

EDITORIAL COMMENTS

A stronger Common Foreign and Security Policy for a self-reliant Union?

At an election rally in Munich in May 2017, the German Chancellor Angela Merkel underlined that “[t]he times in which we could completely depend on others are, to a certain extent, over We Europeans truly have to take our fate into our own hands.”¹ The President of France, Emmanuel Macron, reiterated the point in his annual address to the French Ambassadors: “Europe can no longer entrust its security to the United States alone. It is up to us to assume our responsibilities and to guarantee European security and thereby sovereignty.”²

This interest in Europe’s self-reliance has found further expression in the Member States’ wish for a more vigorous EU foreign and security policy. A stronger CFSP is not only conceived as a means to promote the interests and values of the Union,³ it is also seen as instrumental to strengthening the EU’s “strategic autonomy”, against the backdrop of mounting global and regional uncertainties.⁴

Interestingly, calls for more EU foreign and security policy do not come solely from the most obvious advocates. The Commission is not traditionally known to have a keen interest in the development of a policy deemed to overshadow its own clout on the international plane,⁵ but it too has pleaded for a more energetic CFSP. Echoing its President’s speeches on the State of the Union,⁶ the Commission recently published a Communication explicitly

1. *The Guardian*, 27 May 2017.

2. Speech by President Emmanuel Macron – Ambassadors’ Conference 2018, available at <www.diplomatique.gouv.fr/en/the-ministry-and-its-network/events/ambassadors-week/ambassadors-week-edition-2018/article/speech-by-president-emmanuel-macron-ambassadors-conference-2018>.

3. Art. 3(5) TEU.

4. See e.g. the 2016 Global Strategy for the EU’s Foreign and Security Policy (<eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf>) and “Editorial comments: ‘We perfectly know what to work for’: The EU’s Global Strategy for foreign and security policy”, 53 CML Rev. (2016), 1199.

5. The CFSP is one of the very few domains of EU competence where the Commission does not represent the Union on the international plane: Art. 17(3) TEU.

6. In his State of the Union speech of 2017, Juncker declared: “I want our Union to become a stronger global actor. In order to have more weight in the world, we must be able to take foreign policy decisions quicker. This is why I want Member States to look at which foreign

calling for the Union to be a stronger global actor through “a more efficient decision-making for EU Common Foreign and Security Policy”.⁷

More commitments

The reasons for this new impetus are undoubtedly several. The evolving US approach towards the transatlantic relationship, against the backdrop of increasing volatility of the EU’s neighbourhood may have played a part.⁸ The broader support for an ambitious CFSP is also symptomatic of the legal evolution of the policy itself, at work particularly since the entry into force of the Treaty of Lisbon. Beyond the call for a more effective EU foreign, security and defence policy, Member States and institutions have thus fleshed it out substantively and normatively, through various initiatives based partly on hitherto dormant or recently introduced CFSP provisions.

Alongside the steady increase in the number of EU restrictive measures, seen as “an essential tool of the EU’s Common Foreign and Security Policy”,⁹ various building blocks have been put in place for further cooperation, specifically in the area of security and defence. One initiative that stands out is the establishment of the so-called “Permanent Structured Cooperation” (PESCO),¹⁰ whereby 25 Member States have made commitments to one another, with a view to fulfilling more demanding military missions. The purpose is indeed to develop jointly defence capabilities, invest in shared projects and enhance the operation readiness and contribution of armed

policy decisions could be moved from unanimity to qualified majority voting. The Treaty already provides for this, if all Member States agree to do it”.

7. Communication from the Commission to the European Council, the European Parliament and the Council,

A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy, COM(2018)647 final.

8. See e.g. the Rome Declaration of the Leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017, <europa.eu/rapid/press-release_STATEMENT-17-767_en.htm>, and the Global Strategy, cited *supra* note 4.

9. Presented as such on the EU Council’s website (<www.consilium.europa.eu/en/policies/sanctions/>). The same website defines sanctions as “preventive measures which allow the EU to respond swiftly to political challenges and developments that go against its objectives and values. For instance, sanctions can target: terrorism, nuclear proliferation activities, human rights violations, annexation of foreign territory, deliberate destabilization of a sovereign country”. See e.g. Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, O.J. 2014, L 78/16.

10. Council Decision establishing Permanent Structured Cooperation (PESCO) and determining the list of Participating Member States, 8 Dec. 2017.

forces.¹¹ While voluntary, participation in PESCO involves *binding* commitments from the participating States. Indeed, the Council founding decision makes it clear that the High Representative, assisted by the European External Action Service (EEAS), and the Council are to monitor the participants' performance, with a risk of suspension from the project should commitments not be fulfilled.¹²

A related enterprise in the particular security and defence sphere is the establishment of the European Defence Fund (EDF).¹³ The initiative is purported to support joint research and development in the defence industry across the EU, with the ultimate aim of enhancing the EU's strategic autonomy.¹⁴ Interestingly, the Fund was initiated by the European Commission, in the form of a proposal for a regulation to the European Council, Parliament and Council, based on Articles 173(3) (industry) 182(4), 183 and 188(2) (research and development) TFEU.¹⁵ It is also presented as a "text with EEA relevance", thereby suggesting a direct connection between the EDF and the functioning of the single market.

These initiatives are notable not only because they typify the Member States' interest in deeper cooperation to develop the Union's CFSP. They also illustrate the growing, though not entirely new relevance of other EU (read non-CFSP) rules and tools in the development and pursuit of EU foreign, security and defence policy.¹⁶ Moreover, they seemingly instil a culture of

11. See <www.consilium.europa.eu/en/press/press-releases/2017/12/11/defence-cooperation-pesco-25-member-states-participating/>.

12. Art. 6(3) and (4) PESCO. For a thorough analysis of PESCO, and context see Blockmans, "The EU's modular approach to defence integration: Inclusive, ambitious and legally binding?" in this *Review*.

13. See Blockmans, *ibid*.

14. See the Commission's proposal for a regulation of the European Parliament and of the Council establishing the European Defence Fund, COM(2018)476 final. Further on the notion of strategic autonomy: Mauro, "Autonomie Stratégique – le nouveau Graal de la défense européenne" *Les Rapports du GRIP 1/2018*.

15. Chapter 31 of the accession negotiations concerns the Union's "Foreign, security and Defence Policy" specifically. The latter covers the CFSP, including the CSDP, and comprises legally binding international agreements concluded by the EU, Union's decisions, and notably restrictive measures, as well as EU political declarations and statements with which the candidate has to adopt or align itself, EEAS, Screening report – Montenegro on chapter 31 foreign, security and defence policy, MD 244/13; European Commission, Accession chapters. Retrieved from <ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en>.

16. See in this context Directive 2009/43/EC of the European Parliament and of the Council, simplifying terms and conditions of transfers of defence-related products within the Community, O.J. 2009, L 146/1; Directive 2009/81/EC of the European Parliament and of the Council on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, O.J. 2009, L 216/76; see also Communication from the Commission to the European

obligation and monitoring in a policy area whose hallmark has traditionally been their absence.¹⁷ The articulation of the solidarity clause enshrined in Article 42(7) TEU, which France has called for, could further express and encourage this cultural change.¹⁸

That the CFSP is becoming more normative finds illustration elsewhere. Itself an expression of revitalized EU foreign policy, the recently (re-)invigorated enlargement policy towards south-east Europe underscores the importance of *commitment* towards EU foreign and security policy as prerequisite for membership.¹⁹ While the accession preparation and negotiations involve the candidates' early adoption of the EU foreign policy acquis, the Union's monitoring of that pre-accession alignment has become more scrupulous.²⁰ Membership is thereby presented as involving a solid and substantiated commitment to defend the EU's values and interests on the global stage.

External interests and support

The development of the CFSP has also generated increasing interest outside the Union. Beyond several contributions in EU civilian and military operations, and regular alignment with the EU positions and sanctions, third States which do not necessarily aspire to become Member States are attracted by a deepening cooperation, if not partnership, with the EU in the area of foreign, security and defence policy.

The recent publication of the Norwegian EU strategy offers a shining example of such considerations, and of the importance that third countries attribute to cooperating with the EU in tackling global challenges, including

Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A strategy for a stronger and more competitive European defence industry (COM(2007)764 final); and e.g. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law – The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments* (Hart Publishing, 2001).

17. Declarations 13 and 14 annexed to the EU Treaties.

18. Speech by President Macron – Ambassadors' Conference 2018, cited *supra* note 1.

19. Chapter 31 concerns the Union's "Foreign, security and Defence Policy" specifically. The latter covers the CFSP, including the CSDP, and comprises legally binding international agreements concluded by the EU, Union's decisions, and notably restrictive measures, as well as EU political declarations and statements with which the candidate has to adopt or align itself (EEAS, 2013; European Commission, 2017a).

20. See in this regard the language used in the last EU progress reports on Turkey and on Serbia. Further, see Hillion, "Adaptation for autonomy? Candidates for EU membership and the CFSP", (2017) *Global Affairs* 1.

on the security terrain.²¹ Norway has indeed expressed an interest in participating in PESCO initiatives, and may be involved in the EDF. The conclusion of a Strategic Partnership Agreement between the EU and Canada is another case in point.²²

That the CFSP is becoming meaningful for third States is particularly, if paradoxically, evident in the context of Brexit. Judging from various official UK declarations and notes on the subject, the soon-to-be former Member State seems eager to remain as closely involved as possible in the EU's CFSP, demonstrating greater enthusiasm for the deepening of the policy than at any point during its period of membership. The importance the UK ascribes to the CFSP was made remarkably conspicuous in a so-called "technical note on consultation and cooperation on external security".²³ Much of what the future EU partner would want to maintain is its access to the CFSP institutional framework, underlining the value of the latter's multi-layered forum for dialogue, consultation and decision, and thus as a multiplier of influence in foreign policy matters.²⁴

Distinct, yet integrated

While the significance of the CFSP is acknowledged at political level, growing attention is also being paid to the policy on the legal terrain, academia included,²⁵ particularly since the entry into force of the Treaty of Lisbon.

As is well recognized, the Lisbon Treaty has recalibrated the legal framework within which the CFSP is to be implemented. Suffice it here to mention that the policy is now formally conceived as an EU competence, albeit of a distinct category.²⁶ The legal underpinnings of that competence, and in particular the specific institutional and procedural arrangements governing its exercise, are to be found in the TEU,²⁷ and thus deliberately

21. <www.regjeringen.no/en/dokumenter/eu_strategy/id2600561/>.

22. Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, O.J. 2016, L 329; another such SPA has recently been negotiated between the EU and Japan: <eeas.europa.eu/headquarters/headquarters-homepage/43526/eu-and-japan-conclude-negotiations-strategic-partnership-agreement_en>.

23. <www.gov.uk/government/publications/technical-note-on-consultation-and-cooperation-on-external-security>.

24. See the Foreign Policy Report: Review of the Balance of Competences, 28 Nov. 2012, available at <www.gov.uk/government/consultations/foreign-policy-report-review-of-the-balance-of-competences>.

25. See e.g. Blockmans and Koutrakos (Eds.), *Research Handbook on the EU Common Foreign and Security Policy* (Edward Elgar, forthcoming).

26. Art. 2(4) TFEU.

27. Chapter II of Title V TEU.

separate from the provisions establishing the other (external) competences of the Union – which are, for their part, located in the TFEU.

The Treaty-based distinctiveness of the CFSP, to be safeguarded by the Court of Justice under the terms of Article 40(2) TEU, is counterbalanced by various factors of integration of the policy with other elements of the EU legal order. The TEU thus makes clear that, akin to any other external undertaking of the Union, its action in the area of CFSP (including the Common Security and Defence Policy, CSDP) “shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with the general [Treaty] provisions [on the Union’s external action]”.²⁸ The degree of incorporation of the CFSP in the general framework of EU external action is increased by the fact that the Lisbon Treaty has disposed of the old division which used to exist between the specific objectives of the CFSP,²⁹ on the one hand, and the other aims to be fulfilled through the exercise of other EU external competences, on the other. These hitherto distinct objectives have been merged into one set of goals framing the entire EU external action, and including the CFSP.³⁰

The Court of Justice – endowed with a limited though significant jurisdiction in relation to the CFSP – has been called upon to refine the terms of the policy’s recalibration. The ensuing case law, which has been analysed in this *Review*, is remarkable in its substantiation of the tight imbrication of the CFSP in the EU constitutional fabric. For example, the ECJ has confirmed the applicability of general EU institutional principles to the CFSP, particularly insofar as the exercise of the CFSP competence involves the EU treaty-making procedure located in Article 218 TFEU.³¹ It has also established that CFSP operations are not immune from the application of EU substantive rules and principles.³² More generally, the Court has stressed the significance of EU constitutional principles, and especially the protection of fundamental rights, in the interpretation of the specific institutional provisions governing the CFSP, and in particular with respect to the terms of its own jurisdiction therein.³³

28. Art. 23 TEU.

29. Pre-Lisbon Art. 11 TEU

30. Art. 21(2) TEU.

31. See e.g. Case C-263/14, *Parliament v. Council (Tanzania)* EU:C:2016:435; Sánchez-Tabernero, “The choice of legal basis and the principle of consistency in the procedure for conclusion of international agreements in CFSP contexts: *Parliament v. Council (Pirate-Transfer Agreement with Tanzania)*” 54 CML Rev. (2017), 899.

32. Case C-439/13, *Elitaliana SpA v. Eulex Kosovo* EU:C:2015:753; Case C-455/14 P, *H v. Council and Commission*, EU:C:2016:569, Van Elsuwege, “Upholding the rule of law in the Common Foreign and Security Policy: *H v. Council*”, 54 CML Rev. (2017), 841.

33. Case C-130/10, *Parliament v. Council (Smart Sanctions)*, EU:C:2012:472; Case C-72/15, *Rosneft*, EU:C:2017:236; Poli, “The Common Foreign Security Policy after *Rosneft*: Still imperfect but gradually subject to the rule of law”, 54 CML Rev. (2017), 1799; see also

The ECJ's recent decision in a case concerning the EU Partnership Agreement with Kazakhstan further exemplifies the high degree of integration of the CFSP with the standard operation of the EU legal order.³⁴ In a dispute between the Commission and the Council as to the choice of legal basis for the adoption of a decision on the position to be adopted on behalf of the EU in the Cooperation Council established under the Agreement,³⁵ and in particular as to the necessity to include a CFSP provision (*viz.* Art 31(1) TEU) therein, the Court treated the question as if it concerned any other conflict of legal basis when applying its classic "centre of gravity test".

The Court found that "the provisions of the Partnership Agreement displaying a link with the CFSP ... apart from being few in number in comparison with the agreement's provisions as a whole, [were] limited to declarations of the contracting parties on the aims that their cooperation must pursue and the subjects to which that cooperation [would] have to relate, and [did] not determine in concrete terms the manner in which the cooperation [would] be implemented". The Court then concluded that: "[t]hose provisions, which fall fully within the objective of the Partnership Agreement ... of contributing to international and regional peace and stability and to economic development, are not therefore of a scope enabling them to be regarded as a distinct component of that agreement. On the contrary, they are incidental to that agreement's two components constituted by the common commercial policy and development cooperation". The Court stated that the "links between the Partnership Agreement and the CFSP [were] not sufficient for it to be held that the legal basis of the decision on the signing of that agreement, on behalf of the European Union, and its provisional application had to include Article 37 TEU".³⁶

The mere "link" ("certains liens" in plural, in the French version) between certain provisions of the EU instrument and the CFSP³⁷ would not therefore automatically activate the specific institutional framework governing the policy, and thus the use of a CFSP legal basis. Circumscribing the significance of the Treaty-based distinctiveness of the CFSP, the ruling specifies the point at which that distinctiveness is relevant, namely if it is clear from an analysis

Wahl and Prete, "The gatekeepers of Article 267 TFEU: On jurisdiction and admissibility of references for preliminary rulings", 55 CML Rev. (2018) 511.

34. Case C-244/17, *Commission v. Council*, EU:C:2018:662.

35. Itself signed on the basis of a combination of Arts. 37 and 31(1) TEU (CFSP), and several TFEU legal bases: Arts. 91, 100(2), 207 and 209 TFEU; the procedural legal basis being Art. 218(5) and (8) second indent.

36. Case C-244/17, *Commission v. Council*, paras. 42–46.

37. It should be noted that neither the A.G. nor the Court explain how they establish the link between the provisions of the Agreement they single out as allegedly linked to the CFSP, and the CFSP as per the Treaty. The analysis is more performative than compelling.

of whether the CFSP related provisions “determine in concrete terms the manner in which the cooperation [in the field would] be implemented”. For this would be an indication that the EU intended to exercise its CFSP competence, thus warranting a specific CFSP legal basis and procedure.³⁸ In other words, the special nature of the CFSP competence does not seem to require any distinct approach in the Court’s analysis of the correct legal basis. The institutional specificity of the CFSP is not given any more weight than any other procedural difference between other legal bases. It is indeed noteworthy that the provisions of Article 40 TEU did not play any role in the Court’s reasoning, despite the provision being part of the argumentation of the Commission and Council.³⁹ In that sense, the Court’s ruling points to a degree, albeit limited, of *normalization* of the CFSP competence.

The judgment indeed makes clear that the EU external objectives that were specifically CFSP related in the pre-Lisbon dispensation, and which are now merged in the general list enshrined in Article 21(2) TEU, can be pursued not only through the exercise of the specific CFSP competence. They can, and indeed should, equally be pursued through the exercise of other competences, *in casu* the Common Commercial Policy and development cooperation.⁴⁰ In sum, the CFSP as a policy is being mainstreamed in the EU external action,⁴¹ but without the latter being further “intergovernmentalized” as a result.

Uncertain prospects

It is early days to establish how the different political and legal dynamics presently shaping the CFSP will eventually play out, particularly when taken together. One may however venture to suggest that, as a result of the developments flagged above, the CFSP is becoming less peripheral in the overall policy-making of the EU, and legally and normatively less distinct than sometimes assumed.⁴²

There are indeed common features in the two political and legal dynamics which could contribute to strengthening the momentum. The introduction of

38. It may be wondered what the Court would expect those provisions to stipulate in the specific field of CFSP, also in view of the high threshold of concreteness it has established for ascertaining that a competence is indeed exercised (see Case C-377/12, *Commission v. Council (Philippines PCA)*, EU:C:2014:1903 as regards the migration component of the agreement).

39. Paras. 13 and 19.

40. Art 205 TFEU.

41. In line with Art. 24(1) TEU.

42. See in this respect the EU reaction to the new US sanctions against Iran, e.g. Joint statement on the re-imposition of US sanctions due to its withdrawal from the Joint Comprehensive Plan of Action (JCPOA), <eeas.europa.eu/delegations/iran/49155/iran-deal-eu-shield-eu-companies-re-imposed-us-sanctions_en>. See also the recent EU and partners’

binding commitments in PESCO, the involvement of EU institutions both to monitor ensuing participants' performances and to contribute through other EU instruments and rules to the development of the CFSP, bring the latter closer to the fecund ecosystem of the EU legal order, thereby potentially ensuring better overall delivery.

Whether that trajectory is followed or altered, the development of an active CFSP that could meet the grand ambition of Europe's self-reliance will in any event have to navigate around remaining difficulties related to the very structures of the CFSP.

First, the CFSP remains an optional EU competence, in the sense that Member States are not bound to make use of it even if they have a common position on a foreign policy matter.⁴³ Hence the more normalized the CFSP framework becomes, in design and/or as a result of its increased imbrication in the standard operation of the EU legal order, the less (some of) the Member States might be inclined to allow the Union to exercise its competence. They might instead opt for common action *outside* the legal framework of the Union altogether, to avoid too many legal and/or practical constraints. France's decision to launch the "European Intervention Initiative" ("E2I") alongside PESCO, is partly a case in point.⁴⁴ In other words, one needs to tread carefully in integrating the CFSP in the EU legal order, so as not to dissuade Member States from pursuing their common foreign policy interests through the EU.

The second issue is the recurring requirement and actual practice of unanimity in the development of the CFSP. As well established, this has been an obstacle to the adoption of measures in the past, particularly in the field of security and defence. While Brexit might facilitate decision-making in CFSP,⁴⁵ and thus generate an integration dividend, the structural unanimity requirement seemingly remains a potential impediment to decisive action by the Union. Indeed, the recent Franco-German Meseberg Declaration ("Renewing Europe's promises of security and prosperity") includes a first section on "foreign policy, security and defence" that calls for "new ways of increasing the speed and effectiveness of the EU's decision-making in [the]

decision to set up a mechanism to protect legitimate business with Iran: <eeas.europa.eu/delegations/iran/51066/iran-deal-eu-and-partners-set-mechanism-protect-legitimate-business-iran_en>.

43. Though the provisions of Art. 3(6) TEU could suggest a bias in favour of EU action, as opposed to Member States' common action, especially if combined with the principle of sincere cooperation enshrined in Art. 4(3) TEU.

44. <www.defense.gouv.fr/english/dgris/international-action/l-iei/l-initiative-europeenne-d-intervention>.

45. "UK to veto EU 'defence union'", *EUobserver*, 17 Sept. 2016.

Common Foreign and Security Policy”,⁴⁶ and specifically to “explore possibilities of using majority vote in the field of the Common Foreign and Security Policy in the framework of a broader debate on majority vote regarding EU policies.” Similarly, the Commission Communication on the CFSP, mentioned above, calls for increased use of qualified majority voting in various fields of activities falling under the CFSP,⁴⁷ as indeed already foreseen under the current dispensation.⁴⁸ The question of whether the move to QMV is worth the trade-off should then be carefully considered, given the greater weight that the EU’s position has if it is clearly a unanimous one. Another issue worth pondering is the possible demand for stronger accountability mechanisms at EU level, for instance of parliamentary and/or judicial nature, if QMV were to be used more extensively for CFSP purposes.

The third challenge, connected to the other two, is that of compliance and loyalty. According to EU primary law, the exercise of the CFSP competence does not prevent the Member States from pursuing their own foreign policy, while the CFSP framework still lacks adequate mechanisms to guarantee observance, despite strongly worded provisions insisting on loyalty and solidarity.⁴⁹ The EU will not be able to secure a credible and influential foreign, security and defence policy without an element of compliance control to prevent, and address potential deviations from the agreed EU line. As Member States indeed agreed when meeting in Rome in 2017 to celebrate the 60th anniversary of the Treaty, the duty of sincere cooperation enshrined in the Common Provisions of the TEU has a part to play in EU foreign policy too, thereby bolstering the embryonic culture of commitment in the CFSP, already alluded to above.⁵⁰

46. <www.diplomatie.gouv.fr/en/country-files/germany/events/article/europe-franco-german-declaration-19-06-18>.

47. Commission Communication, cited *supra* note 7.

48. See Art. 31(2) TEU.

49. Art. 24(3) TEU foresees that “[t]he Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They 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. The Council and the High Representative shall ensure compliance with these principles”.

50. See Rome Declaration, cited *supra* note 8.