

Common Foreign, Security and Defence Policy

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Introduction

For decades the Common Foreign and Security Policy (CFSP) of the EU has been the ‘odd one out’. It emerged in an incremental, pragmatic fashion in the beginning of the 1970s when it became clear that a coordination of the different foreign policies of the Member States was helpful, and occasionally even necessary, for the European Community to pursue its goals. These days the CFSP objectives are an integral part of the overall objectives of the European Union and the policy area has developed from a purely intergovernmental form of cooperation in the days of the European Political Cooperation (EPC) to an area in which the Member States have increasingly accepted new forms of institutionalisation.¹

The integration of external policy goals is visible in Article 3(5) TEU: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

Yet, as laid down in Article 24(1) TEU, “The common foreign and security policy is subject to specific rules and procedures”. Indeed, in many aspects the nature of CFSP still differs from other ‘common’ policies, such as the Common Commercial policy or the Common Agricultural policy. Over the years, Member States have shown a willingness to cooperate, but remained reluctant to actually transfer competences.² This makes it difficult to establish the type of competence the EU has under CFSP. Article 2(4) TFEU merely states that “The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy [...]”. Whereas this provision indicates that CFSP moved beyond intergovernmentalism (as the competences as such is laid in the hand of the Union), the nature of the competence remains unclear. CFSP is not mentioned in Articles 3-6 TFEU under either of the categories: exclusive competences, shared competences or supporting, coordinating or supplementing competences. It would probably come closest to the shared competences:³ both the Union and the Member States have roles to play. Yet it remains questionable to which extent activities of the Union would pre-empt Member State action.

The different nature of CFSP is usually related to a number of elements that are lacking when compared to most other Union policy areas: the different roles of the European Commission and the European Parliament in the decision-making process, the impossibility of the CJEU to rule on most CFSP decisions and treaty provisions, the different effects of CFSP decisions in the domestic legal orders of the member States, and the different nature of the instruments themselves.⁴

Member States' Obligations under CFSP

The systematic cooperation referred to in the list of CFSP means in Article 25 TEU is to be established in accordance with Article 32, which contains the actual procedural obligations. In principle, the scope of issues to which the systematic cooperation applies is not subject to any limitation regarding time or space: "Member States shall inform and consult one another within the European Council and Council on any matter of foreign and security policy [...]". Nevertheless, Article 32 immediately fills this lacuna in adding the words "*of general interest*". The European Council has not provided a strict definition of 'general interest' in Article 32. This seriously limits the information and consultation obligation in the first part of this Article: on the one hand, Member States are obliged to inform and consult one another, whereas on the other hand they are given the individual discretion to decide whether or not a matter is of 'general interest'. The principle of conferral (Article 5 TEU), implies that whatever has not been attributed to the organisation remains with the Member States.

Nevertheless, it can be asserted that the Member States are indeed *obliged* to inform and consult one another. Through the information and consultation obligation the Member States ordered themselves to use it as one of the means to attain the CFSP objectives in Article 11. The procedures stipulated in Article 32 only reflect the methods by which the Member States implement CFSP. Moreover, as we have seen, the content of the norm does not provide any other conditions than that the issue should be of general interest.

Taking into account the nature of the information and consultation obligation, it is rather unfortunate that the Treaty does not further define the obligation. Yet, there are no reasons to assume that the notion of consultation as used in Article 32 deviates from these general definitions, which leads us to conclude that the EU Member States are to refrain from making national positions on CFSP issues of general interest public before they have discussed these positions in the framework of the CFSP cooperation.

Informing and consulting one another should take place 'within the European Council and the Council'. Keeping in mind the requirement of *systematic* cooperation, this should not be interpreted as only within those institutions. Cooperation within the preparatory organs (Political and Security Committee, COREPER, and working parties – *infra*), as well as bilateral and multilateral consultations are equally covered by this obligation. In fact, as we will see, it is in these bodies that the actual systematic cooperation takes place. A second reason not to limit the cooperation to meetings of the Member States in the Council, may be found in Article 34. According to this provision, Member States shall coordinate their action in international organisations and at international conferences as well. Even when not all Member States are represented in an international organisation or an international conference, the ones that do participate are to keep the absent states informed of any matter of common interest.

It has been asserted that over the years the CFSP cooperation at all levels has become more intense, automatic and systematic. The 'European reflex' has become part of the decision-making culture in national ministries; traditional national reservations ('*domaines réservés*') have decreased in number as well as in intensity; and new issues have become part of the CFSP agenda (like developments and actions in Africa). The flip-side, however, is that the larger Member States in particular tend to ignore the information and consultation procedures whenever sensitive policy issues are at stake. In cases like these they take individual positions and diplomatic initiatives or opt for cooperation in the framework of another international organisation. This paradoxical situation reveals that CFSP has become part of the day-to-day policy-making in the national ministries as well as in

Brussels, but that important or sensitive issues may also still be dealt with nationally or in other fora.

CFSP Decision-Making and the Role of the Institutions

The Institutions responsible for the CFSP do not differ from the ones in other policy areas. Indeed, the preamble of the TEU refers to a “single institutional framework” and Article 13 TEU on the Institutions does not exclude any policy area. Yet, the role of the Institutions is clearly different and a number of organs are specifically relevant for the CFSP.

The provision in Article 24 TEU that “the adoption of legislative acts shall be excluded”, implies that CFSP decisions are not adopted on the basis of the legislative procedure, which is, *inter alia*, characterised by a Commission initiative, co-decision by the European Parliament and qualified majority voting. As we will see, neither of these elements form part of CFSP decision-making.

The European Council

Apart from its general role described in Article 15 TEU, the European Council has a leading role in the formulation of the CFSP. According to Article 22 TEU “[...] the European Council shall identify the strategic interests and objectives of the Union”. It “[...] shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties.” Article 216 TFEU adds that “[t]he European Council shall identify the Union’s strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.” The competences of the European Council in implementing the CFSP are thus indirect: they make possible or facilitate the decision-making by the Council of Ministers. Its decisions form the basis for the CFSP decisions taken by the Council and the existence of Common Strategies may allow for different voting procedures in the Council.

The permanent President of the European Council was introduced by the Lisbon Treaty and “shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.” (Article 15(6) TEU). He may convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union’s policy if international developments so require. (Article 26(1) TEU).

The Council

The Council can be regarded as the main CFSP decision-making institution. Apart from the general rule in Article 26(2) TEU that “[t]he Council shall frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council”, more concrete provisions (Articles 28 and 29) stipulate that “[t]he Council shall adopt decisions”. Moreover, the Council decides on the voting procedures and it reviews the principles and objectives of the decisions in order to allow for possible national derogations. Usually CFSP decisions will be taken by the General Affairs Council, consisting of the Ministers for Foreign Affairs of the Member States.

Unanimity continues to form the basis for CFSP decisions, “except where the Treaties provide otherwise” (Article 24(1) TEU). In that respect it is interesting to point to the fact that apart from the previously existing possibilities for Qualified Majority Voting (QMV) under CFSP,⁵ it is now possible for the Council to adopt measures on this basis following a proposal submitted by the High Representative (Article 31(2) TEU). Such proposals should, however, follow a specific request by the European Council, in which, of course, Member States can foreclose the use of QMV. In addition QMV may be used for setting up, financing and administering a start-up fund to ensure rapid access to appropriations in the Union budget for urgent financing of CFSP initiatives (Article 41(3) TEU). This start-up fund may be used for crisis management initiatives as well, which would potentially speed up the financing process of operations.⁶ Overall, however, it is clear that any action on the part of the EU will in the end continue to depend on the consent of its Member States.

In most cases CFSP Decisions are adopted without any debate in the Council; they have been prepared by the Council’s subsidiary organs and a consensus has already been established between the representatives of the Ministers for Foreign Affairs. When decisions are taken by the General Affairs Council, the issues do not appear on the agenda out of the blue. In most cases the draft decisions have thus already followed a long path through the various subsidiary organs of the Council.

Some of the preparatory and implementing organs have a direct treaty basis, others are set up by the Council itself. According to Article 240 TFEU the Committee of Permanent Representatives of the Member States (COREPER) is responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council. Regardless of the fact that COREPER is nowhere explicitly mentioned in the CFSP provisions, its competences in this area are beyond any doubt, since Article 38 TEU provides that the Political and Security Committee shall act “without prejudice to Article 240 TFEU”.

Over the years, this Political and Security Committee (PSC) has developed into the key preparatory and implementing organ for the CFSP and CSDP.⁷ During the period of the European Political Cooperation (EPC), a ‘Political Committee’ was created.⁸ This committee consisted of the Political Directors of the national Foreign Ministries. The current PSC is a standing committee, composed of representatives from the Member States. It “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 .” (Article 38 TEU). The PSC is also a key actor in the Union’s security and defence policy (see below).

As in all other areas, CFSP decisions are prepared in working groups or working parties (composed of representatives of the Member States and the Commission). The preparatory bodies are installed by the Council⁹ and have an important function during the first phase of the decision-making process. According to Article 19 (3) of the Council’s Rules of Procedure, the main task of the working groups is to carry out certain preparatory work or studies defined in advance. These may include all possible ‘CFSP output’, ranging from *démarches* to decisions in the form of Joint Actions. The Secretariat prepares reports of the discussions of the working group meetings, which are circulated to all delegations through the Coreu network. On all CFSP matters the working groups report to the PSC.

*The High Representative of the Union for Foreign Affairs and Security Policy
and the Commission*

Unlike other Council configurations, in its configuration as ‘Foreign Affairs Council’ the Council is chaired not by Member State representatives, but by the High Representative (HR) (Article 18(3)

TEU). Indeed, the original key role of the Member States in CFSP is put into perspective on a number of occasions. Before Lisbon, most proposals in the area of CFSP came from Member States, with the Presidency having a particularly active role. Article 30(1) TEU lays down the new general rule that ‘Any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission’s support, may refer any question relating to the common foreign and security policy to the Council and may submit to it initiatives or proposals as appropriate.’ It is in particular this new role of the Commission that may trigger new possibilities for the EU in its external affairs. Whereas the Commission so far has largely refrained from making use of its competence to submit proposals on issues in the area of foreign, security or defence policy (Article 22 TEU), the creation of the competence to submit joint proposals with the HR may enhance its commitment to this area.

This is strengthened by the fact that the person holding the position of HR at the same time acts as a member (and even a vice-president) of the Commission (Article 17, paras 4 and 5). This combination of the functions of HR and Vice-President of the Commission is, without doubt, one of the key innovations of the Lisbon Treaty.¹⁰ The potential impact of this combination on the role of the EU in international affairs lies in the fact that there could be a more natural attuning of different external policies, in particular where borders between policies are fuzzy, such as in crisis management. At the same time, – as indicated above – the continued separation between CFSP and other Union issues may very well lead to a need for different legal bases for decisions, and hence for the use of distinct CFSP and other Union instruments. This holds true not only for the outcome of the decision-making process, but also for the process itself, in which sincere cooperation between the Council and the Commission, supported by the HR/VP and the new and hybrid European External Action Service (EEAS),¹¹ will remain of crucial importance.

Indeed, a successful CFSP depends on successful leadership. The position of the High Representative has clearly been strengthened by the last treaty modification. The name change reflects the fact that it has become clear that the HR indeed represents the Union and not the (collective) Member States. The HR’s competences are clearly laid down in the EU Treaty and form part of the institutional framework. Although the term ‘Foreign Minister’, which was used in the Constitutional Treaty, has been abandoned, the new provisions make clear that the HR will indeed be the prime representative of the Union in international affairs. Even the President of the European Council (note: not the European *Union*) exercises that position’s external competences “without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy” (Article 15, para 6(d)). The HR is appointed by the European Council (with the agreement of the President of the Commission) by QMV. This again underlines the HR’s role as a person who can act on behalf of the Union and who is perhaps competent to act even in the absence of a full consensus among the Member States. The HR is to ‘conduct’ the Union’s foreign, security and defence policy, contributing proposals to the development of that policy, and presiding over the Foreign Affairs Council (Article 18 TEU). In addition, the HR’s de facto membership of the European Council is codified in Article 15 TEU (although strictly speaking it is stated that the HR only ‘takes part in the work’ of the European Council). The HR is to assist the Council and the Commission in ensuring consistency between the different areas of the Union’s external action (Article 21 TEU), and together with the Council, ensures compliance by the Member States with their CFSP obligations (Article 24(3) TEU). All in all, the position of HR has been upgraded to allow for stronger and more independent development and implementation of the Union’s foreign, security and defence policy, which—potentially—allows for a more coherent and more effective role for the EU in the world.

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

Article 36 TEU provides:

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

Special representatives may be involved in briefing the European Parliament.

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

Here too, the differences with regard to most other Union policy areas are obvious. The main difference lies in the fact that with regard to CFSP Parliamentary influence is not directed towards a concrete decision (as is the case in other procedures), but only towards “the main aspects and the basic choices” of CFSP. Moreover, it is not the institution which actually takes the decision that is ordered to consult the EP, but the High Representative. The formal influence of the EP is therefore limited to the general policy lines and does not include influence on the actual decisions which are their result. The obligation of the Commission to regularly inform the EP is of course put into perspective when the modest involvement of the Commission in CFSP is taken into consideration.

The Court of Justice of the European Union

Limited parliamentary control may to some extent be compensated by judicial control. With respect to CFSP, however, the powers of the Court of Justice are largely excluded by the treaty provisions. Obviously some Member States argued that they better be safe than sorry, which resulted in a denial of the Courts competences in this area in both Treaties. Article 24 (1) TEU provides:

“[...] 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. [...]”

And, indeed, Article 275 TFEU states:

“The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

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

This is not to say that the CFSP provisions are not at all relevant for the European Court of Justice.¹² The treaty provisions indicate a role for the Court in relation to Article 40 TEU. As indicated before, this provisions calls for a balanced choice for either a CFSP or another legal basis of decisions. Conflicts on this issue can be brought before the Court, and the predecessor of Article 40 (Article 47)

has indeed been used by the Court.¹³ These observations underline that the Court of Justice is the ultimate arbiter to decide where the line of demarcation between the Union's issue-areas lies.

Apart from Article 40 situations and general constitutional issues, such as the access to documents, the treaty now provides for an additional situation in which the Court enjoys jurisdiction in relation to CFSP. The Court is competent to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal person. This is the result of the proliferation of sanctions targeted at individuals in the (global) fight against terrorism. The implication is that, even if the restrictive measures are only laid down in CFSP measures,¹⁴ the Court has jurisdiction once the plaintiff is directly and individually concerned.

While recent case law indicates that the Court of Justice is increasingly seen as the Court of the European Union, it remains clear that the current regime regarding legal protection reveals a number of shortcomings. The most obvious lack of judicial control is apparent when competences and decision-making procedures *within* the CFSP legal order are at stake. In that case, there are no possibilities for the Court to scrutinise either the decision-making procedures or the legal basis chosen for a CFSP decision. This means, for instance, that neither the Commission, nor the European Parliament can commence a procedure before the Court in cases where the Council has ignored their rights and competences in CFSP decision-making procedures in a situation where CFSP as a legal basis is not disputed. As far as the legal basis for decisions is concerned, there are no possibilities for the institutions or the Member States to request the opinion of the Court. It is important to note that this brings about a situation in which the interpretation and implementation of the CFSP provisions (including the procedures to be followed) is left entirely to the Council. Keeping in mind their preference for 'intergovernmental' cooperation where CFSP is concerned, it may be understandable that Member States at the time of the negotiations had the strong desire to prevent a body of 'CFSP law' coming into being by way of judicial activism on the part of the European Court of Justice, but it is less understandable that they were also reluctant to allow for judicial control of the *procedural* arrangements they explicitly agreed upon (although it is acknowledged that it may be difficult to unlink procedures and content).

The CFSP Instruments

Article 26(2) TEU entails a general competence for the Council to "frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council." A combination of this provision and the more specific legal bases allows for the Council to adopt different CFSP legal and political instruments. One political instrument is the Declaration. Declarations are usually issued by the High Representative on behalf of the European Union and may concern all areas of CFSP where a political statement is needed towards third states.

On the basis of Article 25 TEU, "The Union shall conduct the common foreign and security policy by:

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

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

The *general guidelines* are adopted by the European Council to lay down the strategies of the Union in relation to a particular third state, region or theme (Article 26(1) TEU). On the basis of the same provisions Decisions may also be adopted by the European Council,¹⁵ but in relation to CFSP issues these usually take the form of ‘Conclusions’.

Informal instruments

Although they lack a specific legal basis, the Council confirmed that the political impact of Declarations may go beyond that of formal decisions. The difference with some generally phrased decisions is not always easy to establish. On the other hand, although Declarations may be used for policy orientations *vis-à-vis* a third state, they lack an operational framework, which ultimately calls for a formal legal act to implement that policy.

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

Dialogue meetings can take place at different levels. The highest level is that of the High Representative or the Presidency (together with the President of the Commission). Lower levels are the ministerial level, the level of political directors, the senior official or expert level and the parliamentary level. Due to agenda difficulties there is a growing tendency to send lower deputies to dialogue meetings. Thus the ministers often send junior ministers, and political directors increasingly send deputy political directors or even more junior officials.

Legal acts

CFSP legal acts cannot be adopted in the form of Regulations or Directives, but only as ‘Decisions’. This is again a striking difference compared to other Union policy areas. At the same time, the CFSP ‘Decisions’ are not to be equated with the ‘Decisions’ in Article 288 TFEU. Although they are qualified as ‘legal acts’ (or ‘actes juridiques’ in for instance the CFSP Annual Reports) they have not been adopted on the basis of the legislative procedure. Article 25 TEU makes a distinction between decisions defining: (i) actions to be undertaken by the Union; and (ii) positions to be taken by the Union. Hence, both actions and positions can be laid down in the form of a CFSP Decision. At the same time Decisions can be used for “(iii) arrangements for the implementation of the decisions referred to in points (i) and (ii)”. Again this follows the practice that all implementing, modifying or repealing decisions take the shape of a CFSP Decision.

When we take a first look at the contents of CFSP Decisions, the main objectives seem to be ‘political’ (reinforcing democracy and respect for human rights) and ‘diplomatic’ (preventing and solving conflicts, coordinating emergency situations). In addition ‘economic’ objectives (support of economic reforms, regional development) and ‘legal’ objectives (supporting the development of the rule of law and good governance) can be discovered.

These established characteristics of the CFSP Decisions certainly clarify its nature to some extent. The question, however, is whether an analysis of the *procedure* to adopt Joint Actions may shed some additional light on the nature of the *instrument*.

From the outset, the binding nature of CFSP Decisions has puzzled academics and practitioners alike. The main reason would be the very limited role of the CJEU in relation to adopted

CFSP Decisions. Yet – and apart from the indeed limited legal supervision – the obligatory force of CFSP Decisions can clearly be derived from Article 28(2) TEU: “Decisions referred to in paragraph 1 shall commit the Member States in the positions they adopt and in the conduct of their activity.” Hence, CFSP Decisions Actions, once adopted, limit the freedom of Member States in their individual policies. Member states are not allowed to adopt positions or otherwise to act contrary to the Decisions. They have committed themselves to adapting their national policies to the agreed Decisions. It is tempting to make comparisons with EU Regulations, which also demand the unconditional obedience of Member States once they are adopted. But, the Treaty text alone does not support reading the CFSP Decisions along the same lines as the instruments used in Article 288 TFEU– in particular where the addressees of the obligations or the direct applicability are concerned. A comparison with the legal instrument of ‘Directives’ equally reveals glaring differences, for example regarding the implementation period of Directives.

The nature of Article 29 Decisions as concrete norms of conduct demanding a certain unconditional behaviour from the Member States, is underlined by the strict ways in which exceptions are allowed. A first possibility to depart from adopted Joint Actions is offered by Article 28(1), which is similar to, but at the same time clearly departs from, the *rebus sic stantibus* rule as presented in Article 62 of the Vienna Convention on the Law of Treaties.¹⁶ Article 28(1) provides that even if the original circumstances constitute an essential basis of the consent of the parties to be bound, or the effect of the change is radically to transform the extent of obligations still to be performed, Member States may not invoke the change in circumstances as a ground for not living up to the particular Decision. In that sense the CFSP provision cannot be regarded as a *clausula rebus sic stantibus*. Instead, it is provided that: “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.” Hence, even a change in circumstances may not be invoked by the Member State as a reason to neglect the adopted Decision. It is up to the Council to decide on possible modifications. Pending the decision of the Council, no deviations from the Decision are allowed.

The idea that CFSDP Decisions, which are adopted by the Council, can only be modified or terminated by that institution, is furthermore emphasised by the subsequent paragraphs of Article 28. Paragraph 3 reveals the rule that: “Whenever there is any plan to adopt a national position or take national action pursuant to a decision as referred to in paragraph 1, information shall be provided by the Member State concerned in time to allow, if necessary, for prior consultations within the Council. The obligation to provide prior information shall not apply to measures which are merely a national transposition of Council decisions”.

The *rationale* behind this provision is obvious: it creates a procedure to identify potential conflicting national policies at an early stage. The procedure is in the interest of the Member States themselves; it prevents the adoption of national policies which, because of a conflict with a CFSP Decision, would run the risk of being in violation of Article 28 (2) TEU (“Decisions [...] shall commit the Member States in the positions they adopt and in the conduct of their activity.”).

Member states are not obliged to refer national implementation measures to the Council. On the other hand, when they have major difficulties in implementing a CFSP Decision, paragraph 5 stipulates that these should be referred to the Council, which shall discuss them and seek appropriate solutions. The inviolability of adopted Joint Actions is underlined by the rule, formulated in the last sentence of paragraph 5, that “[s]uch solutions shall not run counter to the objectives of the decision [...] or impair its effectiveness”. While the wording of paragraph 5 is in general quite clear, the question emerges why this procedure is related to ‘major’ difficulties only. What if a Member State encounters problems with the implementation of a minor part of the Decision only? Obviously, there would be no obligation to refer the case to the Council. On the other hand, we have seen that a

Decision commits the Member States; there is no ground for reading paragraph 2 as “Decisions Actions commit the Member States *to the largest possible extent*”. This, together with the loyalty obligation discussed above, leads to the conclusion that the discretion offered to the Member States to decide whether or not their implementation problems need to be brought to the attention of the Council, is limited. In case of any controversies concerning this issue, it seems to be up to the Council, to seek an appropriate solution.

Does it follow from the fact that CFSP Decisions are binding that Member States may *never* avoid the obligations laid down in the Decision in question? The CFSP provisions in fact include one quite explicit exception (Article 28 (4)): “In cases of imperative need arising from changes in the situation and failing a review of the Council decision as referred to in paragraph 1, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of that decision.” In this case “[t]he Member State concerned shall inform the Council immediately of any such measures”. While this provision again comes close to the *rebus sic stantibus*-rule in Article 62 of the Vienna Convention on the law of treaties, the criteria to be met are strict: 1 there must be a case of *imperative need*; 2 the situation must have been changed; 3 the Council has not (yet) come up with a decision to solve the matter; 4 measures will have to be *necessary*; and 5 must be taken as a *matter of urgency*; 6 the general objectives of the Decision should be taken into consideration; and 7 the Council shall be immediately informed.

Common Security and Defence Policy

The place of CSDP in the Treaties

The global ambitions of the EU are not limited to foreign policy, but include a clear security and defence dimension.¹⁷ The ‘Provisions on the Common Security and Defence Policy’ (CSDP) are laid down in Section 2 of Chapter 2 TEU called ‘Specific Provisions on the Common, Foreign and Security Policy’. Indeed, Article 42(1) provides that “The common security and defence policy shall be an integral part of the common foreign and security policy”. Since both CFSP and CSDP deal with ‘security’ and that concept is not defined by the treaty, it has always been unclear where to draw the line. In the 1992 Maastricht Treaty objectives it was implied that there is a difference between the security of the Union and the security of the Member States, since the objective originally read “to strengthen the security of the Union and its Member States in all ways”. Thus, the objective was not only aimed at strengthening the security of the Union, but also at the security of individual Member States. Nevertheless, the apparent confusion raised by this distinction must have been the reason to delete that reference. These days, the objectives in Article 21 (2) TEU simply state that the Union shall “[...] safeguard its values, fundamental interests, security, independence and integrity”.

What is meant by ‘security’? The Treaty provisions do not provide reasons to limit this concept to military security. Obviously different dimensions of security are acknowledged, including, for instance, environmental and economic security, international crime and terrorism. These aspects of security were originally mentioned by the European Council in Lisbon (1992) as well.¹⁸ It may be argued that it is exactly these non-military or at least *internal* dimensions of security that are intended in this objective since another objective explicitly deals with the international dimensions: to “preserve peace, prevent conflicts and strengthen international security.”¹⁹

Keeping in mind the assertion of Robert Schuman as reflected in his Declaration of May 9, 1950, that the creation of a High Authority would “make it plain that any war between France and the Federal Republic of Germany becomes, not merely unthinkable, but materially impossible”, a role for the Union as an internal stabiliser should not be ruled out as well. In this interpretation ‘security’

should at least also be seen as meaning ‘internal security’. Since the first drafts of the TEU the objectives included a reference to the eventual framing of a defence policy, which strengthens the idea that the security concept is also directed at security between the Member States. After all, this security would be ultimately guaranteed when a common defence policy would exist. In this context it can be noted that the current Treaty unconditionally confirms that “The Union’s competence in matters of common foreign and security policy shall cover [...] all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.” (Article 24 (1) TEU).

Although all concepts are not defined by the treaties, practice reveals that CFSP would be linked more to ‘Foreign Affairs’, whereas CSDP would be the responsibility of the Defence Ministries. This would also draw a relative clear line of division between ‘military security’ (CSDP) and other forms of security (CFSP). However, the different provisions on security and defence policy are far from clear. Obviously, they can again be seen as compromises between states in favour of more integration in this area and states that are afraid of losing control.

The Specific CSDP Provisions

As CSDP can be seen as forming part of CFSP, the decision-making takes place along similar lines. Decisions are taken by the Council. Art. 42(4) TEU provides:

“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.”

The ‘external’ nature of this policy is underlined by the first provision in this section, Art. 42 (1):

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

Indeed, “the Union may use them on missions outside the Union”. CSDP is thus intended to allow the Union to play its role as a regional and global security actor. This is underlined by Art. 43 (1), which lays down the other key provision:

“The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.”

The references to ‘joint disarmament operations’, ‘military advice and assistance tasks’, ‘post-conflict stabilisation’ and ‘the fight against terrorism’ in Article 43 (1) were introduced by the Lisbon Treaty and allow the Union to further develop its security and defence policy.

Crisis management may also be needed in relation to an attack on the Union itself. However, with regard to the ‘defence’ part of CSDP, the Treaty remains ambiguous: “The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides.” (Art. 42 (2) TEU). Despite the careful wording of this provision in line with earlier versions, the Treaty does offer reasons to conclude that something has changed. First of all – and despite the claim that a ‘common defence’ is not yet included in CSDP – Article 42 (7) provides the following:

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

The collective defence obligation does not really differ from Article 5 of the NATO Treaty or Article V of the WEU Treaty.²⁰ What is different, however, is that both NATO and the WEU started their life as collective defence organizations and only started to get engaged in other security operations later. The EU seems to follow the reverse path, by concentrating on external crisis management before establishing a mechanism to defend its own Member States.

Nevertheless, the feeling that something similar to a collective defence obligation has been created (although somewhat hidden in par. 7 of Art. 42) becomes stronger when the so-called ‘solidarity clause’ is taken into account. This clause flowed from the ‘Declaration on Solidarity Against Terrorism’,²¹ which was issued by the European Council after the Madrid terrorist attacks in March 2004, although the Declaration does not refer to a role for the Union as such, but to the “Member States acting jointly.” It is somewhat peculiar that this solidarity clause is separated from the collective defence clause and is included in the TFEU (Art. 222) rather than together with the CSDP provisions in the TEU. The clause does not restrict common defence to ‘armed aggression’, but in fact extends the obligation to terrorist attacks:

“The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) – prevent the terrorist threat in the territory of the Member States;
- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
- (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.”

Paragraph 2 adds the following:

“Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.”

Paragraph 3 refers to a coordinating role of the Council as well as the procedure: the arrangements for the implementation of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the HR.

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

The CSDP missions

Both military and civilian missions may be established on the basis of the CSDP provisions. On 1 January 2003, the EU launched the European Union Police Mission in Bosnia and Herzegovina (EUPM) as its first-ever civilian crisis management operation within the framework of the CSDP.²² On 31 March 2003, the EU finally deployed Operation Concordia, its inaugural military mission, to follow up on NATO's efforts to contribute to a stable and secure environment in FYROM.²³ Since 2003, the EU has affirmed its operational capability through the launching of more than twenty CSDP operations,²⁴ mainly in Africa and in the Western Balkans, but also in the EU's eastern neighbourhood, the Middle East, and Asia. The EU has acted as a crisis manager in several guises:

- as an honest broker of peace between the parties to a conflict (e.g. Aceh);
- as an assistant to border management (e.g. Moldova/Ukraine);
- as an adviser in justice reform (e.g. Georgia);
- as a trainer of police and prison staff (e.g. Iraq);
- as a security sector reformer (e.g. Guinea-Bissau);
- as a security guarantor during elections (e.g. Democratic Republic of Congo);
- as a peacekeeper on the invitation of a host country (e.g. FYROM);
- as a regional arrangement operating under a mandate by the United Nations Security Council, to counter the threat to international peace and security (posed by, e.g., piracy and armed robberies against vulnerable vessels off the Somali coast) and to assist peacekeeping operations carried out by other international organisations (e.g. Chad and, indirectly, Darfur); and
- as a component of an international transitional administration (e.g. Pillar IV in UNMIK).

The EU has never acted in the capacity of enforcer of the peace (like NATO in Kosovo in 1999) nor in defence against an armed attack on its territory.

While most of the early operations were fairly successful, largely thanks to the fact that they were usually short-term and limited in both scope and size, they have also revealed shortfalls, bottlenecks as well as broader issues in crisis management. They range from 'growing pains', including the creation of the 'brand' of EU crisis management as well as the planning and drawing up of appropriate mandates for CSDP missions, to more enduring challenges such as coherence among EU policies, institutions and instruments, coordination with other international organisations, notably NATO and the UN, and consistency of 'output'.²⁵ Lessons learned from these operations should be taken to heart now that the European Union is facing its 'maturity test' as an international crisis manager.

In spite of the growing pains in the development of CSDP, the European Union has made significant strides in deploying crisis management operations. However, the issue of defining success of the CSDP is no longer measured in terms of merely launching missions, ensuring mission output and gathering operational experience. CSDP is past its age of innocence. The bar is set much higher

now. Not only is greater intra- and inter-institutional coordination and cross-pillar coherence required by EU law and policy,²⁶ the Union is also expected to conduct several operations at the same time,²⁷ to carry them out in line with both human rights law and international humanitarian law (see below), to live up to its promises by accomplishing its tasks, to effect positive change on the ground, and to show that it can take the lead among other international and institutional actors. These issues have become more pressing since the EU embarked on bigger and more difficult CSDP operations, for instance in the high-risk theatres of Kosovo, Afghanistan and Chad. If such crises are managed badly, then the European Union risks losing its recently found confidence and acquired image as a regional and global actor serving the interest of international peace and security, especially if an ill-prepared and/or under-equipped CSDP operation stumbles into another ‘Srebrenica’. In short, the European Union is facing a big maturity test in CSDP.

Conclusion

The image of CFSP as a purely ‘intergovernmental’ form of international cooperation is not supported by the treaty provisions. Yet, the non-exclusive nature of CFSP is paramount. The competences of the institutions, the obligations of the Member States and the decision-making procedures all reflect the intention of the states to create a common policy that would not unconditionally *replace* the national policies of the individual states, but that would only emerge *where and when possible*. Despite concrete obligations aiming at the establishment of a common policy, a number of vague notions (‘important common interests’, ‘general interest’, ‘reasons of national policy’) allow for a large margin of appreciation on the part of the Member States. Whenever a common policy does not prove possible, Member States are free to pursue their own national foreign policies.

Even adopted ‘Decisions’ – as the key CFSP legal instruments – do not deprive the Member States of all their rights to maintain national policy in the areas covered by the CFSP decisions. Practice reveals that most decisions have a narrow scope only, allowing for parallel national policies in the same issue area. And, even within the scope of the CFSP decisions, Member States have possibilities to lay emphasis on certain national preferences and implementation modalities.

The legal outcome of the negotiations on CFSP was the only one possible when states have a common foreign policy but are not prepared to give up their sovereign rights in favour of an independent common institution. While an analysis of the origins of CFSP and the subsequent negotiations indeed reveal a certain preference for ‘intergovernmental’ cooperation on the part of most Member States, the further institutionalisation of both CFSP and CSDP indicate serious constraints on the Member States in executing their foreign policy as well as on the EU institutions involved.

¹ Cf. A. Sari, ‘Between Legalisation and Organisational Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy’, in P.J. Cardwell (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, The Hague: T.M.C. Asser Press, 2012, pp. 59-95; P. Koutrakos (Ed.), *The European Union’s external relations a year after Lisbon*, The Hague: CLEER Working Papers 2011/3; and R.A. Wessel, ‘The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation’, *European Constitutional Law Review*, 2009, No. 1, pp. 117-142.

² P. Van Elsuwege, ‘EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency’, *Common Market Law Review*, 2010, pp. 987-1019.

³ Cf. M. Cremona, ‘A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty’, *EUI Working Paper LAW No. 2006/30*, at 17.

4 R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective*, The Hague: Kluwer Law International, 1999.

5 These exceptions recur in Art 31(2) TEU and apply as follows: —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 Art 22(1); —when adopting any decision implementing a decision defining a Union action or position; —when appointing a special representative in accordance with Art 33.

6 See also DG for External Policies of the Union, Policy Department, 'The Lisbon Treaty and its Implications for CFSP/ESDP', Briefing Paper, European Parliament, February 2008, 3. Nevertheless, for some Member States, resort to the EU budget may remain attractive, even if this means delaying the EU's response. See R Whitman and A Juncos, 'The Lisbon Treaty and the Foreign, Security and Defence Policy: Reforms, Implementation and the Consequences of (non-)Ratification' (2009) 14 *European Foreign Affairs Review* 25, 39.

7 A. Junco and C. Reynolds, 'The Political and Security Committee: Governing in the Shadow', *European Foreign Affairs Review* 12: 127–147, 2007.

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

9 An overview is published by the Council Secretariat. See for instance <http://register.consilium.europa.eu/pdf/en/12/st05/st05269.en12.pdf>

10 More extensively: C Kaddous, 'Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty', in S Griller and J Ziller (eds), *The Lisbon Treaty: Constitutionalism without a Constitutional Treaty?* (Vienna, Springer, 2008), 206. Cf also Whitman and Juncos, 'The Lisbon Treaty and the Foreign, Security and Defence Policy', *European Foreign Affairs Review*, 14 (1), pp. 25-46 at 32; and J Paul, 'EU Foreign Policy after Lisbon: Will the New High Representative and the External Action Service Make a Difference?' (2008) 2 *Centre for Applied Policy Research (CAP) Policy Analysis*.

11 See B. Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service', *Common Market Law Review*, 2011, pp. 475-502; S. Blockmans and M.-L. Laasit, 'The European External Action Service: Enhancing Coherence in EU External Action?', in Cardwell, *op. cit.*, pp. 135-159; S. Blockmans, 'The European External Action Service One Year On: First Signs of Strengths and Weaknesses', The Hague: *CLEER Working Paper Series* 2012/2.

12 Cf. M. Brkan, 'Then Role of the European Court of Justice in the Field of common Foreign and Security Policy after the Treaty of Lisbon: New Challenges for the Future', in Cardwell, *op.cit.*, at 97-115.

13 A case in point is Case 91/05 Commission v. Council [2008] ECR I-3651. See C. Hillion and R.A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?', *Common Market Law Review*, 2009, pp. 551-586

14 It goes without saying that the Court has jurisdiction in relation to restrictive measures not based on a CFSP Decision, but on a Council Regulation following the procedure in Art. 215 TFEU, even if there is a relation with CFSP (see Case C-130/10, EP v Council (Restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, 19 July 2012).

15 See for instance European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, 2011/199/EU, OJ L 91/1, 6.4.2011.

16 Vienna Convention on the Law of Treaties, Article 62, paragraphs 1 (a) and (b). The criteria to justifiably invoke this provision include: the fundamental change of circumstances was not foreseen by the parties and (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

17 S. Blockmans and R.A. Wessel, 'The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?', in *Journal of Conflict and Security Law*, 2009, No. 2, pp. 265-308.

18 Lisbon European Council, 26 and 27 June 1992, Annex 1: Report to the European Council in Lisbon on the likely development of the common foreign and security policy (CFSP) with a view to identifying areas open to joint action *vis-à-vis* particular countries or groups of countries, *Bulletin EC* 6-1992.

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- 19 S. Blockmans and R.A. Wessel, 'The European Union and Peaceful Settlement of Disputes in its Neighbourhood: The Emergence of a New Regional Security Actor?', in A. Antoniadis, R. Schütze, E. Spaventa (Eds.), *The European Union and Global Emergencies: A Law and Policy Analysis*, Oxford: Hart Publishing, 2011, pp. 73-103.
- 20 Art. 5 of the North Atlantic Treaty reads: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. [...]"
- Art. V of the modified Brussels Treaty (WEU) reads: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power."
- 21 Brussels European Council 25-26 March 2004, Presidency Conclusions.
- 22 See Council Decision 2002/968/CFSP of 10 December 2002 concerning the implementation of Joint Action 2002/210/CFSP on the European Union Police Mission, *OJ* 2002 L 335/1.
- 23 See Council Decision 2003/202/CFSP of 18 March 2003 relating to the launch of the EU military operation in the Former Yugoslav Republic of Macedonia, *OJ* 2003 L 76/43.
- 24 For an up-to-date list, see the website of the Council of the EU, CSDP operations, at <http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=268&lang=en&mode=g>.
- 25 These issues are well documented. See, e.g., F. Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations', in M. Trybus and N. White, eds., *European Security Law* (Oxford, Oxford University Press 2007), 61-101; Emerson and Gross, eds., op. cit.; and T. Hadden, ed., *A Responsibility to Assist: Human Rights Policy and Practice in European Union Crisis Management Operations* (Oxford/Portland, Hart Publishing 2009).
- 26 For academic analysis and references to relevant case-law of the ECJ, see P. Koutrakos, 'Security and Defence Policy within the Context of EU External Relations: Issues of Coherence, Consistency and Effectiveness', in Trybus and White, eds., op. cit., 249-269; Hoffmeister, loc. cit.; S. Vanhoonacker, 'The European Security and Defence Policy and Coherence Challenges in the Council', in Blockmans, ed., op. cit., 145-156; K. Raube, 'European Parliamentary Oversight of Crisis Management', *ibid.*, 181-198; and V. Kronenberger, 'Coherence and Consistency of the EU's Action in International Crisis Management: the Role of the European Court of Justice', *ibid.*, 199-211.
- 27 In its Declaration on Strengthening Capabilities of 11 December 2008, the Council mentioned the following ambitions: "two major stabilisation and reconstruction operations, with a suitable civilian component, supported by up to 10,000 troops for at least two years; two rapid-response operations of limited duration using inter alia EU battle groups; an emergency operation for the evacuation of European nationals (in less than ten days), bearing in mind the primary role of each Member State as regards its nationals and making use of the consular lead State concept; a maritime or air surveillance/interdiction mission; a civilian-military humanitarian assistance operation lasting up to 90 days; around a dozen ESDP civilian missions (inter alia police, rule-of-law, civilian administration, civil protection, security sector reform, and observation missions) of varying formats, including in rapid-response situations, together with a major mission (possibly up to 3000 experts) which could last several years." The Declaration is available on the website of the Council of the EU, among the reference documents about civilian crisis management, at <<http://ue.eu.int/showPage.aspx?id=1378&lang=En>>.