

4 THE MAIN DISTINGUISHING CHARACTERS OF THE EU'S COMMON FOREIGN AND SECURITY POLICY IN THE EU LAW AND INSTITUTIONAL SYSTEM

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4.1 INTRODUCTION

Since its conception, the Common Foreign and Security Policy (CFSP) of the European Union has been a separate subsystem within its legal and institutional system, in addition to the common Community policies defining the single internal market. The foreign policy, which is to be created, represented and implemented jointly by EU Member States, is still operated through a specific set of structures and procedures, as well as, specific instruments even after quarter of a century. Although the institutional and decision-making system of CFSP is currently operated within the single institutional system introduced by the Lisbon Treaty, that is within an EU without pillars, in parallel with the other policies, in a still well-distinguished and significantly different manner. Significant differences can be identified by the nature and legal effect decisions and their possible enforcement against Member States of adopted in the CFSP decision-making process.

The characteristics that distinguish the Common Foreign and Security Policy within the framework of the functioning of the European Union are described through an overview covering the fora which ensures the development of the EU's Common Foreign and Security Policy (the Foreign Affairs Council as the Council configuration responsible for the CFSP, as well as an institutional interface providing a framework for continuous discussions among the ambassadors of the Member States, the Political and Security Committee) and then an overview of the CFSP's decision-making process, the nature and effect of the decisions adopted within the framework of the Common Foreign and Security Policy, as well as the instruments available for the CFSP.

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4.2 FOREIGN AFFAIRS COUNCIL

4.2.1 *Composition and Leadership*

The Foreign Affairs Council is the Council formation for CFSP, orchestrated by the Member State acting at the actual president of the Council until the changes introduced by the Lisbon Treaty. In accordance with the division of powers applicable from 2009, this competence was also conferred upon the High Representative of the Union for Foreign Affairs and Security Policy.¹ Such competence includes the convening and preparation for the meetings of the Foreign Affairs Council, setting its agenda and elaborating the related proposals.

The Foreign Affairs Council, however, provides a framework not only for the meetings of the Member States' foreign ministers, but also for those of the ministers of defence. Since the Common Security and Defence Policy (CSDP) matters constitute one of the areas of the CFSP, the Foreign Affairs Council provides a framework also for consultations among the ministers of defence and for decision-making in this field. Traditionally, the ministers of defence attend the meetings of the Foreign Affairs Council twice a year and informal meetings are also held (twice a year).

In cases requiring a rapid decision, generally in crisis situations or other important events affecting international peace and security, the High Representative, on (currently) her own initiative, or at the request of one or more Member States, may convene an extraordinary Council meeting within 2 days.² A Council meeting may be convened at the request of any institutional actor in CFSP within the shortest possible period of time if necessary.

4.2.2 *Proposals for CFSP Decision-Making*

One of the main distinguishing characteristics of the CFSP is that the so-called “community method” – the prerogative of the European Commission to initiate decision-making and its exclusive power to make proposals – is not applicable in this specific field of common policies. No legislation takes place by any EU institution in CFSP, the power to make initiatives for the decision-making agenda and set the timetable can be exercised only by the Member States and the High Representative for the Foreign Affairs and Security Policy (HR for FASP), as the “chief executive officer” in charge of the “diplomatic apparatus” (European External Action Service) of the Union and of the synchronization of common foreign policy amongst Member States.

¹ Art. 18(3) TEU.

² Art. 30(2) TEU.

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Prior to the Lisbon Treaty, the High Representative previously had no formal right to make initiatives in CFSP, though in practice, however, he could influence the common foreign policy proposals indirectly, through preparatory consultations with the Member States. The previously existing entitlement of the European Commission to make proposals for CFSP positions and actions was conferred upon the High Representative for FASP in the Lisbon Treaty.³ Thus, based on such authorisation, the High Representative replaced, to a certain degree, the European Commission in making foreign policy initiatives. As regards the various dimensions of CFSP, the initiatives and perspectives of the European Commission are connected and transmitted by the High Representative as its Vice-President into the intergovernmental decision-making dimension.⁴ Therefore, the High Representative, in her capacity as the Vice-President of the European Commission can propose agenda items and submit initiatives for common EU declarations or measures based on and representing the position of the principal executive body of the European Union. Obviously, making those motions becomes necessary where the proposals of the High Representative for the FASP/ Vice-President relates to circumstances and developments beyond direct foreign policy matters and other related EU policies. In such cases, his involvement is justified by the Commission professional background, information and practical experience of the European Commission justifies its involvement on the quest for or formation of an adequate CFSP response.

Furthermore, each Member State may submit an initiative for adding any foreign and defence policy matters to the agenda.⁵ The High Representative informs the other Member States of the proposal together with her own position regarding the initiative. Thus, any Member State may influence the CFSP agenda as they may submit any matter for discussion and consideration as well as propose the adoption of positions and measures by the Council. This opportunity, which is available equally to all Member States, ensures that any Common Foreign and Security Policy matters concerning any Member State may be brought to the attention of other Member States within the relevant Council formation of the Union. As the security of any EU Member State cannot be separated from the security of other Member States among participants of a politically motivated "risk community" within the framework of an unprecedentedly close integration, significant foreign or security policy matters affecting any of them will sooner or later become a common issue for all of them.

3 Art. 30(1) TEU.

4 Art. 18(4) TEU.

5 Art. 30 TEU.

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4.3 POLITICAL AND SECURITY COMMITTEE

4.3.1 *Competence and Role: the CFSP “COREPER”*

In the field of the CFSP, continuous consultation among Member States, at the level below the Foreign Affairs Council, is ensured within the Political and Security Committee (PSC) as consisting of ambassadorial level representatives assigned to Common Foreign and Security Policy matters. Due to their regular consultations in preparation of Foreign Affairs Council meetings, the presentation of Member State interpretations from national perspectives and the elaboration of common positions optimally already at ambassadorial level within its framework, the Political and Security Committee plays an essential role in decision-making procedure through the Foreign Affairs Council.

Since the Foreign Affairs Council ensures a ministerial level intergovernmental collaborative and collective policy-making framework for common foreign trade and international development policies of the EU, the Committee of Permanent Representatives (COREPER) – in addition to PSC – also has a frequent and significant role in preparing the meetings of the Council formation responsible for complex issues of foreign affairs. In addition to trade and development policy matters, in the COREPER, Member States consult and take position on any and all matters concerning the external relations of the Union within the competence of the European Commission, not falling within the narrower and more directly political themes of foreign and security policy.

In addition to monitoring continuously the areas falling within CFSP (practically any issue deemed to affect the foreign policy or security interests of the Union), the Political and Security Committee takes part actively in the formulation of common political answers. The PSC is a special institutional component of the EU, designated for maintaining continuous political assessment and preparation of CFSP decisions amongst Member States.

The extensive responsibilities and its significant role in foreign and security policy indicate both the political importance and the remarkable institutional autonomy of PSC. The Political and Security Committee consists of Member State ambassadors who are the highest level diplomats responsible for CFSP matters at the permanent representations of their respective countries to the European Union. Thus, the status of PSC participants is essentially the same as that of those participating in COREPER II. operating in the field of common policies for the single European market.

As opposed to the operation of COREPER (both levels I and II) which provides for common policy consultations and which is chaired by the ambassador of the Member State as the actual president of the Council, the PSC meeting agenda is set by the official

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appointed by the High Representative of the Union for Foreign Affairs and Security Policy for that purpose to act on her behalf and chair those meetings.⁶

The PSC submits its assessments and proposals to the Council reflecting the agreement or at least the highest common denominator among Member States, which serves as the basis or at least as the starting line for consensual decision-making in CFSP. The PSC may submit its opinion either 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.⁷

Due to the authorization of the PSC to make opinions and initiatives, the Council can react in a timely manner, but generally the initiatives and requests from the Council and the High Representative determine the working agenda of PSC. Such moves may be taken in response to new international events or contingencies (e.g. rapid or unexpected of crisis situations) or during the implementation of EU measures or tasks (e.g. crisis management operations) that are based on previous Council decisions requiring their modification or significant correction as the result of the changing circumstances.

4.3.2 *The Responsibilities of the Political and Security Committee*

In addition to tasks related to the formation and coordination of national positions and the preparation of decisions, the Political and Security Committee was also given the competence for the 'political control' and "strategical management" of EU crisis response measures as operational instruments of CFSP.⁸ In addition to preparatory consultations for the purpose of adopting CFSP Council decisions on international developments and occurrences with direct or indirect effect on EU interests, the PSC carries out significant tasks also in the implementation phase of measures and decisions adopted by the foreign ministers of Member States. The executive and supervisory tasks of the PSC are delimited according to the division of competences between the European Commission and the High Representative for FASP reflecting the emphasis on placed on the institutional balance and the separation of competences in the TEU.⁹

During the preparation and implementation of CFSP decisions, the PSC:

- sends guidelines to the EU Military Committee and other committees concerning foreign and security policy issues falling under its competence,
- maintains a close and direct link with the High Representative for FASP and EU special representatives,

6 EU High Representative Catherine Ashton appoints the Permanent Chair of the Political and Security Committee, *Press release IP/13/593*, 21 June 2013.

7 Art. 38 TEU.

8 *Id.*

9 *Id.*

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- receives positions and proposals from the EU Military Committee (Member States military representatives at the level of generals/admirals), as well as from the EU Committee for Civilian Aspects of Crisis Management (CIVCOM).
- coordinates, supervises and manages the activities of Council working groups dealing with CFSP matters
- operates as the primary forum for the dialogue between the EU and NATO (which increases significantly the institutional weight of PSC due to the importance of EU-NATO relations)
- manages the development of military capacities under Council supervision.¹⁰

4.4 CFSP DECISION-MAKING

4.4.1 *The General Rule: Unanimous Decisions*

Decisions concerning the Common Foreign and Security Policy are based on the overall consensus of all Member States.¹¹ (This is not a novelty introduced by the Lisbon Treaty, because the previous versions of the TEU had already provided for the opportunity to derogate from the general consensus-based and decisive rule of the intergovernmental decision-making scheme.) According to the EU Treaty, derogation from the rule of unanimous decision-making is permitted only exceptionally, in respect of predetermined types of decision or decisions having a specific subject matter or based on an individual decision adopted by the Heads of State and Government of the EU Member States.

The CFSP's decision-making process results in the adoption of guidelines or decisions based on which however rules, requirements and obligations are created only in respect of the relevant operations, organisational provisions and positions to be followed. Those set out general rules to be applied repeatedly instead of specific "implementation decisions." Even though the CFSP decisions are also acts of the EU having legal effect, as they are not adopted in the framework of the proceeding set out in the relevant provisions of the Treaties,¹² they cannot be considered as legislative decisions according to the provisions of the EU Treaties.

As a result of the amendments enacted by the 1997 Amsterdam Treaty, that is already in an early phase of the evolution of the EU Treaty, the rules of unanimous decision-making shifted from full consensus to accepting, in certain cases, as sufficient the decision of the overwhelming majority. The rules, that made decision-making with qualified majority in relation to certain CFSP rules regular, were introduced as a compromise. The essential reason and purpose of that compromise was to mitigate the effects of the sus-

¹⁰ Section 1 of the Annex to the Council decision 2001/78/CFSP.

¹¹ Art. 31(1) TEU.

¹² Arts. 293 to 299 TFEU.

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pension of decision-making and blocking of the adoption of decisions, caused by the requirement of the initial and prudent unanimity (full consensus) which protects the Member States' interests at any time. The differentiation introduced in the field of the CFSP, defined then as "Pillar" II of the EU, allowed for preventing that Common Foreign and Security Policy measures get blocked, and by that no common positions or collective actions can be adopted in cases where the large majority's consensus is reflected in the relevant matter. The requirement of unanimity continued to remain the general rule, and it is complemented by the possibility of giving a more flexible reply based on decision-making with a qualified majority even where the Member States' views are not fully identical. This, however, does not result in fully disregarding the interests and views of countries that represent the minority position.

The current decision-making rules of the EU's Common Foreign and Security Policy contain three different solutions to protect the interests of Member States with a minority view, in case of derogation from the general rule (full consensus). One solution is the officially declared constructive abstention (and absence from the implementation), the other one is the prevention of decision-making with a qualified majority (application of the "CFSP veto"), whilst the third one is the requirement of weighted voting (multiple qualified majority).

In its operation related to the Common Foreign and Security Policy, the Council may use expedited decision-making in procedural matters through the adoption of decisions by simple majority.

4.4.2 *Constructive Abstention: "Flexible Unanimity" and "Declaration of Abstention"*

In the practice of international organisations serving as a framework for intergovernmental cooperation, unless otherwise provided, abstention by a Member State is not considered as a hindrance to establishing that the requirement of unanimous votes has been complied with, if applicable, for valid decision-making.¹³ Accordingly, the relevant provision of the EU Treaty reflects the same approach. Thus, abstention by any Member State cannot be considered as a refusal or negative vote from that Member State. Thus, even where the Member States' views cannot be fully identical, consensus is not hindered unless disagreement is manifested in a negative vote. The decision adopted is binding for the abstaining Member State even where it did not fully agree with such decision, but it did not vote against its adoption.

¹³ C.F. Amerasinghe, *Principles of the Institutional Law of International Organisations*, Cambridge University Press, 2005, p. 151.

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At the same time, based on the practice of certain other international organisations,¹⁴ the EU provides that whilst abstention does not invalidate the requirement of unanimity, the decision adopted is not applicable to the Member States that do not support such decision. If the Member State having a different position wants to avoid the consequences and costs relating to the implementation of the relevant decision, it may do so by constructive abstention. Based on the abstention specified by the provisions of this Article of the EU Treaty, any Member State may express its divergent opinion without necessarily hindering decision-making in cases where the EU Member States shall adopt decisions unanimously. This solution is particularly suitable for reconciling the differences among traditionally neutral Member States and the representatives of foreign and/or security policy positions that are essentially divergent in certain matters due to political reasons, without hindering the EU's common action.

If the Member State which maintains its divergent view declares its abstention formally, it is not obliged to implement the decision adopted. In that way, the declaring Member State intends to acquire an "occasional exemption" from the implementation of the relevant decision. At the same time, the abstaining Member State acknowledges that the decision adopted will have legal consequences for the EU. In its foreign and security policy actions, the European Union as a whole is bound by the decision adopted. As a new expression of the EU's international legal personality, which is separate from that of its Member States, obligations arising from the decisions adopted within the CFSP are separated in respect of the EU and the Member States thereof. According to the provision of this Article, a decision adopted in the appropriate procedure, with formal declaration of the constructive abstention, is suitable for binding the European Union as an international organisation so that not all of its Member States have an equal share in the implementation and costs of the unanimously adopted decision.

Even though the Member State which expresses its divergent interests or preferences, is exempted from the application of the given consensus-based CFSP decision, it shall refrain from all activities, practices or declarations that may be against the EU's actions or measures based on the decision adopted. Therefore, the Member State with a minority opinion shall avoid all steps that may obstruct or hinder the foreign and security policy of the EU. At the same time, the other Member States acknowledge that, by this legal act, the declarant excludes its political and legal liability that may otherwise arise, without formal declaration, from the failure (by the Member State) to implement the CFSP decision. Thus, by the declaration, the abstaining Member State limits its obligation of ownership arising from the essential requirement of the "mutual solidarity" applied in the field of the CFSP and justifies its diverging conduct as long as this does not result in hindering the EU's common external activities.

14 See e.g. Art. 6(2) of the Statute of the Organisation for Economic Co-operation and Development (OECD).

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4.4.3 *The Critical Mass of Abstaining Member States*

The Member States expressing their abstention, however, cannot represent more than one-third of the Member States and of the EU's population. If the weighted votes of the minority represented by the abstaining Member States exceeds one-third of the eligible votes, the decision cannot be adopted. The votes of Member States which do not refuse the decision, but only agree with that to a limited extent, as well as the upper limit applicable to the population represented by such Member States, restrict the application of abstention within the Common Foreign and Security Policy, in the form of a "qualified minority." If the portion of abstaining Member States became too high, this would question the "common" characterization of any EU external political action or position, as well as their efficient implementation. Therefore, due to the cumulative effect of abstentions exceeding the "qualified minority", the outcome of decision-making is essentially negative, meaning that the "relevant decision cannot be adopted" even though none of the Member States voted against the proposal submitted. Thus, the consensual decision-making enshrined in relevant TEU provisions as a general rule with respect to CFSP decisions, permits deviation from unanimous vote only to a predetermined extent even in the absence of express opposition to the proposed common stance.

4.4.4 *Derogation from the General Rule: Cases of Decision-Making by Majority Voting*

In certain cases, the provisions of the EU Treaty on CFSP decision-making allow expressly for divergence from the general rule of unanimous decision-making in the field of the CFSP.¹⁵ The exceptions specified allow for decision-making with a qualified majority if certain conditions are met. As a result of Lisbon Treaty changes, the scope of CFSP decisions that may be adopted by a qualified majority, was extended. The amended provisions introduced two new options. One option allows for further derogations from unanimous decision-making on a regular basis according to the source of the decision-making proposal (the High Representative at the European Council's request), whilst the other option makes possible such derogations based on the "highest-level" ad hoc authorisation (authorising decision of the European Council). The previously applicable rules specifically quantified the qualifying majority that is required for adopting CFSP decisions.¹⁶ The current rules do not contain such a provision and the qualified majority shall be established based on the method applied as a general rule in EU decision-making.

In sum, adoption of CFSP decisions with a qualified majority is allowed in the following cases:

¹⁵ Art. 31(2) TEU.

¹⁶ Former Art. 23(2) TEU.

- a. Decisions on the implementation of CFSP decisions adopted in the European Council. The decisions on the Common Foreign and Security Policy at the level of the Heads of State and Government lay down the EU's strategic interests and objectives.¹⁷ Such decisions may cover relations with specific countries or regions or a specific topic and shall identify also "the means to be provided by the EU and the Member States." The adoption of further decisions with the aim of implementing, representing and translating into operational actions the EU's strategic foreign and security policy related interests may already take place within the Council, based on the identical position of the overwhelming majority of the Member States even where there is no full consensus. In such a case, decisions which may be adopted with a qualified majority, are based on a CFSP instrument reflecting the Member States' consensus, identical position due to its "origin." Since the EU's common strategic interests and objectives are adopted unanimously by the Heads of State and Government of the Member States within the European Council, the Council's subsequent decisions based on such interests and objectives are based on decisions unanimously adopted at the highest political level and embodying the identical position of all Member States. When adopting a CFSP decision with a qualified majority on such basis, of course, the European Council's strategic decision from which the potential derogation from unanimous decision-making may be inferred, shall be identified.
- b. Involvement of the EU's High Representative for CFSP in the scope of persons allowed to make proposals and initiate decision-making created a new opportunity to adopt decisions with a qualified majority as compared to the previous legislation (prior to the adoption of the Lisbon Treaty, only the Member States and the Commission were entitled to do so). Proposals submitted by the High Representative receive a particular emphasis if those proposals are elaborated and submitted to the Council at the request of the same. Such request may be motivated by the initiative of the High Representative or that of the European Council. In both cases, the approval expressing the consensus adopted at the highest political level of the EU Member States constitutes the basis for authorisation. It depends on the formulation of the guidelines and expectations included in the mandate given in the request, to what extent the European Council is able to influence or set the limits, length and content of the proposal finally submitted by the High Representative of the EU for CFSP. Through the proposal elaborated by him, the High Representative may have a significant influence over decision-making in certain matters as for adopting the proposal based on the European Council's authorisation, the consensus of all Member States is not required, but it is sufficient if the required majority of the Member States is convinced.

17 Art. 22(1) TEU.

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- c. The implementation of collective measures or shared common positions coming from any source and the adoption of CFSP decisions on their implementation in practice may also be subject to qualified majority vote. Such collective actions and common positions had already been adopted unanimously within the Council according to the general CFSP decision-making rules, or they were adopted as measures which aim at implementing the common strategy adopted with a consensus in the European Council, by the Council with a qualified majority, according to the previous paragraph. In any event, decisions adopted with a qualified majority are based on CFSP instruments which transmit decisions adopted with direct or indirect unanimity.
- d. EU special representatives having authorisation to act in certain geographical or thematic political matters¹⁸ are appointed by the qualified majority vote of the Council, in the form of a separate decision. Since special representatives' appointment, determination of their activities and tasks do not generally take place based on an EU common strategy or in the implementation of such strategy, appointment decisions are a separate and specifically named category of CFSP decisions adopted with a qualified majority.

4.4.5 *Passage to Casual Flexibility in CFSP Decision-Making: The Passerelle Clause in the Treaty*

The possibility for the casual extension of the scope of decisions adopted by qualified majority represents one of the significant novelties introduced by the Lisbon Treaty in the field of CFSP. In addition to the potential reasons set out in its provisions, the Treaty also allows the European Council to apply decision-making by qualified majority in further cases.¹⁹ This may be possible where the Heads of State and Government of the EU Member States decide so unanimously by means of an authorisation granted to the Council to that effect. The European Council may extend the derogation from the general rule also for cases not mentioned in the Treaty. Such authorisation may be limited to certain cases or circumstances and developments related to such cases, but it may cover also entire topics or organisational and operational matters in CFSP cases based on decisions adopted by a qualified majority. To this end, however, full consensus by all Member States is required.

In the absence of overall political coherence amongst the Member States, shifting from unanimous decision-making to decision-making with a qualified majority in any matter is not possible. Since the application of facilitated decision-making (the "Community method") may be extended not only to certain specific situations, but also to certain types

¹⁸ Art. 33 TEU.

¹⁹ Art. 31(3) TEU.

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of cases, the unanimous position of the European Council on the possible adjustment of CFSP decision-making carries significant political weight.

Even though, applying decision-making with a qualified majority to certain topics or cases still does not mean that the protection of substantial and identifiable national interests would be lost. Even in those cases, the Member States may still block decision-making where the CFSP decisions are adopted by applying the exception from the general rule. First, the reconciliation of various Member States interests may be suspended due to a reason made clear also for the other Member States, and then referred to the highest political level (the European Council) where decisions violating the substantial interests identified by the relevant Member State may only be adopted in full consensus by the Member States.

Procedural Veto in Decision-Making by Qualified Majority

The Amsterdam Treaty which amended the EU Treaty introduced a further last “procedural defence line” to protect the interests of any states with a minority position against the potential consequences of extending the scope of decision-making by qualified majority. When, by way of derogating from unanimity during the Council’s decision-making process, the qualified majority of the Member States reaches consensus, any country that represents a different view may block decision-making by reference to its own “vital national interests.” According to the respective Treaty provisions, such country may officially declare that it objects to the adoption of a decision by qualified majority for a stated and particularly important national political reason. As the consequence of clearly and formally declared conflicting interest of that Member State, the decision-making procedure is suspended and postponed.

According to this solution, the Member States may essentially use a “procedural veto” by which they may prevent the voting procedure in cases where the “qualified majority” of the Member States otherwise have the right to pass a decision under the provisions of the TEU. The procedural veto may obviously be applied where the converging positions of the necessary number of Member States makes probable the adoption of a decision detrimental to the national positions or interests of those representing the minority opinion. In case of a foreseeable and unfavourable outcome of the voting (the majority seems to satisfy all the three qualifying requirements), the undesirable solution may only be avoided by blocking the decision-making procedure.

Under the TEU, the application of “preventive defence” against decision-making is covered by the discretionary decision-making powers of Member States, because even though the given country shall indicate the relevant reason, the other Member States have no legal basis under the EU Treaty to deliberate or challenge the presented justification. Thus, under the mechanism for the protection of interests, which may be applied for

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a “vital national political reason”, a right of veto like the “Luxembourg compromise” is conferred upon the Member States.²⁰ The solution, which was developed in the field of Community policies decades before and which ensured the maintenance of the classic (consensus-based) intergovernmental form of decision-making, was applied as a tested recipe also during the further development of sensitive political dimensions of EU integration.

If decision-making by qualified majority is blocked due to the abovementioned reason and in the prescribed manner, the High Representative for FASP could exercise significant responsibilities as mediator and negotiator. By carrying out close consultations, the High Representative and the Member State concerned are expected to look for a solution to unblock decision-making, through the elaboration of a compromise consistent both with the original aim of the proposed CFSP decision and the vital interests indicated by the relevant Member State. To this end, other Member States may also be involved in the consultation between the High Representative and the country concerned.

If the mediation and consultation carried out by the High Representative proves inconclusive, the only option for countries representing the majority position to “overrule” and achieve “correction” remains the referral of the case to the European Council. The Foreign Affairs Council may decide by qualified majority on the referral, thereby giving effect to the already formed majority position in this respect. According to the consensual decision-making order in the European Council, if the Member State using the procedural veto does not change its position within the highest political decision-making forum of the European Union, there is no possibility for overcoming the applied veto in the controversial CFSP matter.

4.4.6 *Exceptions under Decision-Making Rules*

The rules on adopting CFSP decisions by qualified majority do not cover decisions adopted in military and defence policy matters. Decisions concerning the common security and defence policy – including those on institutional issues, capacity-building or the operations, may always be adopted unanimously regardless of whether they would satisfy the requirements for a qualified majority (e.g. implementation of the common strategy).

4.5 THE CFSP DECISIONS: LEGAL EFFECT AND POLITICAL OBLIGATIONS

The decisions adopted within the Foreign Affairs Council may also set forth the purpose, means and duration of various joint measures and actions. The Council may also order

²⁰ Paul Craig & Grainne De Burca, *EU law – Texts, Cases, Materials*, Oxford University Press, 2003, p. 38.

the adoption of specific measures required for the effective implementation of decisions on collective EU action in the form of CFSP decisions.

As a result of the modifications set out in the Lisbon Treaty, both the common positions and the common security and defence policy actions implementing the concerted and joint actions, as well as the decisions ensuring their operational implementation, equally appear in the form of “decisions.” As opposed to the previous instruments which expressed the differences in their content and purpose also in their names (the so-called “common position” and “joint action”), the CFSP decisions taken following the amendments of the Treaty have assumed common format. The new instruments of foreign policy implementation may be differentiated based on their content and provisions or the measures set out therein, instead of their “genre.” As it is clearly set out in the EU Treaty in two places,²¹ regardless of their content and purpose, none of the “CFSP decisions” create norms which would introduce obligations to be applied repeatedly by the Member States and could be enforced through the usual EU legal enforcement mechanism and institutional fora.

The binding effect of the decisions adopted by Member States derives from the Treaty provisions setting forth their obligations to act or refrain from certain acts. The most important “active obligation” is contained in their duty to consult among Member States before taking international actions or making international commitments,²² or ensure the compliance of their national policies with EU positions.²³ As regards their obligations to refrain from certain acts, it is of fundamental importance that “in the positions they adopt and in the conduct of their activity” (Article 28(2)), the Member States should not take any measure contrary to the operational actions of the Union or undermine their effects. In line with Article 24(3), the Member States “shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations” as a general rule and not only in case of operational measures.

Compliance with the decisions that translate the Common Foreign and Security Policy, on the basis of the adopted guidelines and strategic directions, into practical action ensuring their single and coherent implementation, cannot be ensured by the standard tools of the EU legal order. The so-called “infringement procedure”, the legal remedy for the enforcement of legal obligations in the other dimensions of EU law and institutional operation, is not applicable to the Common Foreign and Security Policy. As set out in the relevant CFSP provisions of the EU Treaty, the Court of Justice of the European Union (CJEU) “does not have competence in respect of the provisions” concerning the CFSP.²⁴ (The only exceptions are verifying compliance with Article 40 of the TEU, as well as

21 Arts. 24(1) and 31(1) TEU.

22 Art. 32(1) TEU.

23 Art. 29 TEU.

24 Art. 24(1) TEU.

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reviewing the lawfulness of decisions setting out restrictive measures in respect of natural or legal persons.) In the absence of CJEU jurisdiction, the options available for the Council and the High Representative for “enforcement” or the imposition of compliance beyond political and diplomatic means remains extremely restricted.

Essentially, the performance of obligations for intergovernmental cooperation within the international legal framework of a regional consultation and coordination regime – as codified in multilateral agreements (the EU Treaties) – can be required by and from the Member States. The principles of “loyalty” and “solidarity” as set out in the Treaty determine the prescribed form of conduct (in addition to the already mentioned duty to act or refrain) and accountability of Member States in the implementation of CFSP.²⁵ The possibility of sustained foreign policy consultations among Member States ensures the most important condition for compliance with, and the accountability for these principles and obligations.

4.6 POSSIBLE CONTENT AND PURPOSE OF THE COMMON FOREIGN AND SECURITY POLICY DECISIONS

4.6.1 *CFSP Strategies*

Decisions on CFSP policy measures and instruments may be adopted within the framework of the European Council and of the Foreign Affairs Council. The strategic foreign policy interests and objectives of the European Union are always determined at the level of the European Council.²⁶ On the basis of the strategic directions and objectives set by the Heads of State and Government, the Foreign Affairs Council adopts Common Foreign and Security Policy measures and the decisions necessary for the elaboration of their content and of their implementation.²⁷

Since both the strategic interests and objectives fall within the competence of the summits of EU Member States, those are established and adopted by consensus. The Foreign Affairs Council prepares the initial proposals and submits the agreed positions to the European Council where the High Representative for FASP is also invited on those occasions.²⁸ The European Security Strategy in 2003 laid down the first framework for the interpretation of an overall EU foreign and security policy, which was replaced (following a partial update in 2008) in 2016 by the new global EU security policy as guidelines for strategic assessment and international operational engagements.

25 Art. 24(3) TEU.

26 Art. 22(1) TEU.

27 Art. 26(2) TEU.

28 Art. 15(2) TEU.

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In line with the European Council request and guidelines, the Foreign Affairs Council adopts the set of common objectives and priorities with respect to a given region (regional strategies) or issues (thematic strategies) as well as the conceivable means and measures for their accomplishments. The foreign ministers of the Member States thereby develop general frameworks of interpretation for determining CFSP strategy directions and objectives which indicate, both for Member States and for other states, the foreseeable “direction” of the common international political positions and actions of the European Union.

The EU adopted regional strategies in respect of certain conflict zones (e.g. Africa’s horn²⁹), Central Asia³⁰ or the risks in the West African Gulf of Guinea.³¹ In addition to those, the EU developed thematic strategies in respect of circumstances and factors that constitute particular risks and threats for the international security such as the prevention of the proliferation of weapons of mass destruction, action against the illegal trade of small and light weapons,³² the international maritime security³³ and cyber security.³⁴

4.6.2 CFSP Guidelines

CFSP guidelines serve as reference frameworks and orientations for EU strategic foreign and security policy interests and objectives. Although the adoption of these “general guidelines” falls within the competence of the European Council according to the EU Treaty,³⁵ but in practice such decisions are generally taken – upon the request of the European Council – and implemented by the Foreign Affairs Council. CFSP guidelines are adopted to determine concerted diplomatic positions as well as practice of the EU and its Member States converging in a single shared political direction. These may be necessary, in particular, in complex regional contexts (e.g. Southern Asia³⁶) or in case of the application of certain CFSP instruments (e.g. restrictive measures or EU sanctions³⁷).

29 A Strategic Framework for the Horn of Africa, Doc. 16858/11, 14 November 2011.

30 Council Conclusions on the EU Strategy for Central Asia, Foreign Affairs Council, 22 June 2015.

31 EU Strategy on the Gulf of Guinea, Foreign Affairs Council, 17 March 2014.

32 EU Strategy to Combat Illicit Accumulation and Trafficking of SALW and their Ammunition, Doc. 5319/06, 13 January 2006.

33 European Union Maritime Security Strategy, Doc. 11205/14, 24 June 2014.

34 Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace, JOIN(2013) 1 final, 7 February 2013.

35 Art. 26(1) TEU.

36 Guidelines on the EU’s Foreign and Security Policy in East Asia, Doc. 11492/12, 15 June 2012.

37 Guidelines on implementation and evaluation of restrictive measures (sanctions). in the framework of the EU Common Foreign and Security Policy, Doc. 11205/12. 15 June 2012.

4 THE MAIN DISTINGUISHING CHARACTERS OF THE EU'S COMMON FOREIGN AND SECURITY POLICY IN THE EU LAW AND INSTITUTIONAL SYSTEM

4.6.3 *Ensuring the Coordination of Foreign Policies and Member States Cooperation*

In addition to the general guidelines and the adoption of decisions, “regular collaboration” among the Member States is also one of the primary means for implementing the Common Foreign and Security Policy as required by the EU Treaty.³⁸ Even though this may seem to be the general and essential condition for the sustained operation of CFSP, it is more specifically expressed in the provisions of the subsequent Articles. Even though the preparation, elaboration, adoption as well as the uniform and consistent implementation of the common EU positions or collective actions are not ensured by that, they are essentially conditional upon the Member States foreign ministers “coordinating and orchestrating their activities” within the Foreign Affairs Council presided by the EU High Representative for FASP. In order to do so, prior to taking any international action or making commitments affecting the interests of the European Union, the Member States should consult with the other Member States at the level of foreign ministers and of the Heads of State and Government, in accordance with their obligations enshrined in the EU Treaty.

In addition to the foregoing and in their foreign policy practice, Member States are expressly obliged by the EU Treaty to conduct consultations and “synchronise” the operation of their diplomatic representations and their diplomatic presence at international fora for the efficient representation and promotion of EU interests and values internationally. Thus, the expected diplomatic discourse among Member States stipulated in the requirement of regular cooperation becomes a means for effective common foreign policy as a general and continuous obligation for Member States in their national foreign policy practice.

4.6.4 *CFSP Decision on Crisis Management Operational Action*

The EU operational undertakings constitute the primary means of implementation in the practice and operative “translation” of the EU Common Foreign and Security Policy into action. Such actions cover a wide scope of tasks and activities, ranging from sending international observers, crisis management operations, providing support for democratisation and state-building processes to international measures against the proliferation of small and light weapons, as well as weapons of mass destruction.

In order to distinguish between Council decisions concerning the execution of CFSP with different content and purposes, it is of key importance that a CFSP decision on operational action may be adopted for two reasons.³⁹ One reason is where the crisis

³⁸ Art. 25(c) TEU.

³⁹ Art. 28(1) TEU.

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management action is launched with recourse to the common resources or means of the European Union. In the other case, authorisation by the Member States acting on behalf of the EU is necessary for any international undertaking for civil or military purposes.⁴⁰ Since 2003, as the manifestation of CFSP, various coalitions of the participating states (EU Member States and their external partners) have implemented a series of military and civil crisis management operations on the ground of EU decisions and with the EU institutional engagement as the framework for collective implementation. Since the beginning of these CSDP crisis management operations and missions, the particular CFSP decisions on such operational enterprises have constituted the appropriate legal basis within the normative order of the European Union.

The relevant provision of the EU Treaty clearly provides for the legally binding effect of the CFSP decisions on EU operational actions.⁴¹ Such decisions bind EU Member States both in their positions taken and represented in the conduct of their foreign policy.

4.7 CONCLUSION

The current short overview of the distinguishing legal, institutional and procedural characters of EU Common Foreign and Security Policy summarizes the most important features which define CFSP as a separate subsystem within the organisational and operational order of the EU. Even though the Common Foreign and Security Policy has undergone significant transformation since its introduction into the EU Treaty in 1992 with regard to the depth, length and implementation methods of the issues covered, the institutional and procedural order as well as the legal instruments of their implementation, it continues to operate as a specific and separate dimension of intergovernmental integration within the European Union in accordance with the persistent intent of Member States.

⁴⁰ Art. 44 TEU.

⁴¹ Art. 28(2) TEU.