reinhard, L. Tompkins, B. Pietsch and G. McDonnell Nieto del Rio, 'Fire Map: California, Oregon and Washington' *The New York Times* (Updated 1 October 2020) <<https://www.nytimes.com/interactive/2020/us/fires-map-tracker.html>>; B. Hubbard and M. Abi-Habib, 'Deadly Explosions Shatter Beirut, Lebanon' *The New York Times* (4 August 2020, Updated 10 December 2020) <<https://www.nytimes.com/2020/08/04/world/middleeast/beirut-explosion-blast.html>>.

<sup>9</sup> L. Harding and A. Roth, 'A cup of tea, then screams of agony: how Alexei Navalny was left fighting for his life' *The Guardian* (Moscow, 20 August 2020) <<https://www.theguardian.com/world/2020/aug/20/a-cup-of-tea-then-screams-of-agony-how-alexei-navalny-was-left-fighting-for-his-life>>; 'FSB Team of Chemical Weapon Experts Implicated in Alexey Navalny Novichok Poisoning' (*Bellingcat*, 14 December 2020) <<https://www.bellingcat.com/news/uk-and-europe/2020/12/14/fsb-team-of-chemical-weapon-experts-implicated-in-alexey-navalny-novichok-poisoning/>> accessed 12 January 2020.

<sup>10</sup> Capitol riots: A visual guide to the storming of Congress' *BBC* (7 January 2021) <<https://www.bbc.com/news/world-us-canada-55575260>>.

<sup>11</sup> H. Cooper and A. Goldman, 'House, With Some G.O.P. Support, Votes to Impeach Trump a Historic Second Time' *The New York Times* (Last Updated 18 January 2021) <<https://www.nytimes.com/live/2021/01/13/us/trump-impeachment>>.

<sup>12</sup> P.-P. Bermingham, 'Merkel among EU leaders questioning Twitter's Trump ban' *Politico* (11 January 2021) <<https://www.politico.eu/article/angela-merkel-european-leaders-question-twitter-donald-trump-ban/>>.

<sup>13</sup> I. Khurshudyan and L. Morris, 'Russian opposition leader Alexei Navalny detained on his return to Moscow' *The Washington Post* (18 January 2020) <[https://www.washingtonpost.com/world/europe/navalny-russia-return-poisoning/2021/01/16/56aa8858-559f-11eb-acc5-92d2819a1ccb\\_story.html](https://www.washingtonpost.com/world/europe/navalny-russia-return-poisoning/2021/01/16/56aa8858-559f-11eb-acc5-92d2819a1ccb_story.html)>.

Union wants to be a pillar of the emerging multipolar global order or whether it will resign itself to being a pawn. The challenges that Europe faces today will not go away. Global competition will harden. The pace of technological change will increase. Geopolitical instability will grow. The effects of climate change will be felt. Demographic trends mean that migration to the EU will continue.<sup>14</sup>

Even though the Commission's perspective might be a bit too dramatic to the tastes of some, it is clear that in order to be properly addressed, such crises demand fast, coherent and effective action. While the EU's role in the world is defined by the external dimension of all of its policies, what nearly all of the above-mentioned situations have in common is that the realm through which the EU can tackle them is its Common Foreign and Security Policy (CFSP),<sup>15</sup> which, partially by virtue of its particular nature, is itself in need of reformation and improvement, the necessary changes being already long overdue. The latter is particularly true in view of the Union's ambitions under the heading of 'strategic autonomy', a notion that was first described in the 2016 EU global strategy to form the basis of 'Europe's ability to promote peace and security within and beyond its borders',<sup>16</sup> and that has further been developed in political science and European Studies literature.<sup>17</sup>

Against the background of the Conference on the Future of Europe,<sup>18</sup> this contribution aims to identify ways to improve the CFSP's functionality, on the basis of both existing scholarly work and an empirical assessment of the last 10 years of the Union's foreign policy. By focussing on legal rather than political solutions, it aims to contribute to ongoing debates on the effectiveness of CFSP. Keeping in mind the clear Treaty brief that CFSP is to 'cover all areas of foreign policy and all questions relating to the Union's security' (Article 24 TEU), the following section will first of all revisit the focus of the EU's Common Foreign and Security Policy (including the Common Security and Defence Policy; CSDP) since the Treaty of Lisbon (ToL). This is largely done on the basis of existing databases as well as new empirical work on the focus of various CFSP decisions of the past ten years. This will be followed by an assessment of the possible ways for improvement of the CFSP and CSDP, providing suggestions for treaty amendments, focusing on both the options offered by the current versions of the treaties such as the bridging clause(s) and the so-called sleeping beauties. Finally, some concluding remarks will be offered.

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<sup>14</sup> European Commission, 'A stronger Global Actor: A more efficient decision making for EU Common Foreign and Security Policy' (Communication to the European Council, the European Parliament and the Council) (Brussels, 12.9.2018) COM (2018) 647 final, 1.

<sup>15</sup> For convenience, the terms common foreign and security policy, foreign and security policy, foreign policy, as well as the abbreviation will further be used interchangeably.

<sup>16</sup> European External Actions Service (2016). Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy, p. 9 <<https://eeas.europa.eu>>.

<sup>17</sup> The notion is not further analysed in the present contribution, which has a more legal focus. See for an overview of the debate N. Helwig, 'EU Strategic Autonomy: A Reality Check for Europe's Global Agenda', FIIA Working Paper 119, October 2020 <[https://www.fiaa.fi/wp-content/uploads/2020/10/wp119\\_strategic\\_autonomy-2.pdf](https://www.fiaa.fi/wp-content/uploads/2020/10/wp119_strategic_autonomy-2.pdf)>.

<sup>18</sup> The Conference was formally launched on 'Europe Day', 9 May 2021.

## 2. CFSP and CSDP Decisions Since the Treaty of Lisbon

The main objective of the current section is to assess the current scope of CFSP, both on the basis of how the Treaty competences have been used over the past ten years and what the substantive (geographical and thematic) focus has been. In order to create a comprehensive picture of the adopted CFSP decisions, a database has been created, for which the authors manually collected Council decisions from 2010 to 2020, by making use of the EUR-Lex public resource.<sup>19</sup> Additionally, for a further separation of policies between CFSP and CSDP, the collected decisions were respectively divided in two distinct categories according to their legal bases and subject matter. The database takes note of the decision's legal bases, subjects of concern, geographical designation, as well as of the institutions involved in the decision-making process. Because of the vast amount of documents published by the Council, their manual collection can sometimes be problematic. The methodological challenges accompanying quantitative research in the field of EU foreign policy were also highlighted by a similar recent study on data transparency in the CFSP (some data from which will be also presented below).<sup>20</sup> The conclusions of that study mention, among other things, the lack of a systematic distinct categorisation CFSP output in public databases, which makes it difficult to systematically record and analyse the CFSP as an independent policy area. Moreover, the searching functions and filters on the EUR-Lex database are not always reliable in this regard, and elementary filter functions according to common categories such as the CFSP are not applied. This makes any collection of data somewhat troublesome even when using automatized tools. Therefore, the numbers presented below should be regarded merely as orders of magnitude as opposed to precise indicators. Nevertheless, they are representative enough to enable us to draw conclusions from the most prominent results and to facilitate an investigation into the evolution of CFSP and highlight trends and striking irregularities of the CFSP. In short, the present section aims to do some legal fact-finding to allow us to assess options for improvement later.

### 2.1 *The Geographical Scope of CFSP*

Generally, one must be aware that the decisions taken by the Council within the CFSP sphere, including CSDP, reflect worldwide events which the Union decided to react to. Focussing on the most frequent countries which were addressed by the Council in regard to CFSP decisions, one can note that Ukraine has been most frequently addressed, closely followed by Syria. As for the CSDP, the country with the largest number of decisions directed towards it was Somalia. The presence of the EU is explained by the launch of a capacity building mission (EUCAP Somalia) in

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<sup>19</sup> While our database has clear focus on the legal bases used, it is not the first database on CFSP decisions. See for an elaborate study on sanctions F. Giumelli, F. Hoffmann, A. Książczaková, 'The when, what, where and why of European Union sanctions' (2021) 30(1) *European Security* 1 (with the database being available here: <<https://www.giumelli.org/eu-sanctions-database>>); as well as the very useful study by A. Bendiek, M. Ålander, P. Bochtler, 'CFSP: The Capability-Expectation Gap Revisited: A Data-based Analysis', SWP Comment 2020/C58, December 2020 available at <<https://www.swp-berlin.org/en/publication/cfsp-the-capability-expectation-gap-revisited/>>.

<sup>20</sup> M. Ålander, A. Bendiek and P. Bochtler, 'A Critical Perspective on Data Transparency in the Common Foreign and Security Policy of the European Union', SWP Comment 2020/C58 WP Nr 2, November 2020.

2012 and the launch of Operation Atlanta (EU NAVFOR) in 2008.<sup>21</sup> The mandate of EUCAP Somalia was extended in 2018 with an attached budget of 66,1 million Euros, aiming at the enhancement of the maritime civilian law enforcement capacity in Somalia, including Somaliland.<sup>22</sup> Mali was the country which received the second most EU attention due to the European Union Capacity Building Mission in Mali (EUCAP SAHEL MALI) which became active in 2014 and aims at the training of local security forces in Mali.<sup>23</sup> The most frequently addressed region within the CFSP arena is the Middle East, while CSDP decisions were most often addressed to the Horn of Africa, which can be explained through the previously described Missions taking place in this region.

While this research reveals that some countries and regions have received abundant attention by the EU's foreign policy, it also shows that others have not. Thus, for instance, it may be striking that Syria has not been at the top of the CFSP priority list, despite the fact that the Council (and well as the other institutions) have been quite engaged with this region on the basis of Declarations. Generally, the focus of CFSP in terms of adopting formal decisions very much seems to depend on reaching consensus in the Council to adopt formal decisions, leaving matters to be dealt with in Declaration or just Council minutes often offers a way out. While we realise that our focus on 'formal' CFSP decisions may provide an incomplete picture of the Union's attention for certain regions, we argue that for the purpose of the present contribution – analysing possible legal shortcomings and providing possible solutions – this focus adds a new element to the existing literature.

## 2.2. *The Legal Bases of the CFSP*

For non-legal scholars, it is important to note that the chosen legal basis for a Decision to a large extent indicates the way in which the Union has made use of its competences under CFSP and that the use of any legal basis is subject to general principles and values of the EU, which also apply to the area of CFSP.<sup>24</sup> It is therefore the most exact way to assess the ways in which the Union has made use of its competences. Yet, we are not aware of recent legal studies having engaged in the same exercise. As per the most frequently used legal bases, it is worth noting that nearly half of all the CFSP decisions (except the ones touching upon CSDP which will be analysed separately further below) are based solely on Article 29 Treaty on European Union (TEU) (47%), which entails the Union's general competence to adopt foreign policy positions, but which in

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<sup>21</sup> Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Mission on Regional Maritime Capacity Building in the Horn of Africa (EUCAP NESTOR) [2012] OJ L187/40; Agreement between the European Union and the Somali Republic on the status of the European Union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta [2008] OJ L10/29.

<sup>22</sup> Council Decision (CFSP) 2018/1942 of 10 December 2018 extending and amending Decision 2012/389/CFSP on the European Union Capacity Building Mission in Somalia (EUCAP Somalia) [2018] OJ L324/56.

<sup>23</sup> The database, in the form of an excel file, is available upon request.

<sup>24</sup> Not only the principle of conferral (Art. 5(2) TEU) also applies to CFSP (thus limiting the Union's powers to what has been transferred to it in the Treaties), but *all* key principles and values that guide the functioning of the Union apply to the area of CFSP; See also R. A. Wessel, 'General Principles in EU Common Foreign and Security Policy', in V. Morena-Lax, P. Neuvonen, K. Ziegler (Eds.), *Research Handbook on General Principles of EU Law* (Edward Elgar Publishing, 2021, forthcoming).

practice is mostly used to adopt sanctions.<sup>25</sup> This indicates that sanctions are by far the most used instruments in the Union's foreign policy. The use Article 29 TEU is followed by Article 31(2) TEU (around 25% being based on this provision only), which allows the Union to adopt decisions to implement previously adopted decisions.<sup>26</sup> Again, most of these decisions amend existing sanction regimes by modifying their subjects or extending their validity.<sup>27</sup> Thus, overall sanctions decisions amount to more than 70% of all the decisions, which clearly shows the focus of the formal CFSP decisions. The next large category is constituted by the decisions that list among their legal bases Article 28,<sup>28</sup> which allows for operational activities of the Union in various foreign policy fields (around 13% - both alone and in combination with other articles). Article 33 TEU<sup>29</sup> (the appointment of Special Representatives) is used in around another 13% of decisions. Finally, Article 31(1) TEU<sup>30</sup> defines the decision-making procedure and is occasionally expressly referred to (in around 9% of the cases).

Despite being part of CFSP, the CSDP has its own legal bases and counting these provides us with an indication of the amount of decisions taken in this specific area. The most frequently

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<sup>25</sup> 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.'

<sup>26</sup> Article 31(2) TEU: 'By derogation from the provisions of paragraph 1, the Council shall act by qualified majority: — 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), — when adopting a decision defining a Union action or position, on a proposal which the High Representative of the 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, — when adopting any decision implementing a decision defining a Union action or position, — when appointing a special representative in accordance with Article 33.'

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.'

<sup>27</sup> Importantly, these articles are also used in combinations with other legal bases. In this instance, however, only the decisions where they are the only indicated legal basis were counted. However, if one would calculate the proportion by counting the times these articles were invoked as legal bases in comparison to the rest, approximately 38% out of the total of invoked legal bases (as opposed to the total number of decisions) would account for Article 29 TEU and 25% for Article 31(2) TEU.

<sup>28</sup> Article 28 TEU:

'(1) 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.'

(2) Decisions referred to in paragraph 1 shall commit the Member States in the positions they adopt and in the conduct of their activity. [...]

<sup>29</sup> Article 33 TEU: '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.'

<sup>30</sup> Article 31(1) TEU: 'Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded. 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.'

used provision is Article 43(2) TEU,<sup>31</sup> which allows the Union to adopt decisions related to, *inter alia*, ‘joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation’ as well as ‘the fight against terrorism’ (nearly 50% of the collected CSDP decisions). It is shortly followed by Article 42(4) TEU,<sup>32</sup> which merely lays down the decision-making procedure (in nearly 45% of the CSDP decisions). Article 38 TEU on the role of the Political and Security Committee (PSC) ranks third as a legal basis used (around 40.5%) and indicates the extent to which the PSC was asked to implement Council Decisions.<sup>33</sup>

For future legal studies on the use of legal bases, it is also important to note that, as our analysis reveals, the Council is not always consistent in indicating its legal bases in the areas of CFSP/CSDP, despite the key function of a legal basis in view of the Union’s competences. In fact, the picture of the last ten years is quite fragmented, and a clear legal reasoning why some legal bases are used (or combined) and others are not, is lacking. Article 38 TEU on the role of the PSC forms a good example, as in around 9.5% of the invoked legal bases it is indicated without reference to a specific paragraph, while in another 19.5% specific reference is made to its third paragraph (38(3) TEU). Nonetheless, this indeed underlines the importance of the PSC and its central role in the conduct of CSDP through the management of missions. In 29% of the collected decisions, Articles 42(4) TEU and 43(2) TEU (together covering the substantive and procedure aspects of CSDP) are used together in combination. Moreover, both articles are also used in another 15.5% of decisions, together with Article 28 (on operational CFSP action). Article 28 TEU, once again, both alone and with specific reference to its first paragraph, is used cumulatively in around 22% of the decisions, or as around 15% of the invoked legal bases. Article 37 TEU (on the conclusion of international agreements) is used in around 6% of cases while the use of the remaining available legal bases is barely significant in comparison to the ones already mentioned.

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<sup>31</sup> Article 43(2) TEU: ‘The Council shall adopt decisions relating to the tasks referred to in paragraph 1, defining their objectives and scope and the general conditions for their implementation. The High Representative of the Union for Foreign Affairs and Security Policy, acting under the authority of the Council and in close and constant contact with the Political and Security Committee, shall ensure coordination of the civilian and military aspects of such tasks.’

<sup>32</sup> Article 42(4) TEU: ‘Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State. The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate.’

<sup>33</sup> Article 38 TEU: ‘(1) Without prejudice to Article 240 of the Treaty on the Functioning of the European Union, a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or of the High Representative of the Union for Foreign Affairs and Security Policy or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative.

(2) Within the scope of this Chapter, the Political and Security Committee shall exercise, under the responsibility of the Council and of the High Representative, the political control and strategic direction of the crisis management operations referred to in Article 43.

(3) The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation.’ (Please note that the paragraphs of Article 38 are not numbered in the Treaty and have been numbered here by the authors to reflect the practice of the Council).

In addition, Articles such as 26,<sup>34</sup> 28, and 37 TEU (concerning the Union's competence to conclude international agreements in the area of CFSP), as well as Articles 217 and 218 Treaty on the Functioning of the European Union (TFEU) (on the competence and procedure of concluding international agreements) are used in both areas of foreign policy. This last development is rather interesting as the combination of TEU with TFEU legal bases underlines what has been termed the 'normalisation' of CFSP and opens the door to a wider external action in terms of the Union's approach to foreign policy,<sup>35</sup> and to an extended jurisdiction of the Court of Justice of the EU (CJEU) in reviewing the legality of CFSP acts, something that was earlier considered to be excluded,<sup>36</sup> which in turn raises the overall accountability in the area of CFSP.<sup>37</sup>

### 2.3 *The Subject Matters of the CFSP*

While the choice of legal basis to some extent reveals the focus of CFSP over the past the years, the limited number of available CFSP legal bases, as well as their sometime quite general nature, only partly allows us to map the subject matters on that basis. Therefore, to thematically assess the output of the CFSP/CSDP in terms of subject matters, it is useful to link our findings to another recent study on the EU's CFSP output, conducted by Annegret Bendiek, Minna Ålander and Paul Bochtler.<sup>38</sup> In contrast to the methodology followed for collecting data for the present paper, the authors of that study used automatised instruments to collect and scan Council decisions for approximatively the same period of time and independently of the authors of this article.<sup>39</sup> According to the so-called EUROVOC descriptors awarded to each decision in the EUR-Lex

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<sup>34</sup> Article 26 TEU: '(1) The European Council shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.

If international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union's policy in the face of such developments.

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

The Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union.

(3) The common foreign and security policy shall be put into effect by the High Representative and by the Member States, using national and Union resources.'

<sup>35</sup> R. A. Wessel, 'Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis', in C. Kilpatrick and J. Scott (eds) *Contemporary Challenges to EU Legality* (Collected Courses of the Academy of European Law) (Oxford University Press 2021) 71.

<sup>36</sup> Article 24 TEU: '(...) The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union'; For convenience, The Court of Justice of the European Union will be further referred to as 'CJEU', 'the Court of Justice', or just 'the Court'.

<sup>37</sup> For more on the combination of legal bases See section 3.2 of this paper on the conduct of CFSP through Non-CFSP instruments, as well as C. Hillion and R. A. Wessel, 'The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP', in S. Blockmans and P. Koutrakos (eds), *Research Handbook in EU Common Foreign and Security Policy* (Edward Elgar 2018) 65; P. Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 *International and Comparative Law Quarterly* 1; and G. Butler, 'Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law' (2018) 24 *The Columbia Journal of European Law* 637.

<sup>38</sup> A. Bendiek, M. Ålander and P. Bochtler, 'CFSP: The Capability-Expectation Gap Revisited' (n 19).

<sup>39</sup> Please note that nonetheless the period for which the Decisions were collected is shorter than the one used for the present paper. For more on the methodology see M. Ålander, A. Bendiek and P. Bochtler, 'A Critical Perspective on Data Transparency in the Common Foreign and Security Policy of the European Union' (n 20).



database, the authors of that study grouped the Council decisions taken between 2009 and 2020 into five major categories: sanctions, missions and operations, EU Special Representatives, arms control, and others. This is what their research yielded:

An analysis of the EUR-Lex database shows that between 2009 and 2020, the Council adopted 506 decisions on sanctions, 245 decisions on EU missions and operations, 123 decisions appointing special representatives and 86 decisions on arms control regimes. Another 94 decisions concerned institutional innovations such as the creation of agencies or other arrangements and agreements. In total, since 2009 the Council has adopted 1,045 politically binding but legally nonbinding decisions in the CFSP and 1,146 legislative acts in other policy areas.<sup>40</sup>

These findings confirm that sanctions are indeed the most frequently used instrument of EU foreign policy. This also implies that CFSP is largely characterised by ‘punative’ rather than by ‘constructive’ foreign policy decisions. They often constitute symbolic policy solutions rather than result-oriented action and may indicate a lack of thorough policy planning. Research by Giumelli, Hoffmann and Książczaková furthermore identified that the use of sanctions has even significantly increased since the Treaty of Maastricht. Moreover, ‘smart’ and ‘targeted’ sanctions, which are directed at private individuals rather than states as such, became over time the prevalent trend for the EU. Such measures mostly include travel bans and asset freezes. In addition, democracy promotion was identified as the most frequent reason for the imposition of sanctions, which is a rather pleasing detail, depending on their efficiency.<sup>41</sup>

Furthermore, by counting all CFSP *and* CSDP decisions together, the study by Ålander, Bendiek and Bochtler shows that the next big category, after sanctions, concerns EU missions and operations. The appointment of EU Special Representatives, according to Article 33, can also be found on our list of significantly frequently used instruments.

Overall, the conclusions drawn in that study resemble those presented in this article:

[...] EU Member States are possessively trying to protect their national competences and are not making any serious effort to overcome their lack of consensus at supranational level. Nor do the EU institutions agree on who should represent the EU externally and who should make it politically accountable internally.<sup>42</sup>

It is clear that the CFSP and the CSDP output ‘calls into question the special legal position of the CFSP within the EU’s Treaty structure.’<sup>43</sup> The authors also suggest that the CFSP lacks result-oriented policy, while manifesting a high quantitative output and point to the fact that the Organisation for Security and Cooperation in Europe (OSCE), with its clearly intergovernmental set-up, maintains a higher number of civilian operations than the EU, while also having adopted

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<sup>40</sup> A. Bendiek, M. Ålander and P. Bochtler, ‘CFSP: The Capability-Expectation Gap Revisited’ (n 19), 3.

<sup>41</sup> F. Giumelli, F. Hoffmann and A. Książczaková, ‘The when, what, where and why of European Union sanctions’ (n 19).

<sup>42</sup> *ibid.*, 2.

<sup>43</sup> *ibid.*, 4

less resolutions. Notably, the OSCE has 57 participating states, is active on three continents and encompasses a total population of over a billion people.<sup>44</sup>

### 3. Legal Tools to Improve the Functioning of the CFSP and CSDP

The rather limited focus of CFSP reveals that it does not ‘cover all areas of foreign policy and all questions relating to the Union’ security’, as it is supposed to as per Article 24 of the TEU, and is far from constituting a common defence by the ‘progressive framing’ of a common defence policy. In short, CFSP does not seem to live up to what it was intended to entail. The present section aims to analyse suggestions of legal tools that could possibly facilitate the process.

#### 3.1 *Flexible Cooperation*

A first possibility is to assess the options allowing groups of states not amounting to the total of EU members to participate in all parts of CFSP.<sup>45</sup> The EU Treaty offers some flexibility tools designed to facilitate policy implementation. In addition to the instruments that will be analysed more in detail in this section – enhanced cooperation and permanent structured cooperation (PESCO) – the TEU also envisages other flexibility tools such as delegating the implementation of CSDP tasks to groups of individual Member States.<sup>46</sup> In addition, the possibility of constructive abstentions, enshrined in Article 31(1) TEU and allowing the Member States to refuse to apply a certain decision (while still being under the obligation not to impede their implementation) is another important flexibility feature.<sup>47</sup> In the words of Blockmans: ‘the mechanism of constructive abstention aims at reconciling the position held by the majority of Member States with the reservations and concerns of some.’<sup>48</sup> If one third of the Member States comprising one third of the Union’s population, qualify such abstentions, a blocking minority is formed and hence the concerned decision cannot be adopted. Notably, such abstentions do not block the adoption of decisions unless the last condition is met, in light of which Cremona argues that: ‘The existence of this form of flexibility is in reality probably sufficient to prevent the type of decision-making

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<sup>44</sup> *ibid.*

<sup>45</sup> See more extensively R. A. Wessel, ‘The Participation of Members and Non-Members in EU Foreign, Security and Defence Policy’, in W. T. Douma, C. Eckes, P. Van Elsuwege, E. Kassoti, A. Ott, and R.A. Wessel (eds), *EU External Relations Law: European and Global Challenges* (The Hague: T.M.C. Asser Press 2021), 177.

<sup>46</sup> Articles 42(5) and 44 TEU.

<sup>47</sup> Article 31(1) second sub-paragraph provides that: ‘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.’

<sup>48</sup> S. Blockmans, ‘Differentiation in CFSP’, in S. Blockmans (ed), *Differentiated Integration in the EU. From the Inside Looking Out* (Brussels, Centre for European Policy Studies (CEPS)) 46, 49; See also C. Törő, ‘The Latest Example of Enhanced Cooperation in the Constitutional Treaty: The Benefits of Flexibility and Differentiation in European Security and Defence Policy Decisions and their Implementation’ (2005) 11(5) *European Law Journal*, 641.

impasse in the CFSP that enhanced cooperation seems designed to avoid'.<sup>49</sup> Yet, constructive abstentions have remained a rare phenomenon.<sup>50</sup>

### 3.1.1. Enhanced Cooperation

The major novelty brought by the ToL to the realm of enhanced cooperation within the CFSP framework was that it removed the previously present restriction to use it for the implementation of positions and operational actions.<sup>51</sup> Hence, with regard to foreign policy, flexible cooperation has indeed achieved flexibility, albeit that the procedure for authorising such action has been tightened. Nonetheless, as pointed out by Cremona: 'the change signals that enhanced cooperation could be used to establish a new line of policy in CFSP, not merely an implementation of already defined goals'.<sup>52</sup> The restrictions to the use of enhanced cooperation having military or defence implications, previously presented in the Treaties, was removed, meaning that this type of flexible cooperation can also freely operate within the CSDP paradigm.<sup>53</sup>

Notwithstanding the positive changes that occurred in relation to the actions the Union can now pursue by means of enhanced cooperation, a fundamental drawback is that to set it in motion the Council has to act by unanimity (unlike under the previous version of the Treaty which prescribed Qualified Majority Voting; QMV).<sup>54</sup> However, as soon as an agreement on the activation of enhanced cooperation has been reached, the Council in its new formation of participating states may deviate from the unanimity rules where they are normally prescribed by unanimously adopting a shift to QMV within the enhanced cooperation framework.<sup>55</sup> This means that for certain issues, QMV may be achieved by means of enhanced cooperation and that the latter can serve as a *passerelle* to qualified majority.<sup>56</sup> Considering that under such a scenario only the states that participate in the enhanced cooperation project would be bound by the decisions taken within its framework,<sup>57</sup> it might be reasonable to argue that a gradual shift to QMV would be easier to attain by making use of this *passerelle* as opposed to the regular one (see below),<sup>58</sup> since political consensus would be less troublesome to find. In other words, Member States are more likely to vote in favour of a decision activating enhanced cooperation in a certain field of the CFSP than to shift that entire field to QMV on the basis of Article 31(3) TEU.

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<sup>49</sup> M. Cremona, 'Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU' (2009) 21 EUI Working Papers LAW, 15.

<sup>50</sup> In fact, so far, constructive abstention has been used only once, by a Member State. See the abstention by Cyprus in 2008 when the Council adopted the Decision establishing the EULEX Kosovo mission; Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ 2008 L 42/92.

<sup>51</sup> Cremona, 'Enhanced Cooperation' (n 49), 2-9; See also H.-J. Blanke, 'Article 20. [Enhanced cooperation]', in H.-J. Blanke and S. Mangiameli (eds), *The Treaty on the European Union (TEU)* (Springer 2013) 787.

<sup>52</sup> Cremona, 'Enhanced Cooperation' (n 49), 9.

<sup>53</sup> *ibid.*

<sup>54</sup> Article 329 TEU.

<sup>55</sup> Article 333 TEU.

<sup>56</sup> Cremona, 'Enhanced Cooperation' (n 49), 10.

<sup>57</sup> H. Bribosia, 'Les Coopération Renforcées', in G. Amato, H. Bribosia and B. de Witte (eds), *Genèse et Destinée de la Constitution Européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* (Editions Bruylant 2007), 636.

<sup>58</sup> See section 3.3.2.

However, there are also drawbacks to this approach, since, even though some Member States may consider joining and supporting a policy initiative pushed through enhanced cooperation, they might not be willing to subject themselves to QMV, and therefore could refuse to participate at all.<sup>59</sup> In addition, there are other significant difficulties for states to join such an initiative at a later stage, as they have to accept the *acquis* of the enhanced cooperation, together with any conditions imposed on participating Member States.<sup>60</sup> Moreover, latecomers would still have to be unanimously admitted by the Council in its enhanced cooperation formation.<sup>61</sup>

This does not change the fact that enhanced cooperation still could prove itself as a powerful and effective tool to be used in advancing and facilitating foreign policy. This is mostly due to the provisions of the Treaty prohibiting the non-participating Member States from creating impediments to the implementation of acts adopted within the enhanced cooperation realm,<sup>62</sup> even though they are not legally bound by them.<sup>63</sup> Therefore, shifting certain areas of the CFSP to the enhanced cooperation framework, or even expanding the Union's foreign and security policy (in a way consistent with Articles 3 to 6 TFEU)<sup>64</sup> by starting an enhanced cooperation project, could prove itself to be highly beneficial if done in a subtle and gradual manner. Of course, it would not reach the same effects as regular Union action in the area of CFSP, specifically because the latter partially derives its power from consensus.<sup>65</sup>

### 3.1.2 Permanent Structured Cooperation in Defence Matters

In recent years there has been a desire by some Member States, such as Germany and France, for closer cooperation in the field of defence policy.<sup>66</sup> There is growing support for a 'multi-speed Europe' to strengthen the security and defence union, as diverging national interests have resulted in stalemates in further integration through CSDP. The EU's defence policy has always been characterized by variable geometry as European security is 'organized differently by region and function'.<sup>67</sup> One area where this lack of coherence can be seen is in the wording of the mutual defence clause introduced in the TEU (Article 42(7)). The drafters were confronted with the

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<sup>59</sup> Cremona, 'Enhanced Cooperation' (n 49), 10.

<sup>60</sup> *ibid.*

<sup>61</sup> Article 331(2) TFEU.

<sup>62</sup> Article 327 TFEU.

<sup>63</sup> Article 20(4) TEU.

<sup>64</sup> This is prescribed by 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.'

<sup>65</sup> Cremona, 'Enhanced Cooperation' (n 49), 15.

<sup>66</sup> A. Bendiek, 'A Paradigm Shift in the EU's Common Foreign and Security Policy: From Transformation to Resilience' (2017) SWP Research Paper 2017/RP

<<https://www.swp-berlin.org/en/publication/eus-common-foreign-and-security-policy/>> accessed 1 January 2020, 16.

<sup>67</sup> *ibid.*

demands of groups wanting to retain a stance of neutrality, those wanting to retain the focus of defence policy in NATO and those with an ambition for a 'European' defence force.<sup>68</sup>

After the introduction of the Lisbon Treaty, progress in CSDP continued to be cumbersome. While Article 42(3) TEU allows '[t]hose Member States which together establish multinational forces may also make them available to the common security and defence policy', flexible cooperation *within* the CSDP had not taken off for many more years to come, despite the fact that a permanent structure cooperation was legally possible. It was only on 13 November 2017 that 23 Member States notified the Council and the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP) about their intention to launch a permanent structure cooperation.<sup>69</sup> By the time PESCO was established in the end of 2017, an additional two Member States, bringing the total to 25 participating Member States, had agreed to additional binding commitments to "invest, plan, develop and operate defence capabilities [...] within the Union framework."<sup>70</sup> On the basis of its current implementation, PESCO is meant to be a new instrument intended to strengthen CSDP by providing an optional political framework for deepened defence cooperation.<sup>71</sup> Within the notification to the Council on the establishment of PESCO, the Member States clarified some of the procedural rules governing PESCO. Preparatory and permanent bodies that deal with CSDP, such as the Political and Security Committee and the European Union Military Committee, are able to meet in 'PESCO formats'.<sup>72</sup> Furthermore the EU Foreign and Defence ministers meet in a joint Foreign Affairs Council/Defence meeting to discuss the overall policy direction of PESCO and to monitor the compliance of Member States towards the additional commitments that have been made.<sup>73</sup> The mechanism to establish PESCO is remarkably progressive given that a qualified majority is sufficient in a field dominated by strong intergovernmental desires.<sup>74</sup> However, Members have been free to cooperate outside the EU framework in defence matters and the increased ease of implementation may very well be to try to harbour cooperation within the Union's institutional infrastructure for those sub-groups that desire more from the CSDP.<sup>75</sup> Furthermore, the use of PESCO is further incentivised through the European Defence Fund (EDF) as Member States receive additional financial incentives to actively participate in PESCO.<sup>76</sup> In contrast to the other flexible cooperation mechanism introduced by the Lisbon Treaty, Enhanced Cooperation in CFSP, PESCO is much easier to establish as it does

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<sup>68</sup> M. Charalampous, 'From a European to a Common Security and Defence Policy' (2010) IES Working Paper 5/2010 <<https://www.ies.be/node/1063>> accessed 2 January 2020, 21.

<sup>69</sup> Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy, European Union, 13 November 2017; S. Blokcmans, 'PESCO's Microcosm of Differentiated Integration', in W. T. Douma, C. Eckes, P. Van Elsuwege, E. Kassoti, A. Ott and R. A. Wessel (eds) *The Evolving Nature of EU External Relations Law* (2021), 163; S. Blockmans, 'The EU's Modular Approach to Defence Integration: An inclusive, ambitious and legally binding PESCO?' (2018) 55 *Common Market Law Review*, 1785; L. M. Wolfstädter and V. Kreiling, 'European Integration Via Flexible Tools: The Case of EPPO and PESCO' (2017) Jacques Delors Institut Policy Paper <<https://institutdelors.eu/wp-content/uploads/2018/01/europeanintegrationviaflexibilitytools-kreilingerwolfstdter-nov17.pdf>> accessed 1 January 2020, 7.

<sup>70</sup> EU, 'PESCO Member States Driven' (PESCO EUROPA, 19 November 2018) <<https://pesco.europa.eu/>> accessed 1 January 2020.

<sup>71</sup> See more extensively Wolfstädter and Kreiling (n 69), 7.

<sup>72</sup> Notification PESCO (n 69).

<sup>73</sup> *ibid.*

<sup>74</sup> Wolfstädter and Kreiling (n 69), 14.

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*, 9; S. Biscop, 'European Defence: Give PESCO a Chance' (2018) 60(3) *Survival* 161, 163.

not require a minimum number of participating states and the objectives being pursued do not need to be *ultima ratio*, a last resort in the face of unattainable Union action.<sup>77</sup> While the procedure and conditions to establish PESCO are surprisingly attainable, the scope of application is limited strictly to military capabilities<sup>78</sup> and civil or police capabilities fall outside the ambit.<sup>79</sup> Overall, however, it forms a good example of options offered by the Treaties to increase and speed-up cooperation in the area of CSDP.

### 3.2. *The Use of Non-CFSP Instruments to Conduct the CFSP*

Next to the flexibility options offered in relation to the CFSP provisions in Title V of the Treaty, one may look beyond these provisions to improve CFSP functionality. This section will address other external action instruments that were used for the conduct of CFSP, and therefore constitute good examples of how the foreign policy can be conducted while side-stepping certain obstacles that guide this policy area.

It has been widely acknowledged that CFSP and non-CFSP external competences are gradually merging into a single external action paradigm and that this distinction is fading away.<sup>80</sup> The frequent overlaps between different policies have long been the cause of confusion with regard to the correct choice of legal bases and the use of the appropriate procedure.<sup>81</sup> However, the possibilities provided by the examples listed below also offer a way-out of political stagnation in CFSP matters, by aligning the specific policy objectives with wider external action goals and achieving them together in single undertakings. Making conscious and systematic use of such instruments in the future could therefore achieve gradual progress in areas where typical CFSP procedures would yield only reactionary or declarative results, as opposed to consistent and preventive action.

To begin, we borrow Lonardo's approach and recall the objectives of the Union's external action contained in Article 21 TEU, which are relevant in light of the duty to choose a legal basis, based on 'the aim and the content' of the adopted measure. It is important to underline that no distinction is made between CFSP and other external action objectives, as they were all brought under the same provision by the Treaty of Lisbon.<sup>82</sup> While there has been extensive debate on whether they can be separated into CFSP and non-CFSP specific objectives, or at least whether any of them are exclusive for one of the two policy areas,<sup>83</sup> it was noted that most of the objectives

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<sup>77</sup> Article 46(2) TEU; Wolfstadter and Kreilinger (n 69), 11.

<sup>78</sup> Article 42(6) TEU.

<sup>79</sup> Wolfstadter and Kreilinger (n 69), 11.

<sup>80</sup> See for references to this debate R. A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) 5 *European Constitutional Law Review* 117; R. A. Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy' (2016) 1(2) *European Papers: A Journal on Law and Integration*, 439; and more recently: Wessel, 'Legality in EU Common Foreign and Security Policy' (n 35).

<sup>81</sup> I. Govaere, 'Multi-Faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon', in C. Barnard and O. Odudu (eds), *Cambridge Yearbook of European Legal* (Hart Publishing 2011), 87; G. Butler, 'Pinpointing the Appropriate Legal Basis for External Action' (2015) 6(2) *European Journal of Risk Regulation*, 323; Wessel, 'Legality in EU Common Foreign and Security Policy' (n 35).

<sup>82</sup> L. Lonardo, 'Common Foreign and Security Policy and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union' (2018) 14(3) *European Constitutional Law Review* 584, 586-588.

<sup>83</sup> *ibid*, 588-599.

were used both in CFSP and the rest of external action, and therefore that in practice they are mostly common (as also suggested by the name of the TEU section under which they are hosted – General Provisions for the Union’s External Action).<sup>84</sup>

In this regard, the overlaps between the CFSP and the Area of Freedom, Security and Justice (AFSJ) is the first issue to be addressed when aiming for solutions to enhance the Union’s foreign policy. The external action objective from which the Union derives its CFSP competences concerning terrorism is Article 21(2)(c) TEU,<sup>85</sup> which relates to the corresponding TEU legal bases. Nonetheless, terrorism can also be combatted by making use of the TFEU, and in particular Article 75.<sup>86</sup> And indeed, the correct choice of legal basis was frequently questionable, as for instance in the case of the conclusion of a Treaty with Tanzania,<sup>87</sup> which contained certain conditions on the transfer to Tanzania of suspected pirates captured by the EU.<sup>88</sup> Even though the Court of Justice pronounced its ruling with regard to the choice of legal basis in favour of the Council,<sup>89</sup> the Parliament’s argument pointing to the fact that such an agreement also touches upon issues such as judicial cooperation in criminal matters and police cooperation is still a very sound one. Therefore, since under EU law terrorism can be fought through both policies, the criteria for distinguishing them becomes hard to identify, which is why the nexus between the two has been subject to a lot of discussion.<sup>90</sup> In addition, migration, which was also addressed under both policy areas, only complicates the already blurred distinction.<sup>91</sup> Some suggestions with regard to a potential solution to the apparent clash between the CFSP and terrorism, as well as migration, encompass the existence of ‘internal’/‘external’ distinctions of the latter, which could help with

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<sup>84</sup> Note that the text previous to the Lisbon Treaty envisaged different objectives for CFSP and external action; Lonardo, ‘Common Foreign and Security Policy and the EU’s External Action Objectives’ (n 82), 588.

<sup>85</sup> Article 21(2)(c) TEU concerns preservation of peace, prevention of conflicts and strengthening of international security, ‘in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders’.

<sup>86</sup> Article 75 TFEU: ‘Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. [...]’

<sup>87</sup> Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania [2014] OJ L108/3.

<sup>88</sup> See Lonardo, ‘Common Foreign and Security Policy and the EU’s External Action Objectives’ (n 82), 597.

<sup>89</sup> Case C-263/14 *Parliament v Council* [2016] ECLI:EU:C:2016:435; Note that the Council Decision on the signing and conclusion of the agreement was annulled by the CJEU on the basis of Article 218(10) TFEU, see paras 68-85.

<sup>90</sup> See, to that extent: P. Koutrakos, ‘The Nexus between CFSP/CSDP and the Area of Freedom, Security and Justice’, in S. Blockmans and P. Koutrakos (eds), *Research Handbook on the EU’s Common Foreign and Security Policy* (Edward Elgar 2018), 296; P. Van Elsuwege, ‘The Interface Between the Area of Freedom, Security and Justice and the Common Foreign and Security Policy of the European Union: Legal Constraints to Political Objectives’, in R. L. Holzhaecker and P. Luif (eds), *Freedom, Security and Justice in the European Union* (Springer 2017), 119; P. Koutrakos, ‘Legal Basis and Delimitation of Competence in EU External Relations’, in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008), 171; M. Gatti, ‘Conflict of Legal Bases and the Internal-External Security Nexus: AFSJ versus CFSP’, in E. Neframi and M. Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos 2018), 89.

<sup>91</sup> On the nexus between the CFSP and migration law see G. Butler, ‘EU Foreign Policy and Other EU External Relations in Times of Crisis: Forcing the Law to Overlap?’, in E. Kuzelewska, A. Weatherburn and D. Kloza (eds), *Irregular Migration as a Challenge for Democracy* (Intersentia 2018), 51.

classifying a terrorism or migration related issue under either CFSP or AFSJ.<sup>92</sup> However, the Court did not explicitly endorse such reasoning and the institutional practice significantly deviates from this rationale.<sup>93</sup> In any event, as rightfully pointed out by Lonardo with regard to migration, it makes little difference to the people at sea under which legal basis they are intercepted:

The differences lie exclusively in the procedure for the adoption of the act and other legal technicalities. But the distinction between CFSP and the area of freedom, security and justice is barely identifiable and cannot be rationalised and defined by a sound legal principle. In particular, while the issue of boundaries between CFSP and other external action competences is a recurrent one, the conflation of CFSP and the area of freedom, security and justice is clearer.<sup>94</sup>

Furthermore, another example illustrating the gradual merger of the CFSP and the rest of external action, as well as the possibility to go beyond the CFSP legal bases mentioned earlier, are association agreements. For instance, the Association Agreement with Ukraine, concluded in 2014,<sup>95</sup> used economic integration to pursue political dialogue.<sup>96</sup> This agreement is based on Article 21(2)(e) TEU which was never used for purely CFSP acts, but was indeed used for the conclusion of this treaty. However, in this case it was used together with two CFSP legal bases, Articles 31 and 37 TEU, and therefore also reflects the dual nature of the association agreement with Ukraine. Among other objectives of the association is ‘to promote, preserve and strengthen peace and stability in the regional and international dimensions in accordance with the principles of the United Nations Charter’,<sup>97</sup> which is by all means attributable to the Union’s foreign and security policy. Considering this association agreement within the context of the conflict in Ukraine (which was the most addressed country in CFSP since the Treaty of Lisbon),<sup>98</sup> it becomes apparent that there is a nexus between the *sui generis* policy area and regular external action through economic integration, which in its turn can be further studied and exploited for a better functioning foreign policy.<sup>99</sup> Other elements of the connection between CFSP and economic integration/trade, concern trade in dual-use goods and procurement in the fields of security and defence,<sup>100</sup> and the European Defence Fund, meant to coordinate and increase national investment in defence research and improve interoperability between national armed forces by using the EU budget.<sup>101</sup>

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<sup>92</sup> Case C-130/10 *Parliament v Council*, Opinion of AG Bot [2012] ECLI:EU:C:2012:50, para 81; Case C-658/11 *Parliament v Council*, Opinion of AG Bot [2014] ECLI:EU:C:2014:41, para 114; Case C-263/14 *Parliament v Council*, Opinion of AG Kokott [2015] ECLI:EU:C:2015:729, para 27.

<sup>93</sup> Lonardo, ‘Common Foreign and Security Policy and the EU’s External Action Objectives’ (n 82), 598-599.

<sup>94</sup> *ibid.*

<sup>95</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3.

<sup>96</sup> Lonardo, ‘Common Foreign and Security Policy and the EU’s External Action Objectives’ (n 82), 601.

<sup>97</sup> Association Agreement between the EU and Ukraine (n 95) [2014], Article 1(2)(c).

<sup>98</sup> See section 2 and database.

<sup>99</sup> Lonardo, ‘Common Foreign and Security Policy and the EU’s External Action Objectives’ (n 82), 602.

<sup>100</sup> *ibid.*; See also A. Dashwood, ‘Dual-use Goods: (Mis)Understanding Werner and Leifer’, in D. Arnall et al (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008), 354.

<sup>101</sup> P. Haroche, ‘Supranationalism Strikes Back: a Neofunctionalist Account of the European Defence Fund’ (2019) *Journal of European Public Policy*, 853.



In addition, in some aspects, the CFSP is also closely linked to development cooperation, which is oriented towards the eradication of poverty and is ‘hosted by’ the TFEU.<sup>102</sup> Interestingly, the wording of Article 208(1) TFEU strongly resembles the wording of Article 21(2)(d) TEU.<sup>103</sup> Notably, Council decisions based solely on CFSP legal bases and stating, among others, economic objectives relating to growth and social cohesion, have been endorsed by the Court.<sup>104</sup> Moreover, development cooperation has been extensively addressed in the EU Security Strategy 2003,<sup>105</sup> as well as in the 2016 Global Strategy.<sup>106</sup> Another example of conducting CFSP through other means and instruments is the Alliance for the Sahel. The Strategy for Sahel, which was drafted by the European External Action Service (a body established pursuant to CFSP), links CFSP to other external objectives related to development and conflict resolution, politics, security, and the struggle against extremism.<sup>107</sup> Finally, as also noted by Lonardo, other examples can be found in the area of global climate control and energy policy. While the Paris Agreement is based on Article 192(1) TFEU, energy policy is also pursued by means of CFSP acts, as exemplified by the ‘nuclear deal’ with Iran.<sup>108</sup>

This way of reaching CFSP objectives through the instruments of the wider external action provides a different approach to foreign and security matters and broadens the options for the Union to further develop its foreign policy. As shown for instance by the example of the Association Agreement with Ukraine, it also engages EU’s strategic partners in pursuing CFSP objectives together with the Member States in a pro-active, rather than reactionary manner (the latter being the usual approach as it can be so far deduced from the previously presented data that shows that restrictive measures dominate the Union’s foreign policy).

Nonetheless, as it was already demonstrated, instruments that combine CFSP and non-CFSP legal bases fall under the scrutiny of the Court in what concerns the correct procedure of their adoption. Thus, it might also be possible that attempts to seek CFSP action through other means would be stroke down by the Court in case they lean towards CFSP more than towards other policy areas,<sup>109</sup> or in case there is a *lex specialis*<sup>110</sup> relationship between the special and ordinary provisions which would incline the Court to rule in favour of a CFSP legal basis (therefore implying the general requirement of unanimity). The CJEU has already emphasised that the combination of legal basis is not possible where the procedures they envisage differ,<sup>111</sup> which makes it impossible

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<sup>102</sup> See also M. Broberg, ‘EU Development Cooperation and the CFSP: Mutual Encroachment?’, in S. Blockmans and P. Koutrakos (eds), *Research Handbook on the EU’s Common Foreign and Security Policy* (Edward Elgar 2018), 254.

<sup>103</sup> Article 21(2)(d) TEU: ‘foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’ Article 208(1) TFEU: ‘Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty’.

<sup>104</sup> Lonardo, ‘Common Foreign and Security Policy and the EU’s External Action Objectives’ (n 82), 599-600.

<sup>105</sup> Note from the Secretary General/High Representative to the Council, ‘A secure Europe in a better world - European security strategy’ (Brussels, 12 December 2003).

<sup>106</sup> European Union ‘Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the European Union’s Foreign and Security Policy’ (2016).

<sup>107</sup> Lonardo, ‘Common Foreign and Security Policy and the EU’s External Action Objectives’ (n 82), 604.

<sup>108</sup> *ibid.*

<sup>109</sup> See Case C-244/17 *Commission v. Council* (Agreement with Kazakhstan) [2018] ECLI:EU:C:2018:662.

<sup>110</sup> For more on the *lex specialis* principle see Wessel, ‘Legality in Common Foreign and Security Policy’ (n 35), 86-87; and, more generally: A. Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018), 49: ‘(...) while under the “centre of gravity” theory two different provisions with two different aims are at stake; the *lex specialis derogat legi generali* principle concerns two different provisions, both of which have the same aim, but one being more specific than the other.’

<sup>111</sup> Case C-130/10 *Parliament v Council* [2012] ECLI:EU:C:2012:472, paras 44-45.

to combine CFSP and non-CFSP legal bases that contain conflicting voting rules, since unanimity is the rule of thumb in foreign and security policy.<sup>112</sup> However, combinations between the CFSP TEU legal bases with those relating to the adoption of international agreements contained in the TFEU have proven to be possible.

Furthermore, a Council Decision adopted within the framework of the Enhanced Partnership and Cooperation Agreement with Kazakhstan,<sup>113</sup> which also listed Articles 31(1) and 37 TEU (stating the voting procedure for CFSP acts), also fell under the scrutiny of the Court.<sup>114</sup> It reveals that CFSP elements can be part of international agreements (and allegedly other decisions) when the CFSP element is merely ‘incidental’ to the aim and content of the overall agreement.<sup>115</sup> The exclusion of the CFSP legal bases implies that the decision is not subject to the unanimity rule, implying that even CFSP action can sometime find its way around the specific rules and procedures, where it is merely complementary to other objectives. Moreover, in cases such as this, in the absence of a CFSP legal basis, the Court gains full jurisdiction over the contested acts and therefore may exercise the entirety of its powers.<sup>116</sup> This latter detail is important as it enables greater legality control by the Court and therefore increases overall accountability in CFSP matters, therefore at least partially addressing the legal vacuum in which the CFSP acts are adopted as well as providing a framework for an integrated decision-making.<sup>117</sup>

### 3.3 *Procedural and Institutional Adaptations*

Apart from the options offered above in terms of flexible integration and broadening the CFSP perspective, the function of CFSP might also be improved on the basis of a number of procedural and institutional adaptations or a better use of options already present in the legal regime governing CFSP. This section will re-assess these options.

#### 3.3.1 Changing the Voting Rules

To improve CFSP efficiency, the Commission has suggested a gradual shift from the unanimity rule to qualified majority voting.<sup>118</sup> Also in her first State of the Union speech, Commission President Ursula van Leyen proposed introducing QMV in decisions concerning human rights and sanctions and asked the new High Representative of the Union for Foreign Affairs and Security Policy Joseph Borrell to explore this idea,<sup>119</sup> which had already been introduced by her predecessor,

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<sup>112</sup> Interestingly enough, in practice in certain examples the legal bases even explicitly refer to contradictory voting rules. See Council Decision 2016/342/EU [2016] OJ L71/1; Council Decision 2014/295/EU [2014] OJ L 161/1. For more on the nature of such decisions, surprisingly classified as ‘EU’ as opposed to ‘CFSP’ decisions, see Wessel ‘Legality in Common Foreign and Security Policy’ (n 35), 94-95.

<sup>113</sup> Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part [2016] OJ L29/3; Council Decision (EU) 2017/477 [2017] OJ L73/15.

<sup>114</sup> Case C-244/17 *Commission v. Council* (Agreement with Kazakhstan) (n 109).

<sup>115</sup> *ibid*, paras 42-47.

<sup>116</sup> Wessel, ‘Legality in Common Foreign and Security Policy’ (n 35), 86.

<sup>117</sup> *ibid*, 92.

<sup>118</sup> Commission Communication (n 14).

<sup>119</sup> European Commission (2020) *State of the Union Address by President von der Leyen at the European Parliament Plenary*, Brussels 16 September 2016.

Jean-Claude Juncker in 2017. It was then echoed by the leaders of France and Germany and the European Parliament prepared a brief on the matter.<sup>120</sup> The issue of ‘QMV in CFSP’ is thus clearly on the agenda.

It is a misunderstanding that QMV is completely ruled out in the area of CFSP and it is important to list the already existing options in the current Treaties. Firstly, Article 31(2) TEU provides a list of issues on which the Council should decide by QMV, namely: the adoption of actions based on prior decisions of the European Council; ‘a Union action or position on a proposal which the High Representative of the 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’; the adoption of implementing decisions and the appointment of special representatives.

In the area of sanctions, Article 215(1) TFEU stipulates that the actual restrictive measures are adopted by QMV upon a joint proposal from the High Representative and the Commission, after the ‘political’ decision to adopt sanctions has been taken unanimously. And, the Council shall vote by even a ‘simple’ majority on ‘procedural questions’,<sup>121</sup> without, however, specifying what is to be considered a procedural issue, who would have to decide on whether an issue is indeed procedural, and whether any current questions subject to a unanimous vote in the Council could be ‘declared’ procedural and moved to QMV.<sup>122</sup>

As part of the compromise to introduce QMV in relation to certain issues, Article 31(2) TEU provides that ‘[i]f 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’, thus constituting an emergency brake designed to preserve the specific nature of the CFSP and to provide a comforting safeguard for the Member States who are keen on retaining their sovereignty in the area of foreign affairs.<sup>123</sup> In addition, the principle of sincere cooperation enshrined in Article 4(3) TEU and 24(3) TEU (regarding external action) continues to set certain limits to the Member States’ discretion.<sup>124</sup>

The Lisbon Treaty made limited progress in the realm of CSDP, as the use of qualified majority voting is explicitly prohibited when the decision has military or defence implications.<sup>125</sup> Furthermore, the extension of QMV to other aspects of CFSP through the *passerelle* clause laid out in Article 31(3) TEU is also excluded for decisions having military or defence implications.<sup>126</sup> As noted, an exception to this rule is the establishment of permanent structured cooperation, which according to Article 46(2) TEU shall be adopted by QMV. Furthermore, the Treaty goes further by explicitly providing no alternatives to unanimous decision-making in decisions concerning

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<sup>120</sup> European Parliament (2021) Qualified majority voting in foreign and security policy. Pros and Cons, Briefing, European Parliamentary Research Service.

<sup>121</sup> Article 31(5) TEU.

<sup>122</sup> For more details on procedural questions, see R. Böttner and R. A. Wessel, ‘Article 31 [Procedures for the Adoption of CFSP Decisions]’, in H.-J. Blanke and Stelio Mangiameli (eds), *The Treaty on the European Union (TEU)* (Springer 2013), 1051, 1072-1073.

<sup>123</sup> For more details on the ‘emergency brake’ see Böttner and Wessel, Article 31’ (n 122), 1065-1066. Notwithstanding the wide margin of appreciation, the Member States would benefit from when invoking this provision, it is worth noting that the Lisbon Treaty in fact raised the standards from ‘essential’ to ‘vital’ interests of national policy.

<sup>124</sup> *ibid.*

<sup>125</sup> Article 31(4) TEU.

<sup>126</sup> See section 3.3.2 of this article.

CSDP that do not have ‘military or defence implications’.<sup>127</sup> The Treaty text shows the drafters succumbing to the Member States’ desires of safeguarding sovereignty, by retaining veto rights, over increased efficiency in decision making.<sup>128</sup> Nevertheless, the Lisbon Treaty did introduce areas where QMV is used such as the establishment of PESCO. Some aspects of the European Defence Agency are also governed by QMV, and lastly, decisions concerning the establishment of the defence mission ‘start up’ fund.<sup>129</sup> As a whole, the decision-making structure remains largely intergovernmental in nature and thus prone to deadlocks when dealing with contentious issues, which are inevitable to occur given the political nature of defence policy.

For these reasons, the Commission emphasizes that the shift to qualified majority voting would enable the Union:

To act on the global scene on the basis of robust and consistent positions; to react with speed and efficiency to pressing foreign policy challenges, both where a new position needs to be established and in the implementation of an agreed strategy; and to strengthen the resilience of the EU by shielding Member States from targeted pressure by third countries that try to divide the EU.<sup>130</sup>

Additionally, the Commission calls for consistent action of the Council, which is in practice still acting mainly by consensus even where the Treaty prescribes QMV.<sup>131</sup> As demonstrated in section 2, implementing decisions based on Articles 29 and 31(2) TEU form a big part of the CFSP ‘pie’, and therefore require adoption by QMV. The same applies to decisions on the appointment of Special Representatives adopted on the basis of Article 33 TEU.<sup>132</sup>

Nonetheless, there are also certain concerns voiced by academics on the shift to QMV, mainly regarding the weight of the Union’s positions on certain issues.<sup>133</sup> For instance, it is argued that, by virtue of their nature, unanimous positions have greater impact on the international arena.<sup>134</sup> Moreover, in the context of a more extensive use of QMV, questions about the accountability of the EU were also raised in view of the relatively weak positions of the Court of Justice and the European Parliament in the realm of CFSP.<sup>135</sup> This is also relevant in light of the concepts of loyalty and compliance monitoring, since the Member States are able to pursue their own foreign policies while the CFSP framework ‘still lacks adequate mechanisms to guarantee observance.’<sup>136</sup> Indeed, it is hard to imagine a strong and credible foreign and security policy in the absence of any control from the side of the Union to prevent potential deviations from the agreed policy lines, for instance comparable to the infringement procedure to be launched by the

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<sup>127</sup> Article 42(4) TEU.

<sup>128</sup> Charalampous, ‘From a European to a Common Security and Defence Policy’ (n 68), 18.

<sup>129</sup> Article 46(2) TEU; Article 45(2) TEU; Article 41(3) TEU.

<sup>130</sup> Commission Communication (n 14), 3.

<sup>131</sup> Commission Communication (n 14), 11.

<sup>132</sup> S. Marquardt, ‘The institutional framework, legal instruments and decision-making procedures’, in S. Blockmans and P. Koutrakos (eds), *Research Handbook on the EU’s Common Foreign and Security Policy* (Edward Elgar 2018), 22, 30.

<sup>133</sup> See extensively: Bendick, ‘A Paradigm Shift in the EU’s Common Foreign and Security Policy’ (n 66), 6.

<sup>134</sup> Cremona, ‘Enhanced Cooperation’ (n 49), 15.

<sup>135</sup> ‘Editorial Comments: A stronger Common Foreign and Security Policy for a self-reliant Union?’ (2018) 55(6) *Common Market Law Review* 1675, 1684; Cremona, ‘Enhanced Cooperation’ (n 49), 15.

<sup>136</sup> Editorial Comments, *CMLRev* (n 135), 1684.

Commission according to Article 258 TFEU when a Member State fails to fulfil its obligations under the Treaty.<sup>137</sup> Notably, in spite of the Member States agreeing that the duty of sincere cooperation also applies to the CFSP,<sup>138</sup> such deviations already occurred at the UN in New York and its Human Rights Council in Geneva, where some Member States demonstrated ‘disloyal behaviour’ and prevented the Union from expressing a unified position.<sup>139</sup> The question remains, however, whether procedural changes sufficiently address underlying problems related to different views on for instance fundamental EU values, that are being challenged and ignored by a small group of Member States.<sup>140</sup>

### 3.3.2 The *Passerelle* Clauses in the TEU and their Application

Perhaps the most viable, feasible, and at the same time pragmatic solution which would go beyond pure incremental change would be, as also suggested by the Commission,<sup>141</sup> the activation of the Treaty’s bridging, or *passerelle*, clauses, contained in Article 31(3) TEU.<sup>142</sup> Although this provision was not yet used by the European Council, it provides a way to expand the list of the current four exceptions to the unanimity rule.<sup>143</sup> The Article stipulates that, acting unanimously, the European Council can adopt a decision prescribing that the Council shall act by a qualified majority. It is this bridging clause that was included in the Treaty specifically with the intention of providing an opportunity to gradually shift to QMV without having to initiate the Treaty’s amendment procedure. However, the *passerelle* clause also comes with its own drawbacks and obstacles.

First of all, the main question regarding the activation of Article 31(1) TEU is its relationship with the other bridging clause contained in the Treaty – Article 48(7) TEU.<sup>144</sup> The

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<sup>137</sup> Article 258 TFEU provides that: ‘If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.’

<sup>138</sup> Editorial Comments, *CMLRev* (n 135), 1684.

<sup>139</sup> Marquardt, ‘The institutional framework, legal instruments and decision-making procedures’ (n 132), 43.

<sup>140</sup> See K. Pomorska and R. A. Wessel, ‘Qualified Majority Voting in CFSP: A Solution to the Wrong Problem?’ (2021) *European Foreign Affairs Review* (forthcoming).

<sup>141</sup> Commission Communication (n 14).

<sup>142</sup> Article 31(3) TEU: ‘The European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2.’

<sup>143</sup> Böttner and Wessel, ‘Article 31’ (n 122), 1067.

<sup>144</sup> Article 48(7) TEU: ‘Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.’

latter provides a way of revising the Treaty more generally; however, as opposed to its analogue, it also confers certain powers to the European Parliament and the national parliaments in this process. In its first paragraph, by referring to the TFEU and Title V of the TEU (explicitly), Article 48(7) TEU prescribes the exact same procedure as Article 31(3) TEU. The second paragraph deals with the special versus ordinary legislative procedures and provides another *passerelle* for shifts from one to another. Nonetheless, the third and fourth paragraphs exclude the adoption of such decisions by the European Council in the event of objections from the national parliaments and require the consent of the EP before such a unanimous decision can be adopted.

Although some authors believe that Article 31(3) TEU is to be treated as *lex specialis* to Article 48(7) TEU,<sup>145</sup> the fact that the latter makes explicit reference to Title V of the TEU and that both articles belong to the same range of provisions serves as a powerful counter-argument.<sup>146</sup> It was also argued that the explicit reference to Title V was made to safeguard the ‘unity of the constitution’, as the list of Treaty revision procedures under Article 48(7) TEU would be incomplete without at least mentioning the CFSP-specific one.<sup>147</sup> However, in the authors’ opinion, the wording used in Article 48(7) TEU and requiring the participation of the EP and the national parliaments *in cases listed under its first and second paragraphs*, is a clear indicator that the two provisions are to be read together, even though it could severely harm a potential activation of the *passerelle* clause.

Of course, the safeguards designed to keep the treaty revision processes democratic can be compensated by the adoption of Member States laws prohibiting their executives from voting in favour of a decision to move to QMV without parliamentary consent. This was indeed the case with Germany and the UK and remains a viable solution.<sup>148</sup> It is also notable that no additional national laws need to be adopted in such a situation, the national parliament's approval being sufficient.<sup>149</sup>

Apart from these procedural notions, the more important question perhaps is for which substantive areas the *passerelle* clause could be activated on the short term. Three areas were mentioned by the Commission and indeed also make sense, given our analysis in the first part of this paper: sanctions, human rights related decisions (especially regarding the EU’s action at various international fora) and civilian missions.<sup>150</sup> As it was shown in section 2, sanctions are the most frequently used instrument in achieving the Union’s objectives, while consistent action on human rights issues relates to one of its fundamental values. As per the civilian missions, they are one of the most far-reaching tools of addressing crises available to the EU at the moment, while also providing for some kind of physical presence of the Union and therefore also for more

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<sup>145</sup> See to that extent: W. Wessels and F. Bopp, ‘The institutional architecture of CFSP after the Lisbon treaty – Constitutional breakthrough or challenges ahead?’ (2008) CEPS Challenge Research Paper No 10, 24; J. Wouters, D. Coppens and B. De Meester, ‘The European Union’s external relations after the Lisbon Treaty’, in S. Griller and J. Ziller (eds), *The Lisbon Treaty* (Springer 2008) 143, 163.

<sup>146</sup> Böttner and Wessel, ‘Article 31’ (n 122), 1068.

<sup>147</sup> R. Böttner, ‘The Treaty Amendment Procedures and the Relationship Between Article 31(3) and the General Bridging Clause of Article 48(7) TEU’ (2016) 12(3) *European Constitutional Law Review* 499, 510; On the Unity of the Constitution see H.-J. Blanke, ‘Article 1 TEU [Establishment and Functioning of the Union]’, in H.-J. Blanke and S. Mangiameli (eds), *The Treaty on European Union (TEU)* (Springer 2013) 45, 85-86.

<sup>148</sup> European Union Act 2011, s 6(1) and 7(3); German Federal Constitutional Court (Bundesverfassungsgericht), 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) paras 53 and 316-317.

<sup>149</sup> *ibid.*

<sup>150</sup> Commission Communication (n 14), Section 5.

effective and fast support to those in need, with as few intermediaries as possible. Additionally, the initiation of civilian missions by means of QMV would be substantially less troublesome in comparison to military missions, despite the sometimes unclear distinction between military and civilian missions. As our analysis revealed, all of the three types of decisions discussed above are frequently used to achieve those objective of Article 21 TEU that coincide with Article 2 TEU and the values on which the Union is founded, meaning that addressing them in the first instance would indeed be an attractive way to begin the gradual shift to QMV, while at the same time playing the role of a ‘test drive’ for the more reluctant Member States.

### 3.3.3 Institutional Adaptations and Treaty Modification

Some additional suggestions in literature concern an alteration of the institutional framework to incorporate more power to the Commission. As the HR functions within two roles, it has been suggested that future reforms remove the ‘duality’ of the High Representatives/Vice President of the Commission by integrating the office of the former with the office of the President of the Commission.<sup>151</sup> A similar direction was proposed by the former Commission President Jean-Claude Juncker by suggesting the merging the Commission and European Council Presidencies.<sup>152</sup>

Bendiek suggests that the integration of the office of the HR to the Commission structures would ‘comprise all CFSP agencies and all spheres of activity in foreign, security and defence policy.’<sup>153</sup> A similar proposal is put forth by Charalampous, as he highlights that the Commission, a supranational institution, would be ‘more willing to accelerate the integration process within CSDP’ compared to the Member States representatives promoting national interests at the Council.<sup>154</sup> While this may seem like a drastic alteration of the institutional framework, as it could also have consequences for a further extension of the jurisdiction of the CJEU, it would fit the process of the ‘normalisation’ of the CFSP.<sup>155</sup>

More drastically, making an end to the CFSP’s ‘special rules and procedures’ and its lonely position in the TEU rather than the TFEU would certainly remove from the equation 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. There are no signs, however, that the necessary consensus between Member States has already been reached on this matter.

## 4. Conclusion

The aim of this contribution was two-fold: 1. To assess the areas and themes that have been the topics of CFSP over the past ten years; and 2. To map legal tools to allow CFSP to meet its brief on the basis of Article 24(1) TEU and ‘cover all areas of foreign policy and all questions

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<sup>151</sup> Bendiek, ‘A Paradigm Shift in the EU’s Common Foreign and Security Policy’ (n 66), 6.

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.*

<sup>154</sup> Charalampous, ‘From a European to a Common Security and Defence Policy’ (n 68), 33.

<sup>155</sup> Bendiek, ‘A Paradigm Shift in the EU’s Common Foreign and Security Policy’ (n 66), 6.

relating to the Union's security' and act more efficiently. Indeed, on the basis of our empirical assessment it is easy to conclude that the focus of CFSP has not been on *all* areas of foreign policy but that it has mainly been used for *specific* thematic and geographical areas.

On the basis of existing studies, our assumption was that the 'underuse' of CFSP potential is largely due to a number of factors, including choices for 'specific rules and procedures' for CFSP that hamper the integration of this policy field in the overall external action of the CFSP. The special rules and procedures in particular include specific voting rules and a different role for the institutions compared to other areas of external relations. To overcome these differences and to make use of the gradually accepted 'normalisation' of CFSP, we have identified a number of legal tools that could be used to improve CFSP and to allow it to meet its Treaty brief. While some of these tools have been present and are simply under-used (such as the possibilities for flexible cooperation or a turn to more QMV in selected areas), other options require a treaty modification. As we have shown, the distinction between CFSP and non-CFSP policy areas has partly become artificial and the position of the CFSP rules in a different Treaty does not make any sense from a legal perspective. The Conference on the Future of Europe will not be able to fully integrate CFSP into the legal structure, but it could offer an opportunity to plan the next steps and to investigate CFSP areas that are ready to be dealt with on the basis of procedures that are closer to other EU external policies. 'Specific rules and procedures' can be maintained for the most sensitive policy areas, including CSDP, but the overall aim should be to take a next step in consolidating EU external action.

Finally, at the end of the day, all the internal challenges to the CFSP can be reduced to a single concept – that of sovereignty. It is this concept, and the Member States' general unwillingness to pool parts of it to allow the Union to more easily formulate its foreign and security policy,<sup>156</sup> that we must consider the greatest impediment to a 'even closer Union' in terms of foreign and security policy. The current geo-political situation as well as the launching of the Conference on the Future of Europe offers a momentum to reassess the by now largely outdated starting-points of CFSP and gradually make it more effective.

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<sup>156</sup> As a reminder, it is worth noting that CFSP is an EU rather than a Member State competence as is made clear throughout the Treaties (see for instance, Art. 25 TEU: 'The Union shall conduct the common foreign and security policy [...]'; as well as Art. 2(4) TFEU: 'The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.'