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2.1 Introduction

In this chapter, we will be taking a closer look at the Common Foreign and Security Policy (CFSP). The CFSP forms one part of the framework for the pursuit and management of EU external relations, with the other part consisting of the external policies and competences contained in the TFEU. As remarked earlier, the CFSP can be roughly considered to constitute the Union's 'front office', as it is the most visible way in which the EU manifests itself to its international partners. Whenever possible, the Member States will be speaking with one voice on the global scene, channelled here through the High Representative of the Union for Foreign Affairs and Security Policy, acting on their behalf and in their collective interest.

Although the CFSP may at first glance appear to be an all-encompassing policy, regulating all the external ('foreign') relations of the EU, in reality it has a much more limited reach. As will become clear in this chapter, still today it occupies a special, separate position, and carries a more residual character.

In the following sections, we will in subsequent order go into the CFSP's historical background (Sect. 2.2); its purpose and character (Sect. 2.3); the various institutions, bodies, agencies and other actors (Sect. 2.4); decision-making (Sect. 2.5); and the array of legal instruments (Sect. 2.6).

2.2 Historical Background

2.2.1 Before 'Maastricht'

The entry into force of the Treaty of Maastricht on 1 November 1993 marked the official birth of the CFSP: on that moment, it became part and parcel of EU law. At the same time, in 1993, it did not tread upon bare ground entirely since there already existed some forms of cooperation in the fields of foreign and security policy long before 'Maastricht'.

The first attempt at forging a common approach in this field was made by the then French prime minister, René Pleven, with his famous plan for the establishment of a European Defence Community (EDC). His idea basically came down to the setting up of a unitary architecture for a seamless protection against external threats, pooling all available national resources and centralising supervision mechanisms. Put simply, a supranational framework would be erected for all military and defence matters, whereby a single European army would be launched to replace the individual armed forces of the participating Member States (France, Italy, West Germany and the Benelux countries).¹ A treaty to this effect was signed in 1952, but never entered into force due to it being rejected by a (narrow) majority in the French parliament. This failure signalled the end to another project, inextricably linked to EDC Treaty, namely the founding charter of the European Political

¹For more details, see Ruane (2000).

Community. This scheme, the so-called Plan Fouchet, aimed to put in place an overarching framework for the pursuit of a harmonised foreign policy.² As an alternative, the Western European Union (WEU) was created in 1954. In contrast to the grand ambitions of the EDC, the WEU constituted a more loose-knit structure, providing a basis for defence cooperation that left national sovereignty in the field almost completely intact.³

It was only in 1969 that the first initiatives to compensate for the failure of the European Political Community saw the light of day. In that year, a start was made with what would soon become known as European Political Cooperation (EPC).⁴ EPC involved periodic meetings of the foreign ministers and officials from the Member States of the EC, convening on average three or four times a year. The idea was to discuss topical affairs, exchange views and share information.⁵ Attempts would be made to align the individual foreign policies more closely with one another, and to take common positions in international organisations when and wherever possible. However, all the dealings were rather informal, and EPC as such remained outside the scope of Community law. Contrary to the EC with its profoundly supranational character, EPC was dominated by an intergovernmental spirit. Consequently, the only legal rules applicable to the latter framework were those stemming from international law. Yet, formal and explicit commitments were only rarely undertaken within EPC.⁶

In 1987, EPC was officially 'recognised' by the European legal order. The Single European Act awarded a status equal to primary EC law to all the basic principles the Member States adhered to within the scope of EPC, and to the (few) treaties and agreements they had enacted. Nonetheless, EPC did remain separate: although a firm linkage had now been established, it was not incorporated into the existing supranational frameworks. Also, while some institutional refinements were introduced (such as a rotating presidency and some special committees), no law-making powers were created. The cooperation thus retained its political and inter-governmental character.

2.2.2 'Maastricht' and Beyond

In 1993, with the entry into force of the Maastricht Treaty, European Political Cooperation was enshrined in the main EU architecture in the form of the Common

²The plan was devised by and named after the French diplomat Christian Fouchet. An underlying objective was to hedge in the European Commission.

³The WEU lasted for almost 50 years. In 2002, it was for the largest part swallowed up by the EU. On 31 March 2010, the WEU Council officially decided to disband the organisation.

⁴The true enactment followed one year later with the endorsement of the so-called Davignon Report, drafted by a committee chaired by the eponymous Belgian diplomat.

⁵The guiding principles have been described as 'the three c's': consultation, confidentiality and consensus. See Gosalbo Bono (2006), p. 338.

⁶For in-depth studies, see e.g. Allen et al. (1982) or Nuttall (1992).

Foreign and Security Policy. Thereby, the relevant rules were rearranged, streamlined, and substantially strengthened. Furthermore, the institutional apparatus of the EC would now also function for the benefit of the CFSP (at the time referred to as the ‘second pillar’ of the Union), as well as for the cooperation in the field of Justice and Home Affairs (JHA, then labelled the Union’s ‘third pillar’). The celebrated ‘single institutional framework’ of the EU amounted to little more than rhetoric though. The Commission, the Parliament and the Court would, for instance, play little or no role outside the ‘first pillar’ (consisting of the EC, EAEC and ECSC), and the Council occupied a much more dominant place in the CFSP and JHA domains. Also, the rules underpinning the CFSP suffered from a lack of clarity, and the (legal) status of the different instruments remained uncertain.⁷ Also, the decision-making was hampered by a lack of continuity, the requirement of unanimity and the corresponding veto powers of the Member States.

With the Treaty of Amsterdam that entered into force in 1999, the CFSP received a much-needed upgrade, although the progress was not exactly staggering. The position of the Union vis-à-vis the Member States was clarified, its treaty-making competence was reinforced, and the instruments were more clearly delineated. Moreover, the function of High Representative for the CFSP was introduced. Additionally, for the very first time in this politically sensitive domain, some (minor) possibilities for adopting decisions in the Council with a qualified majority were introduced.

Box 2.1 The Carrousel of High Representatives

Contrary to what is often believed, baroness Catherine Ashton, appointed in December 2009, was not the Union’s first High Representative ever. She had no less than two predecessors already: Javier Solana, the Spanish former secretary-general of the North Atlantic Treaty Organization, and the much less well-known German diplomat Jürgen Trumpf. The former held the office from October 1999 to December 2009. The latter did not last nearly as long, serving as HR in his final months as secretary-general of the Council of Ministers. With the incumbent Federica Mogherini, former foreign minister of Italy, the interim total has risen to four.

The Treaty of Nice, which entered into force in 2003, only brought minor changes to Title V TEU. It was however in December 2009, with the entry into force of the Treaty of Lisbon, that the CFSP received a complete overhaul. In line with the suggestions made in the Treaty establishing a Constitution for Europe,⁸ in

⁷A factor contributing to the confusion was that, instead of sticking to Arabic numerals, the provisions of the EU Treaty took their designation after letters of the alphabet (sometimes combined with numbers, leading to articles such as ‘D’, ‘J.3’, ‘K.7’ and ‘Q’).

⁸Signed in 2004, definitely shelved in 2007, first and foremost due to the negative outcomes of the Dutch and French popular referendums that took place in mid-2005.

order to increase efficiency and transparency, the rules were completely revamped. Inter alia, the number of legal instruments was reduced; the position of the High Representative was strengthened (now coordinating the external portfolios in the Commission, as well as chairing the Foreign Affairs Council); the relations between the various actors, bodies and agencies were clarified; and a broad foundation was placed under the European Security and Defence Policy, now renamed Common Security and Defence Policy (CSDP).⁹

Without exaggeration, one may say that with the Lisbon Treaty, the Union has taken a phenomenal leap forward, which all but transformed the CFSP. As a striking testimony of the new-found determination, post-Lisbon the Treaties refer to *the* Common Foreign and Security Policy, whereas previously, Title V TEU claimed to contain merely provisions on *a* Common Foreign and Security Policy.

In the first years of operationalisation, the Lisbon changes have turned out as pretty satisfying, the ramification mostly being felt in the sphere of actors and the sphere of instruments (especially their effectivity). This will be demonstrated in the sections below, which assess several aspects of the regime that was reformed in 2009 in closer detail.

2.3 Purpose and Character

The main ambitions of the European Union on the world stage may be gleaned from Article 21 TEU. Therein, one finds that the EU will be guided by, and that it seeks to advance, the lofty principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, respect for the principles of the UN Charter and international law. In Article 24 TEU, it is stated that the Union's competence in CFSP matters covers all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy, which may one day lead to a common defence. We also read here that the Policy shall be subject to specific rules and procedures, which once again emphasises the special position of the CFSP within the Treaty regime. In the same provision, the differences with other domains of EU law are spelled out: the European Council and the Council are to define and implement the CFSP, in principle acting by unanimity, except where the Treaties provide otherwise¹⁰; the adoption of legislative acts is excluded; the High Representative has a major part to play; the Commission, the Parliament and the Court are pushed more or less to the margins.

⁹More on the CSDP and its evolution in Chap. 3.

¹⁰Which is exactly the reverse of the ordinary situation in EU law, namely qualified majority voting, except where Treaty provisions prescribe that decisions be taken unanimously. For further elaboration and illustrations, see Sect. 2.5 *infra*.

Due to its broadly phrased objectives, the CFSP may clash or overlap with other EU external policies. Therefore, it is of utmost importance to ensure consistency between the various fields. For that purpose, the ‘principle of sincere cooperation’, nowadays included in Article 4(3) TFEU,¹¹ has received a specific follow-up in Article 24(3) TEU, stressing that Member States are bound to support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. Whereas in the past, scholars have questioned the legal bindingness of the obligations undertaken in the CFSP, Article 24(3) TEU states that Member States ‘shall comply with the Union’s action in this area’, ‘shall work together to enhance and develop their mutual political solidarity’, and ‘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’. In the absence of Court jurisdiction, however, these obligations still seem to retain a predominantly political character. This is further encouraged by the fact that Article 24(3) entrusts only the Council and the High Representative with the enforcement of these principles, thus excluding the classic remedy for non-compliance in EU law, infringement proceedings initiated by the Commission.

As regards the purpose and character of the CFSP, what one should keep well in mind at all times is that a *common* foreign and security is being pursued. This differs from unitary actors (e.g., a federal state such as the United States or Russia) that dispose of a *single* foreign and security policy.¹² Instead, the CFSP essentially forms an attempt to take a common stance; if successful, the EU Member States forfeit their sovereign privilege to conduct their own foreign policy with respect to certain dossiers. If, however, no agreement can be reached, there will be no common position to uphold and defend. In contrast to this setup, the component parts of a purely unitary actor have *a priori* no role to play on the international scene, as there is room for only one foreign policy, principally conducted at the central or federal level.

All this testifies to the fundamental intergovernmental nature of the CFSP, distinct from the supranational approach adopted in all other parts of EU law. In other words, the Member States stand on an equal footing while attempting to promote the collective interest through the European Council and the Council, without any independent EU institution being able to fix the agenda and impose its particular preferences against their will. To be sure, judging from the Treaty provisions, the CFSP is permeated by a desire for intense cooperation and synchronisation—but in this special and separate domain of EU law, there clearly exists little or no will to engage in legal integration or harmonisation.

¹¹Formerly the ‘Community loyalty’ principle (*Gemeinschaftstreue*), incorporated in Article 10 TEC; in the post-Lisbon era also referred to as ‘Union loyalty’ (*Unionstreue*).

¹²Notwithstanding the fact that their goals and ambitions in these fields may be internally inconsistent, and shift over the course of time.

2.4 Institutions, Bodies, Agencies and Other Actors

We now proceed to inspect in closer detail the role, basic function and *modus operandi* of the various actors that are active in this particular policy area. Legal doctrine usually classifies them as either institutions, bodies or agencies. As we will notice, however, the dividing lines are not always so clear-cut, and some of the entities that give shape to the CFSP are quite hard to pin down.

2.4.1 The High Representative

The truth of the foregoing statement is underlined immediately when considering the place and function of the ‘High Representative of the Union for Foreign Affairs and Security Policy’ (HR). The terms institution, body nor agency apply here. Instead, although the Treaties are not crystal clear on this, we may presume to encounter a Union ‘office’ here.

As Article 18(1) TEU stipulates, the European Council is responsible for selecting and appointing a suitable candidate, and it may proceed to do so by a qualified majority. The European Council is also the institution that can end his term of office. Since the HR cannot be dismissed in any other way, he is placed in a relatively strong and unassailable position.¹³

Essentially, in accordance with Article 18 TEU and Article 27 TEU, the HR has a starring role to play in the CFSP. The person appointed to the office is bound to contribute to the development of the policy by making proposals, and the latter should be carried out by him in line with the mandate provided by the Council.¹⁴ Furthermore, the High Representative convenes the Council’s regular and extraordinary meetings, submits initiatives, and may refer questions to it.¹⁵ His pivotal position becomes crystal clear from the fact that he is meant to preside over (most of) the meetings of the Foreign Affairs Council.¹⁶

¹³Consonant with Article 17(7) TEU, after being appointed by the European Council as HR, the Parliament needs to approve his nomination as member and vice-president of the Commission. Whereas he can be dismissed from the latter institution in several different ways (see e.g. Article 17(8) TEU and Article 247 TFEU), he will remain in office as HR until the European Council were to relieve him as well.

¹⁴Article 18(2) TEU; see also Article 27 TEU: ‘The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals to the development of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.’

¹⁵Article 30 TEU; see also Article 31(2) TEU.

¹⁶Article 18(3) TEU. However, Article 2(5) of Council Decision 2009/908/EU laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, OJ [2009] L 322/28, provides that discussions in the Foreign Affairs Council on Common Commercial Policy issues will be chaired by the six-monthly rotating Presidency. Moreover, if the HR is unable to attend a session, he will be replaced by one of the Commissioners from the ‘external

The function of High Representative is usually referred to as a ‘double-hatted’ one, since the person in question also functions as a member and a vice-president of the European Commission. In this particular capacity, he is tasked to ensure consistency between the different facets of EU external action encapsulated in various Commission portfolios. Before the entry into force of the Lisbon Treaty, there used to be a separate Commissioner for external affairs. In mid-2009, when the Barroso II Commission took office, this post was abolished. Nowadays, the portfolios specifically related to external affairs are those of the Commissioner for Enlargement Negotiations & European Neighbourhood Policy, the Commissioner for International Cooperation & Development, the Commissioner for Humanitarian Aid & Civil Protection and the Commissioner for Trade. In addition, the portfolios of other Commissioners such as Environment, Maritime Affairs & Fisheries; Transport, Migration & Home Affairs; or Climate Action & Energy possess unmistakable external dimensions as well. In the administration presided over by Jean-Claude Juncker, as a conscious move to improve manageability, different project teams were created for interconnected portfolios. One such project team was christened ‘Europe in the World’, linking all aforementioned Commissioners. As vice-president and team leader, the HR performs the task of streamlining and coordinating the activities undertaken within these portfolios.¹⁷ Legally, however, it still falls to the College of Commissioners as a whole to ensure coherence across the entire range of its external policies.

The prominence of the HR is further increased by Article 15(2) TEU, which provides that he shall take part in the work of the European Council. This is an invaluable stipulation, granting him direct access to the Union’s ‘movers and shakers’. In reality, it allows him to attend meetings when foreign affairs items are on the agenda, creating a bridge between the ministerial level and that of the heads of state and government.

Article 27(2) TEU entrusts the HR with representing the Union for matters relating to CFSP, and also makes him responsible for conducting political dialogue with third parties on the Union’s behalf. He is also to express the Union’s views in international organisations and at international conferences. In order to carry out these representative tasks effectively, he needs to attune his position with that of the President of the European Council.¹⁸

The High Representative also functions as a *trait d’union* with the Parliament, which he has to consult on the main aspects and the basic choices of the CFSP and CSDP. He is bound to keep the Parliament abreast of how these policies evolve and

cluster’, who are to act as his deputies. The foreign minister of the Member State holding the rotating Presidency may also step in, should the need arise.

¹⁷To make this easier, the office physically moved from a separate edifice back to the Berlaymont building. When exercising his responsibilities here, the HR is bound by Commission procedures, albeit, as Article 18(4) TEU stipulates, only to the extent that this is consistent with Article 18 (2) and (3) TEU.

¹⁸Cf. Article 15(6) TEU.

needs to ensure that its views are duly taken into consideration.¹⁹ The HR has issued a Declaration on Political Accountability in which practicalities are set out.²⁰

In light of the foregoing, one might be tempted to conclude that the High Representative functions as the Union's 'foreign minister' in all but the name. However, it should be realised that the HR does not enjoy an absolute pole position. For starters, as mentioned above, when externally representing the Union on CFSP issues, he has to operate in close collaboration with the President of the European Council, who may at times outflank him. Additionally, the HR remains under the overall control of the European Council, an institution that he may try to influence, but of which he is not an official member. Moreover, the success of his actions and initiatives depends largely on the goodwill and smooth cooperation of the (members of the) Foreign Affairs Council, which may prefer to keep him on a tight leash and thwart or stall his proposals. Therefore, while compared to the past the stature of the office has been greatly enhanced, it is still potentially misleading to equate it with that of a 'true' foreign minister.

The complex and multidimensional function of High Representative evidently requires a highly skilled and flexible office holder. After all, he faces the daunting task of having to coordinate the external aspects of the work of the Commission, of safeguarding and promoting the Commission's interests at the meetings of the Council and the European Council, while simultaneously being expected to uphold the decisions of the European Council and the Council, take part in the work of the former, and preside over most of the meetings of the latter. Unsurprisingly then, the versatility and stamina of the HR is a determinant of his effectiveness. The demands become even more weighty when one considers that the function also entails directing the CSDP (which includes heading the European Defence Agency).²¹ To facilitate his plight, a European External Action Service has been placed at his disposal.²² At the same time though, supervising the EEAS consumes further energy.

To conclude, the wide remit of the HR's powers does not fail to impress, but the limits of the office are fuzzy and need to take shape in everyday practice. Some perceive the HR as being superbly well placed to forge pragmatic alliances in the choice between, or the combination of, CFSP and TFEU competences.²³ For that, he needs to obtain the unreserved confidence of Member State and Union colleagues who are comfortably able to outmanoeuvre him. In light of the Herculean nature of the task, a reconsideration of the office's institutional position or a

¹⁹Article 36 TEU.

²⁰Adoption of a Council Decision establishing the organisation and functioning of the European External Action Service, OJ [2010] C 210/1. It stipulates *inter alia* that, if the HR is unable to appear before the Parliament, depending on the issue to be discussed, a Commissioner or a representative from the Council Presidency (or the trio) will act as his deputy.

²¹See Article 42(4) TFEU. The CSDP is explored in Chap. 3.

²²Discussed *infra*, Sect. 2.4.10.

²³Dashwood (2013), p. 15.

divestment of responsibilities at one point cannot be ruled out. The appraisals of how the successive HRs have been faring so far are relatively critical, and grist to this mill.²⁴

2.4.2 The European Council

With the entry into force of the Lisbon Treaty, the European Council became one of the official institutions of the EU.²⁵ It is composed of its President, the national heads of state or government, and the President of the Commission.²⁶ As remarked above, the High Representative also takes part in its work.

The European Council is convened (at least) twice every 6 months. It does not exercise a legislative function, but provides the EU with the general impetus for its development, defines the general political directions and the priorities thereof. In principle, it takes all its decisions by consensus.²⁷

In the CFSP, further details on the role of the European Council can be found in Article 26 TEU, which states that it shall identify the strategic interests of the Union, determine the objectives of the CFSP, define general guidelines and adopt the necessary decisions. Article 31 TEU outlines the procedure for the adoption of such decisions. However, most formal decisions in the CFSP are adopted by the Council, not the European Council. Still, this does not diminish the paramount position of the latter, evident from the fact that it sets the overall agenda, takes the most important political decisions and lays down the CFSP's long-term goals. In accordance with Article 42(2) TEU, it is also the only institution that may decide on the establishment of a common defence.

2.4.3 The President of the European Council

Contrary to the past practice, whereby the rotating Presidency of the Council also entailed that the Presidency of the European Council would change every 6 months, the Lisbon Treaty led to the creation of a more permanent regime. Since then, the new-style President is chosen by the European Council for a term of office lasting two and a half years, renewable once. While in office, the selected person is barred from holding any national political function.²⁸

²⁴See e.g. Helwig (2015).

²⁵See Article 13(1) TEU.

²⁶In the past, the European Council also included the foreign ministers of the Member States and a member of the Commission. Article 15(3) TEU now provides that, when the agenda so requires, the members of the European Council may decide to be assisted by a minister, and the President of the Commission by a member of the Commission.

²⁷See Article 15 TEU.

²⁸See Article 15(5) and (6) TEU.

The paramount position of the European Council, described in the preceding section, entails that its President also plays a crucial role: where the European Council is intended to plot the Union's overall course and propel it into the future, the President sits comfortably at the helm of that institution. Thus, the further development of the CFSP rests partly on his shoulders as well. Together with the President of the Commission, he prepares the European Council's agenda and is bound to drive forward its work—something that enables him to influence and steer the decision-making process.²⁹

As he does not enjoy any competence to issue binding instructions, the official power he wields here seems rather limited, and mostly informal. He does exercise a large measure of control in the preparation of the European Council Conclusions, however, with his *chef de cabinet* holding the reins at COREPER level, steering the discussion on draft versions. His informal clout should not be underestimated either.³⁰

The European Council President serves overall to ensure continuity, cohesion and consensus in the EU. As remarked earlier, these three elements are of particular importance for the successful management of EU external relations. For the Union to speak with one voice, and to be seen as speaking with one voice, consistency remains crucial. For that reason, in matters pertaining to the CFSP, the President needs to work in close tandem with the High Representative. As regards representing the Union to the outside world, the TEU has entrusted them with a joint responsibility.³¹ In turn, together with the Commission President, they have established a troika that meets with key interlocutors at the highest political level (e.g., at recurring summits such as ASEM).

2.4.4 The Council of Ministers

The important role of the High Representative, the European Council and the European Council President notwithstanding, the bulk of decision-making in the CFSP takes place in the Council of Ministers. As known, in practice this institution has no single, static form, but meets in various different configurations. In the CFSP, the standard manifestation is that of the Foreign Affairs Council. However, as the relevant articles in the TEU only make mention of 'the Council' as the competent institution to take decisions in the CFSP, such decisions may equally be adopted in other configurations (e.g., by the Agriculture and Fisheries, Competitiveness, or Justice and Home Affairs Council). However, CFSP decisions are

²⁹See Article 15(6) (a) and (b) TEU.

³⁰See e.g. de Waele and Broeksteeg (2012).

³¹See Article 15(6) TEU.

ordinarily decided upon by the Foreign Affairs Council, during sessions chaired by the High Representative.³²

At the same time, the General Affairs Council (chaired by a representative of one of the Member State) is partly responsible for the preparation of, and follow-up to, European Council meetings.³³ In this manner, the country holding the rotating Presidency of the EU can still play a small part in the CFSP, and seek to push forward its own priorities.

As the Treaty puts it, the task of the Council is to frame the CFSP and take the decisions necessary for defining and implementing it, on the basis of the general guidelines and the strategic lines defined by the European Council.³⁴ The Council must also, together with the HR, ensure the unity, consistency and effectiveness of EU action.³⁵ Additionally, it appoints ‘Special Representatives’, mandated with a particular policy issue, on the proposal of the HR.³⁶ Finally, it also calls the shots as regards the establishment of so-called permanent structured cooperation.³⁷

Overall then, for all the impetus provided by the European Council, and notwithstanding the crucial guiding role of the HR, it is for the Council as the main decision-making body to keep the CFSP up and running, to establish the concrete rules and, set up specific projects and missions where necessary.

2.4.5 The Member States

Although the Member States can express their positions and preferences through their representatives in both the European Council and the Council, they also have an autonomous part to play in their ‘bare’ capacity as Member States.

To start with, in the same vein as the High Representative, the Member States may submit initiatives and proposals to the Council and refer question to it.³⁸ In this

³²Notwithstanding the seminal influence of the Committee of Permanent Representatives (COREPER), which pre-cooks every meeting and attempts to reach agreements on most dossiers in advance. In the CFSP, there are numerous other preparatory bodies that actively supply input; an overview can be found in Annex II to Council Decision 2009/908/EU laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, OJ [2009] L 322/28.

³³See Article 3(1) of European Council Decision 2009/882/EU adopting its Rules of Procedure, OJ [2009] L 325/51.

³⁴The decisions are generally taken on the basis of Article 28(1) and 29 TEU, and the Council may act entirely of its own motion, without any prior proposal to act. Decisions regarding the CSDP are however adopted on the initiative of the High Representative or a Member State: see Article 42 (4) TEU.

³⁵See Article 26(2) TEU.

³⁶See Article 33 TEU, as well as Sect. 2.4.15 *infra*.

³⁷See Article 42(6) and 46 TEU. The concept is explored further in Chap. 3.

³⁸See Article 30(1) TEU. As the second section stipulates, they may also request the HR to convene an extraordinary Council meeting if they believe that a topical event requires a quick response.

respect, the Member States (and the HR) may be considered to hold the position in the CFSP that the Commission occupies in most other domains of EU law.³⁹

Next, Article 32 TEU stresses the loyalty and solidarity Member States should exhibit towards the Union, as well as their Treaty partners. They are bound *expressis verbis* to consult with one another on any CFSP matter in order to determine a common approach. Without having done so, they may not undertake any action on the international scene or enter into any commitment which could affect EU interests.⁴⁰

Article 34 TEU contains similar requirements, stipulating that the Member States should coordinate their actions in international organisations and at international conferences and uphold the Union's positions in such forums. This includes deliberations within the framework of the United Nations: Article 34(2) specifies that those Member States holding a seat on the UN Security Council should follow concerted practices, defend the positions and the interests of the EU, and keep the other Member States and the HR fully informed. They are even bound to request that the High Representative is invited to present the Union's position with regard to a subject on the UNSC's agenda, in case the EU has already defined a particular common position on the topic.⁴¹

Finally, the Member States are also required to make available to the Union those civilian and military capabilities necessary to implement the Common Security and Defence Policy. The Council may then empower the countries that are willing and able to partake to engage in actual (civilian or military) field missions. Those Member States whose military capabilities fulfil higher criteria and are willing to take up more binding commitments with regard to the most demanding missions may even go on to establish an *avant-garde*, in the form of 'permanent structured cooperation'.⁴² A decision to this effect was taken in 2017.

2.4.6 The European Parliament

Whereas the competences of the Parliament have been increased considerably over the past decades, the CFSP is one of the few domains where it remains on the margins of the decision-making process. There exists no official political nexus between this institution, the Council and the European Council. Thus, the latter cannot be held to parliamentary account or subjected to genuine democratic scrutiny for the handling of any CFSP issue. This naturally renders the legitimacy of the

³⁹Cf. Article 289(4) TFEU.

⁴⁰In accordance with Article 32(4) TEU, such obligations extend to the diplomatic missions of the Member States and the Union delegations in third countries and at international organisations.

⁴¹The UN does not have to respond favourably, since the EU as such continues to hold only an observer status in that organisation (alongside entities such as the Vatican, the Arab League, and the International Federation of the Red Cross and the Red Crescent).

⁴²See respectively Article 42(3), 44 and 42(6) TEU.

Policy rather questionable, albeit that the individual members of the Council and European Council may still be seized, questioned or instructed in their respective national parliaments.

Article 36 TEU guarantees that the Parliament shall be regularly consulted and informed by the High Representative on the main aspects and basic choices of the CFSP and CSDP.⁴³ Twice a year, the Parliament will hold a debate on the CFSP and CSDP. Its views are, however, fairly non-committal; the HR only has to ensure that these are ‘duly taken into consideration’. The second prerogative of the Parliament laid down in Article 36 does not amount to very much either: the institution is entitled to put questions or make recommendations to the Council or the HR. This again lacks real sting, as it will depend entirely on the voluntary cooperation of the Council and the HR whether the questions are answered and the recommendations given a follow-up.⁴⁴ However, as will be detailed below, the Parliament did establish some stronger powers of control over the EEAS.⁴⁵

One aspect in which the Parliament definitely exercises a substantial competence concerns the budgetary sphere. All administrative expenditure involved with the CFSP is charged to the general EU budget, and the same goes for most operating expenditure.⁴⁶ The Parliament cannot be bypassed here: it needs to approve the budget in advance and grant discharge for all payments afterwards; any of its demands for alterations have to be met in order for the overall scheme to be approved.⁴⁷

A last aspect, highlighted before, concerns the position of Parliament in the conclusion of international agreements. The duty to keep it informed during all stages, incumbent upon the other actors in that process, cannot be taken lightly—and as the Court underscored, this duty applies just as well when those agreements pertain to the CFSP.⁴⁸ Alas, Article 218 TFEU does not confer it a veto right or prerogative to be consulted on the final text of such treaties.

2.4.7 The European Commission

The role of the Commission in the CFSP is ostensibly a marginal one. Article 17 (1) TEU explicitly relieves it from its task of externally representing the EU in this

⁴³As remarked in Sect. 2.4.1, the HR has set out some further modalities in a (non-binding) Declaration on Political Accountability. Of course, in her capacity as member and vice-president of the Commission, she can be subjected to parliamentary scrutiny in the same way as her colleagues.

⁴⁴The same goes for any questions concerning CFSP issues put to the European Council President. The latter is merely bound to present a report after each of the meetings of the European Council: the Treaties do not even oblige him to appear personally before the Parliament.

⁴⁵See Sect. 2.4.10.

⁴⁶See Article 41(1) and (2) TEU.

⁴⁷See Article 310-314 TFEU.

⁴⁸Case C-658/11, *Parliament v Council* (Mauritius agreement).

domain. Article 21(3) TEU makes only a petty reference to the place of the Commission in the CFSP, stating that it is to ensure consistency between the different areas of its external action and between these and other EU policies, together with the Council and the High Representative. In a way then, the HR acts on its behalf in his capacity of vice-president of the Commission, aligning the (potentially) divergent interests in the various portfolios. In addition, as Article 30 TEU stipulates, it may support the questions, initiatives or proposals submitted by the HR to the Council. For the rest, the Commission as such has no formal role to play.

Box 2.2 The Commission's Informal Role in the CFSP: An Influential Actor in the Shadows

As legal sociologists never grow tired of reminding us, the law in the books nearly always fails to tell the whole story. In the same vein, the Commission's contribution to the shaping of the CFSP proves to be somewhat greater in reality than one would assume on the basis of the Treaty texts. In the shadowy world that lies outside the remit of its formal competences, it is increasingly involved in decision-making and has proven influential in one way or the other. One notable example offers the development of the EU Maritime Security Strategy (2014), a document originally of limited ambition, which the Commission managed to broaden to a cross-sectoral approach, touching upon multiple areas and reaching far beyond the CFSP.

That the TEU provisions largely 'lock out' the Commission is perfectly understandable in light of the intergovernmental nature of the domain, even when that image deserves to be nuanced on the basis of its informal activities.⁴⁹ Apart from the institution as such, we should anyhow not overlook the position of its President, who still has an official role in the development of the CFSP in his capacity of member of the European Council.

2.4.8 The Court of Justice

As remarked above, contrary to all other domains of EU activity, in the 'outer layer' of the Union the jurisdiction of the Court of Justice has been severely curtailed. Article 275(1) TFEU makes clear that the Court is generally excluded from interpreting CFSP rules and decisions or ruling on their validity. The decisions taken in this domain are therefore mainly susceptible for political review; suggestions for establishing a full judicial control over these measures have been

⁴⁹See e.g. Smith (2004) and Riddervold (2015).

rejected. All the same, tangential remedies are available in certain circumstances, discussed in greater detail before.⁵⁰

2.4.9 Political and Security Committee

In the CFSP, a Political and Security Committee (PSC) functions alongside the COREPER.⁵¹ It is mainly composed of high-ranking civil servants from the foreign ministries of the Member States, and chaired by a representative seconded by the HR.⁵²

Article 38 TEU entrusts the PSC with a threefold task: first, to monitor the international situation and the implementation of agreed policies under the CFSP; second, to contribute to the definition of policies by delivering opinions to the Council; third and most important, to exercise the political control and strategic direction of crisis management operations, under the responsibility of the Council and the High Representative.

The PSC is advised by a Committee for Civilian Aspects of Crisis Management (CIVCOM), which provides information, drafts recommendations, and gives its opinion to the PSC on civilian aspects of crisis management. Preparatory work is carried out by the Politico-Military Group (PMG), also chaired by a representative of the HR, which contributes to the development of (horizontal) policy, facilitates exchanges of information, and has a particular responsibility regarding partnerships with third states and other organisations (including EU–NATO relations).

Even if not endowed with firm legal competences, the PSC is to be reckoned with as a highly influential body.⁵³ It conducts the political supervision of a set of agencies, including the EU Satellite Centre and the EU Institute for Security Studies. It gives national foreign ministries an important means to control the execution of CFSP acts in an indirect manner. Also, it offers these ministries a direct forum for channelling their distinctive preferences, outside and in addition to the official meetings of the Council of Ministers and the COREPER.

2.4.10 The European External Action Service

Alongside the introduction of the High Representative's office, one other milestone in the recent history of the CFSP has been the creation of the European External Action Service (EEAS), as mandated by Article 27(3) TEU. The EEAS is neither an office nor an agency, but a functionally autonomous body of the EU that functions

⁵⁰See Chap. 1, Sect. 1.6.

⁵¹Often abbreviated as COPS, after its French name, *Comité politique et de sécurité*.

⁵²In tune with Article 2 of Decision 2009/881/EU on the exercise of the Presidency of the Council, OJ [2009] L 315/50.

⁵³As illustrated in Juncos and Reynolds (2007).

under the aegis of the High Representative. It supports the HR in his capacity as President of the Foreign Affairs Council, as well as in his capacity of vice-president of the Commission responsible for coordinating its external action. The functionality of the Service thus stretches beyond the CFSP.

After some hefty skirmishes and several rounds of intense political debate, in mid-2010, the details of its organisation and functioning were finally agreed upon and laid down in a Council decision.⁵⁴ It was ultimately decided that the EEAS would principally serve the High Representative, but that it would also be available to support the external work of the President of the European Council, the Commission and the President of the Commission. To curry the favour of the Parliament, the HR consented to assume political responsibility for the Service's dealings. Moreover, the Parliament was awarded the right to interview proposed senior EEAS staff members, and entitled to say 'yes' or 'no' to its annual budget.⁵⁵

With the creation of the EEAS, a *corps diplomatique* has been put at the disposal of the EU, providing it with the allure of a real 'foreign office' at long last. Previously, both the Commission and the Council had their own international delegations in the world (for example, those that functioned as special liaisons with the UN in New York and the WTO in Geneva). In addition, the Member States never relinquished their own privilege under international law to establish and maintain embassies and consulates in other countries. The EEAS is meant to operate in close cooperation with the diplomatic services of the Member States, without replacing them.⁵⁶ Since the entry into force of the Lisbon Treaty, the EU sends out unitary delegations to represent the Union across the world, in third countries as well as at international organisations. These delegations are seconded by the EEAS and consist of its staff members.⁵⁷

The Service was created on the basis of relevant departments and functions of the Commission and the General Secretariat of the Council, which have been extracted and integrally transferred.⁵⁸ As a result, it consists predominantly of officials from those two institutions. At the same time, the diplomatic services of

⁵⁴Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service, OJ [2010] L 201/30. After the staff regulation, the financial regulation, the budget and the members of the senior management team were approved by the Parliament, the Service became officially operational on 1 December 2010.

⁵⁵The Service received its own section in the EU's general budget.

⁵⁶As Article 5(9) of the Council Decision ordains, EU delegations are to work in close cooperation and share information with the diplomatic services of the Member States. Interestingly, the original proposal for setting up the EEAS added that they would provide all relevant information 'on a reciprocal basis'.

⁵⁷For a colourful portrayal of their work, see Novotná (2014).

⁵⁸E.g. EU Military Staff, the Civilian Planning and Conduct Capability, the Commission DG for External Relations (RELEX). The annex to the Council Decision provides a full list.

the Member States have delegated civil servants to form part of the EEAS, to the amount of roughly one-third of its total personnel.⁵⁹

The highest-ranking official at the Service is a secretary-general. Contrary to original proposals, he is not all-powerful, but operates within a wider ‘management team’ which includes two deputy secretaries-general.⁶⁰ On the insistence of the Parliament, which saw a pyramidal structure as undesirable, his leadership role has been confined to administrative aspects.

The EEAS’ central administration is organised in Directorates-General. These DGs comprise a battery of geographic, multilateral and thematic desks. There are also DGs for administrative, staffing, budgetary, security and ICT matters, as well as a crisis management and planning directorate. Moreover, the EEAS comprises the Civil Planning and Conduct Capability, the European Union Military Staff and the European Union Situation Centre. Because of their prominence and much older pedigree, the latter are discussed in more detail below. The Service’s central administration includes a strategic policy planning department, a legal department, departments for inter-institutional relations, information and public diplomacy, internal audit and inspections, and personal data protection.⁶¹

The functioning of the EEAS was subjected to an incisive review a few years after its launch. This culminated in a scathing report, pointing inter alia to problems with internal (financial) management, lack of organisational coherence, and issues of demarcation/overlap with other Brussels-based organs and structures.⁶² A number of suggestions for improvement were listed, some of which have in whole or in part been acted upon. None of the flaws exposed however related to (potential) shortcomings in the legal arrangements governing its operation—inviting pragmatic solutions and adjustments to its *modus operandi* instead.

2.4.11 EU Military Committee and EU Military Staff

In the Treaty texts, one finds no mention of either of these two entities. They are however essential to ensure the successful operation and development of the CFSP in general, and the CSDP in particular.

The EU Military Committee (EUMC) is the highest military body set up within the Council.⁶³ It is composed of the Chiefs of Defence of the Member States (with the latter’s permanent Military Representatives regularly acting as their deputies).

⁵⁹Since mid-2013, officials and civil servants from all EU institutions may apply for vacant posts in the EEAS. At full capacity, EU officials are to represent at least 60% of the staff at administrator level; at least one-third of all the staff ought to come from national diplomatic services.

⁶⁰And a director-general for budget and administration.

⁶¹Elaborate reflections on the creation, merits and first achievements of the EEAS provide Vanhoonacker and Reslow (2010); Blockmans and Hillion (2013); Gatti (2014).

⁶²Available at eeas.europa.eu/top_stories/2013/29072013_eeas_review_en.htm.

⁶³Pursuant to Council Decision 2001/79 setting up the Military Committee of the European Union, [2001] OJ L 27/4.

The EUMC directs all EU military activities and provides the PSC with advice and recommendations on military matters. It has a permanent chairman, selected by the Chiefs of Defence of the Member States and appointed by the Council.

EU Military Staff (EUMS) was previously a department within the General Secretariat of the Council, and now forms part of the EEAS.⁶⁴ It is the Union's only permanent integrated military structure, providing in-house expertise for the High Representative. The EUMS works under the direction of the EUMC, receives regular input from it and offers support on all the military aspects of strategic planning. The EUMS is also expected to plan, assess, and come up with periodic recommendations as regards the overall military strategy.

2.4.12 Civilian/Military Planning and Conduct Capabilities

Contrary to what the name would have you believe, neither the Civilian Planning and Conduct Capability (CPCC) nor the Military Planning and Conduct Capability (MPCC) is an abstract concept that merely denotes a certain potential. The CPCC is a permanent structure of long standing, responsible for the preparation and implementation of civilian CSDP operations. The MPCC is a relatively new addition, responsible at the strategic level for the operational planning and conduct of non-executive military missions.⁶⁵

The CPCC previously formed part of the Council Secretariat but nowadays functions with the overarching structure of the EEAS. The MPCC has been placed within the EUMS, which nowadays also forms part of the EEAS. Together, the CPCC and MPCC make up a Joint Support Coordination Cell. They are linked to the Crisis Management and Planning Directorate (CMPD), which contributes to the objectives of the EEAS in the planning of CSDP civilian missions and military operations. The CPCC and the MPCC are subordinated to the political control and strategic direction of the PSC and the overall authority of the High Representative.

2.4.13 EU Intelligence and Situation Centre, EU Satellite Centre, EU Institute for Security Studies, EU Security and Defence College

The EU Intelligence and Situation Centre (INTCEN) is the Union's most sensitive security organ. Its task is to provide intelligence analysis, early warning and situational awareness to the HR, the EEAS, the Member States and the various

⁶⁴Council Decision 2001/80/CFSP on the establishment of the Military Staff of the European Union, OJ [2001] L 27/1, as amended by Council Decision 2005/395/CFSP, OJ [2005] L 132/1.

⁶⁵Before the advent of the MPCC, the latter relied on Mission Commanders deployed in theatre. This created difficulties both in the planning and conduct, leaving some missions in need of more proactive HQ support. At the operational level, each mission will now be led by a Mission Force Commander, acting under the supervision of the MPCC's Director.

EU decision-making bodies. Apart from collating information and compiling its own dossiers, it receives crucial data input from national secret services. At the heart of its work is a classified-information-sharing cell, composed of intelligence officers seconded from the Member States. It operates as a round-the-clock operational contact point, monitoring and assessing international events, offering immediate facilities to support a crisis task force. Like the CPCC and CMPD, INTCEN nowadays forms part of the EEAS.

The EU Satellite Centre (EUSC) constitutes one of the Union's official agencies.⁶⁶ In sync with its name, it aims to facilitate the Council's decision-making by providing analyses of satellite imagery and collateral data. It equally supports the EEAS, Member States, the Commission, and even third countries and other international organisations. The EUSC functions under the supervision of the PSC and the operational direction of the HR.

The EU Institute for Security Studies (EUISS) is an agency as well.⁶⁷ Its official objectives are to explore a common security culture for the EU, to help develop and project the CFSP, and to enrich Europe's strategic debate. The HR serves as president of the board of the EUISS. The EUISS functions essentially as a think tank, researching all relevant security issues and providing a forum for debate. In its capacity as an EU agency, it also offers analyses and forecasts to the Council.

In somewhat similar fashion, the European Security and Defence College (ESDC), established in 2005, aims to provide strategic-level education and develop the necessary training and education tools for the CSDP. The ESDC is a virtual network college, operating on the basis of input from universities and academic institutions (both civilian and military). Participants in the courses offered by the College are mainly diplomats, civil servants, police officers, and military personnel from the Union's institutions and Member States. The latter partake and contribute to the ESDC on an entirely voluntary basis.

2.4.14 The European Defence Agency

Originally, the establishment of a European Defence Agency (EDA) was foreseen in the ill-fated Constitutional Treaty, signed in 2004 and derailed soon thereafter.

⁶⁶Established by Council Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre, OJ [2001] L 200/1, subsequently replaced by Council Decision 2014/401/CFSP, OJ [2014] L 188/73.

⁶⁷Established by Council Joint Action 2001/554/CFSP on the establishment of a European Union Institute for Security Studies [2001] OJ L 200/1, as amended by Council Joint Action 2006/1002/CFSP, OJ [2006] L 409/181.

For practical reasons, it was however already launched that same year.⁶⁸ With the entry into force of the Lisbon Treaty in December 2009, the EDA finally received a legal basis in EU primary law.

The EDA is active in the field of defence capabilities development, research, acquisition and armaments. Article 42(3) TEU provides that the Agency has as its main task to identify operational requirements, to promote measures to satisfy those requirements, and to contribute to identifying and implementing any measure needed to strengthen the industrial and technological base of the European defence sector. Moreover, it participates in defining a European capabilities and armaments policy, and assists the Council in evaluating the improvement of existing military capabilities. Article 45 TEU elaborates on all these objectives in further detail.⁶⁹

The EDA is open to all Member States that wish to take part in its activities. It is funded by its members in proportion to their GNP.⁷⁰ Specific groups within the Agency aim to bring together countries engaged in joint projects (a successful example being the development of the European Fighter Aircraft, which was commissioned by the United Kingdom, Germany, Italy and Spain).

The EDA is governed by a steering board meeting at the level of defence ministers, with the HR acting as its head. The latter appoints a chief executive for the day-to-day management. The Agency liaises with the Commission, e.g., in the undertaking and financing of research.

2.4.15 EU Special Representatives

As Article 33 TEU makes clear, the Council may entrust Special Representatives with a mandate in relation to particular policy issues. These Special Representatives of the European Union (EUSRs) carry out their mandate under the authority of the High Representative. They are affiliated with the EEAS, without being officially enlisted by that Service.

Special Representatives have been compared to ‘travelling salesmen’. They are tasked to promote the Union’s policies and interests in selected, often troublesome parts of the world, and play an active role in efforts to consolidate peace, stability and the rule of law.

⁶⁸Council Joint Action 2004/551/CFSP on the establishment of the European Defence Agency, OJ [2004] L 245/17. In July 2011, the Council adopted Decision 2011/411/CFSP, OJ [2011] L 183/16, to replace the earlier Joint Action. It was in turn repealed and recast by Council Decision 2015/1835 defining the statute, seat and operational rules of the European Defence Agency, OJ [2015] L 266/55.

⁶⁹See further Chap. 3, Sect. 3.5.1.

⁷⁰This budget covers the Agency’s operating costs; individual projects are funded separately.

Box 2.3 The World of EU Special Representatives

Over time, the number of EUSRs in office did not remain fixed, and has since the first appointments varied from less than 10 to well over a dozen. Their mandates are mainly of a geographic nature. In the past, they have been assigned to, *inter alia*, Afghanistan, Bosnia and Herzegovina, the Horn of Africa, Central Asia, the former Yugoslav Republic of Macedonia, Georgia, Kosovo, the Middle East, Moldova, the South Caucasus and Sudan. Since 2012, one SR has been entrusted with the ‘horizontal’ portfolio of human rights. Some EUSRs are resident in the country or region assigned, while others work on a travelling basis from Brussels.

EUSRs provide the EU with an active political presence in key countries and regions, acting as a local ‘voice’ and ‘face’ for the Union and its policies. Simultaneously, they may be instructed by the HR to brief the European Parliament on their activities and developments in the assigned areas.⁷¹

2.5 Decision-Making

Overall, the Treaties are silent on the modalities of decision-making within the various actors in the CFSP. This basically allows them to establish and pursue their own (internal) rules, though for many of them, these have been predetermined in secondary law instruments. Nonetheless, for the official institutions, the general rules are firmly spelled out by a plethora of primary law provisions, which apply by analogy in the CFSP. Thus, for example, in line with Article 250 TFEU, the Commission decides by a majority of its members.

As remarked, the bulk of official decision-making in the CFSP takes place in the Council of Ministers. The details of the decision-making by the Council (and, on occasion, the European Council) are outlined in Article 31 TEU. Unanimity is the main rule, unless the Treaties provide otherwise. This effectively amounts to a power of veto for all members. However, a qualified abstention mechanism has been put in place, whereby a Council member may make a formal declaration accepting that the proposed decision commits the Union, without being obliged to apply this measure itself. This enables all other members to go ahead with the adoption of the instrument. It is nevertheless impossible to proceed in case more than one-third of the Council members, representing at least one-third of the Member States, qualifies their abstention in this way.⁷²

⁷¹See Article 36 TEU.

⁷²See Article 31(1) TEU, second sentence.

Since the Treaty of Amsterdam, the main rule of unanimity has gradually given way to a number of possibilities for majority voting.⁷³ There are currently six such possibilities. Article 31(2) TEU enables the Council to act by QMV in four cases: firstly, when adopting a decision defining an EU action or position on the basis of a decision of the European Council that relates to the EU's strategic interests and objectives; secondly, when adopting a decision defining an EU action or position on a proposal from the High Representative⁷⁴; thirdly, when adopting any decision implementing a decision defining an EU action or position; fourthly, when appointing EU Special Representatives. In addition, as Article 31(5) provides, the Council may act by a simple majority when deciding on procedural issues. Lastly, Article 41(3) contains a special regime for the financing of certain CFSP initiatives.

The number of possibilities for majority voting may be widened in the future, as Article 31(3) TEU enables the European Council to adopt (by unanimity) a decision extending QMV to other cases. All QMV possibilities are, however, subjected to two crucial limitations: if proposed CFSP decisions have military or defence implications, they should always be taken unanimously.⁷⁵ Also, in case any Council member for vital and stated reasons of national policy objects to the use of QMV, a vote cannot be taken. The High Representative may then attempt to iron out the differences, but the matter may have to be referred to the European Council for a decision by unanimity.⁷⁶ This is usually referred to as the 'emergency brake' mechanism.⁷⁷

In all, there is nowadays considerable room for adopting measures by majority in the Council of Ministers, the central decision-making body in the CFSP. Yet, at the same time, the exceptions to the main rule of unanimity remain strictly confined. Consequently, Member States will rarely be pressed to subscribe to an act that flatly contradicts their particular interests. Moreover, it is good to realise that up until now, all the leading CFSP decisions have been taken unanimously, and the constructive abstention mechanism has failed to become popular.⁷⁸ While the possibilities for QMV may certainly boost efficiency, at the end of the day, their significance will remain limited so long as a preference for an absolute consensus holds sway.

⁷³The Maastricht Treaty only contained an underexplored exception in Article J.8(2), for procedural issues and the implementation of Joint Actions and Common Strategies.

⁷⁴This might seem to constitute a staggeringly broad possibility for QMV, but here, the proposal should always follow a specific request by the European Council (where unanimity is still required). In other words, any Member State can still throw up an effective blockade if it wants to.

⁷⁵Article 31(4) TEU.

⁷⁶Article 31(2) TEU.

⁷⁷Forming a remote echo of the 'Luxembourg Compromise', the 'agreement to disagree' reached in the 1960s in order to overcome the 'empty chair crisis'.

⁷⁸See Blockmans (2014), p. 5.

2.6 Legal Instruments

As set down in Article 288 TFEU, for furthering law and policy, the Union has three main legal instruments at its disposal, namely Regulations, Directives and Decisions. The CFSP, in this respect, once again displays its wholly different make-up: as remarked earlier, in this special domain of EU law, no legislative acts can be adopted, and the only available instruments are Decisions.⁷⁹ For the sake of completeness, it should be noted that on a daily basis, the CFSP finds a prominent expression through a variety of soft law documents (e.g., resolutions, statements and memoranda) issued by the countless actors highlighted above.

Before the entry into force of the Lisbon Treaty, three different legal instruments could be distinguished in the CFSP, namely ‘Common Positions’, ‘Common Strategies’ and ‘Joint Actions’.⁸⁰ This plurality has of late been greatly reduced. However, when piercing through the veil of uniformity, one quickly discovers that the old status quo has not been completely abandoned. As Article 25 TEU specifies, the decisions to be adopted can be either those defining actions to be undertaken by the EU, those defining positions to be taken by the EU, or arrangements for the implementation of either of these decisions.⁸¹ In Article 26(1) TEU, the European Council is instructed to ‘take the necessary decisions identifying the Union’s strategic interests’, which amounts to a decision of the type that was previously known as a Common Strategy.⁸² In Article 28 TEU, the Council is instructed ‘to adopt the necessary decisions where the international situation requires operational action by the EU; such actions shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation’, which corresponds materially with what was previously known as a Joint Action—in many respects the key vehicle of the CFSP and CSDP when it came to launching concrete projects and field missions.⁸³ Finally, in Article 29 TEU, the Council is instructed ‘to adopt decisions that define the approach of the EU to a particular matter of a geographical or thematic nature’.

⁷⁹At the same time, one should keep in mind that, within the scope of the CFSP, international agreements can be concluded with third countries or international organisations. For this, Article 37 TEU supplies the necessary legal basis, with Article 218 TFEU setting down the procedural arrangement (discussed in Chap. 1, Sect. 1.5).

⁸⁰There also existed the instrument of ‘sui generis decisions’, adopted on the rather dubious legal basis of the former Article 23 TEU. These seemed to be steadily gaining in popularity, and were adopted in ever greater numbers in the 1993–2009 period.

⁸¹Article 25(1) TEU also states that the Union shall conduct the CFSP by defining general guidelines and by strengthening systematic cooperation between Member States, but neither amounts to a legal instrument as such.

⁸²These had more or less fallen into desuetude: only three were ever adopted, namely on Russia, the Ukraine and the Mediterranean region.

⁸³Joint Actions involved financial transfers and expenditure, sending missions (from election observers to military personnel), and were also used for setting up centres and agencies. Joint actions were adopted for operations in e.g. South Africa, Bosnia, Georgia, the Democratic Republic of Congo, Kosovo, Iraq and Afghanistan.

We here stumble upon an exact copy of the phrase that was previously employed for Common Positions.⁸⁴

Thus, although decisions are officially the only available legal instruments in the CFSP, one may at present still discern different ‘flavours’ that bear at least a passing resemblance to their predecessors. Moreover, as Article 25 TEU makes clear, any decision may be further implemented by a subsequent decision—which is in fact identical to the past, when a Common Strategy, Common Position or Joint Action could also receive a follow-up, often in the form of ‘*sui generis* decisions’.⁸⁵

The continuity between the pre-2009 situation and the current setup should nevertheless not be overstated, since the legal nature of the act has become entirely homogenous (unequivocally, all of them are Decisions). Moreover, in its adoption practice, the Council increasingly deviates from the aforementioned, seemingly distinct provisions in the TEU—not shying away from unexpected choices or combinations. Consequently, there are ever more acts that cut across the erstwhile categorisation, and it is no longer always possible to qualify a measure as being of one particular type.

2.7 Conclusion

Although time-wise the CFSP has already reached adulthood, it is legally still evolving towards a full-grown status. Despite frequent stagnation and some terribly disappointing results (with the Iraq crisis of 2003 as a spectacular nadir, when no common ground could be found to oppose British-American warmongering), its intended purpose and added value remain clear as day. Reflecting on the longitudinal trend in the dynamics of the law here, one may well regard its character to be shifting more closely towards that of a single foreign policy, an inference corroborated by the progressive amendments to Title V TEU. Obviously, getting closer in no way means that the final destination has been reached.

The CFSP’s central objectives were clarified by the Lisbon Treaty, trailed by several other improvements to its internal coherence. In the period since then, its interrelation with other domains of EU external relations law became markedly smoother. What is more, where unanimity was previously the default rule of decision-making, in little over a decade, we witnessed a sizeable increase over the years in the possibilities for adopting measures through QMV. For the moment

⁸⁴Common Positions did not concern operational action but roughly amounted to binding political statements. Common positions were e.g. adopted on specific situations related to conflict prevention, anti-terrorism, human rights, the rule of law and good governance. Economic, financial and other sanctions against third countries, suspicious organisations and individuals were also imposed in this form.

⁸⁵Cf. *supra*, footnote 80. Another parallel with the past concerns the imposition of restrictive measures: presently, pursuant to a sanctioning decision under Title V TEU, follow-up measures are to be established under the TFEU (see Article 215 TFEU). In earlier times, in such cases CFSP Common Positions led to the subsequent adoption of EC Regulations.

though, the CFSP retains its distinct intergovernmental spirit, and it remains sealed off—albeit not hermetically—from the Union’s other fields of external competence. As a result, disputes will continue to arise with regard to the proper place for adopting a certain instrument. Whereas in theory, any international issue could be said to concern the EU’s ‘foreign policy’, the attribution of powers principle and the *lex specialis* rule dictate that, in reality, not each and every action should be taken under Title V TEU. Actually, it would be decidedly unhelpful if the latter were the case, since no legislative measures may be adopted in this domain.

As the preceding sections have sketched out, the CFSP is teeming with a panoply of actors (institutions, bodies, agencies and others). It was flagged in passing how this state of play gives rise to frictions and triggers problems of overlap.⁸⁶ There remains as much cause for concern and discomfort with respect to democratic legitimacy, especially in light of the fact that the most important actors (the Council, the European Council and the HR) cannot be subjected to full parliamentary scrutiny. Again, we have not arrived at a satisfactory destination just yet.

Lastly, the polychrome array of CFSP legal instruments may be a cause for bemusement. Post-Lisbon, much has been achieved to increase their effectiveness, and the fuzzy distinctions of old have all but dissipated. Nevertheless, a question mark continues to hover above the CFSP’s head, pertaining to the precise legal nature of this policy. For sure, it is a serious mistake to qualify it as a realm devoid of binding commitments, as political scientists are still too often inclined to do.⁸⁷ Yet, in the absence of courts, there are few guarantees that any of the actors actually comply with the rules that have been set down. This might go a long way towards explaining the TEU’s frantic underlining of the obligations of loyalty, solidarity and faithful cooperation. Should Member States or institutions decide to violate a specified procedure, or ignore or contravene positions they had earlier committed themselves to, neither the ECJ nor the Commission can sanction their conduct. As a result, the CFSP that was deliberately kept intergovernmental, continues to be plagued by its non-supranational deficiencies. Its inherently political nature may even lead one to question whether Title V of the TEU actually amounts to ‘law’, in the absence of any functional means of sanctioning.⁸⁸ That question is, however, intimately connected to classic questions of legal theory on which we will not dwell further, as they fall outside the scope and purpose of this book.

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⁸⁶Cf. the extended analysis in Chap. 10.

⁸⁷Inter alia Cardwell (2015) and Wessel (2015) attempt to debunk this myth.

⁸⁸Compare e.g. the ‘command theory of law’, advanced by the philosopher John L. Austin (1790–1859).

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