

PART II

THE CSDP AND LAW

CHAPTER 4

COMMON SECURITY AND DEFENCE POLICY: A LEGAL FRAMEWORK FOR DEVELOPING THE EUROPEAN DEFENCE INDUSTRY



KRZYSZTOF MASŁO

Abstract

The European Union's (EU) Common Security and Defence Policy (CSDP) is a component of its Common Foreign and Security Policy (CFSP). It was established in the Maastricht Treaty on European Union, which included a provision for the gradual introduction of a common defence policy that could eventually lead to a common defence framework.

The CFSP emerged from the need to enhance the EU's political identity on the international arena and assert Europe's independence in the post-Cold War era. Simultaneously, it remains one of the few areas of competence that exclusively belongs to Member States, where proposals to deepen integration processes have met with lukewarm responses. However, the Russo-Ukrainian war has prompted the European forum to strengthen cooperation between Member States, particularly in the defence industry sector.

The CSDP is regulated only by the Treaty on EU (TEU), while other EU policies are governed by the Treaty on the Functioning of the EU (TFEU). The architects of the Lisbon reform aimed to underscore the distinctiveness of the CSDP from other EU policies, as demonstrated by its legal instruments, decision-making mechanisms, and the nature of EU competences. Cooperation under the CSDP does not fit neatly within the traditional treaty rules governing the division of competences between the EU and its Member States. Fundamental competences in the field of security policy are reserved for Member States, which result from both the TEU and the unambiguous content of Declaration No. 13 on the CFSP.

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The CSDP's intergovernmental nature CSDP determines its institutional implementation. It is defined and implemented by intergovernmental EU institutions, particularly the European Council and the Council. The High Representative supported by the European External Action Service and Member States play a key role in its implementation, drawing on both EU and national funds. The competences of the EU's supranational institutions, particularly the Court of Justice of European Union, are strictly limited in this area.

The relationship between the North Atlantic Treaty Organization and the EU was institutionalised in the early 21st century, building on initiatives from the 1990s aimed at promoting greater European responsibility in defence matters.

Keywords: Common Foreign and Security Policy (CFSP), CSDP legal basis, Court of Justice of EU (CJEU), decision-making mechanism in the CSDP, North Atlantic Treaty Organization (NATO), Treaty on European Union (TEU)

1. Introduction

The legal framework of the European Union's (EU) Common Security and Defence Policy (CSDP), a component of its Common Foreign Security Policy (CFSP), CSDP was first established in the Maastricht Treaty on EU (TEU) on 7 February 1992, although political-level cooperation in foreign areas has been in existence since the 1970s.

The CSDP stemmed from the need to strengthen EU's political identity on the international stage and emphasise Europe's independence post-Cold War. Simultaneously, it is one of the few areas of competence belonging to Member States where proposals to deepen integration processes have been met with a lukewarm response from Member States. However, the Russia–Ukraine war forced European forums to strengthen relations between Member States, particularly in the field of CSDP.

While CSDP does not explicitly distinguish between CFSP and Common Security and Defence Policy (CSDP), TEU specifically mentions CSDP in Article 42(2) TEU. It states that CSDP covers the progressive definition of the EU's CSDP and further specifies that it will lead to a common defence if the European Council, acting unanimously, decides so. Therefore, the TEU makes a clear distinction between CSDP and common defence; common defence is an element of the CSDP, although its activation depends on the European Council's political decisions. Conversely, CSDP has gradually been defined.

As TEU does not define CSDP, it is difficult to distinguish between provisions relating to defence policy and security. This chapter focuses on the broader legal foundations of CSDP. First, I introduce the historical development of legal regulation of the CSDP. Subsequently, I characterise the legal foundations of CSDP and the

decision-making process. Given the intergovernmental character of CSDP cooperation, I briefly refer to the issue of sovereignty. Subsequently, I present the institutional structure of CSDP and its relationship with the North Atlantic Treaty Organization (NATO).

2. Historical development of CSDP

The EU established international relations in the 1950s – initially, as a purely economic project operating within three communities: the European Coal and Steel Community (ECSC), European Economic Community (EEC) and European Atomic Energy Community. The success of ECSC encouraged Member States to deepen integration within political–military areas. Accordingly, the legal aspects of integration in the political–military field are the subject of this subsection. The emergence and development of European Political Cooperation (EPC) will be discussed in another part of the book.

2.1. Initial proposals for the establishment of European Defence Community and European Political Community

In 1950, Winston Churchill proposed to the Parliamentary Assembly of the Council of Europe the establishment of a European army commanded by a European Defence Minister.¹ In response, an announcement was made by French Prime Minister Rene Plevin in October 1950 regarding a plan to create a European Defence Community (EDC).²

Negotiations on the proposal began on 15 February 1951, and on 27 May 1952, representatives of ECSC Member States signed a treaty in Paris to establish EDC.³ The EDC aimed to secure Europe against aggression and maintain peace. Therefore, it is a typical military alliance.⁴ The treaty also contained a *casus foederis* (commitment to common defence, Article 2(3) of the treaty). It established a European army with 40 national divisions comprising 13,000 uniformed soldiers each. It comprised an integrated land, air and naval force of Member States at the corps level (Articles 9–18). The treaty provided for the establishment of the institutional structure of the future community and envisaged the creation of a Commissionariat (Articles 19–32), Council of Defence Ministers (Articles 39–50), Assembly (Articles 33–38) and a Court (Articles 51–67).

1 Schmidt, 2020, p. 32.

2 Koutrakos, 2013, p. 6.

3 Treaty text available at: <https://aei.pitt.edu/5201/1/5201.pdf> (Accessed: 21 January 2024).

4 Koutrakos, 2013, p. 7.

The project to create EDC was met with reservations from European capitals. However, it won the approval of the German government and the United States. In France, support for a joint army declined and the balance of political power led the National Assembly of France to reject the proposal to ratify the treaty on 30 August 1954.⁵ Consequently, work on the treaty was also abandoned in other countries.⁶

Corresponding to the creation of EDC, efforts were being made towards the realisation of political integration within the framework of the European Political Community (EPC). In July 1952, the ECSC Assembly drafted a statute for establishing a new community. Belgian politician Paul Henri Spaak led the preparation to draft the treaty establishing ECSC; the draft treaty was prepared in 1953.⁷ This gave the new community a supranational character and established an institutional structure. The organs of the EPC are the Parliament, Executive Council, President, Court of Justice and the Economic and Social Council. The Parliament consists of two chambers; the People's Chamber is elected by universal suffrage and European Senate by the national Parliaments of EPC Member States. A President was to be elected by Senate. The Executive Council took over the functions of the Council of Ministers of the ECSC and was responsible for the People's Chamber and the President. The Court of Justice (CJ) is the judicial organ of ECSC.

Considering that the French National Assembly rejected the treaty establishing EDC, work on establishing EPC was also interrupted.⁸

2.2. Establishment and functions of Western European Union

Meanwhile, the failure to establish EDC and EPC stalled the process of European integration in the political–military field, and Western European states decided to develop less-intrusive defence alliances in their sovereign rights. Principally, a decision was made to rebuild the 1948 Brussels Treaty and the Western Union was established on its basis.

The Brussels Treaty, signed on 17 March 1948 by France, Benelux countries and the United Kingdom, originally concerned political, military and economic cooperation.⁹ The Treaty was in response to explicit requests from the United States for European partners to institutionalise their efforts to ensure effective self-defence in the face of threats from the Soviet Union and the emerging bloc of Communist States. The treaty was concluded 50 years ago and was open to any country (Article IX). In addition to economic and social cooperation, the treaty contained provisions on mutual security. In the preamble, it was written that they would assist each other in the maintenance of international peace and security. Furthermore, Article IV

⁵ Butler, 2021, p. 21.

⁶ Neuhold, 2013, p. 1.

⁷ Mik, 2000, p. 36.

⁸ Butler, 2021, p. 22.

⁹ *The Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence*, 1948; in: Bloed and Wessel, 1994, pp. 1–6.

enshrines an alliance clause pledging assistance in the event of an armed attack on either party's territory.

Should one of the Highly Contracting Parties be subjected to armed aggression in Europe, the other Parties shall, in accordance with the provisions of Article 51 of the Charter of the United Nations, render aid and assistance to it by all means available to them, whether military or otherwise.¹⁰

The steps taken under Article IV were immediately reported to the UN Security Council (Article V). The Brussels Treaty provided for the creation of a Western Union with its own bodies, including military groups (Article VII), which was the first intergovernmental organisation to be established in Western Europe after the Second World War.

The failure of EDC and EPC changed the perception of Western Union. Simultaneously, the 1951 NATO began functioning based on the 1949 Washington Treaty. The aims of NATO were relatively similar to those of the Western Union. Britain took the initiative to admit West Germany to the Brussels Treaty as late as 1954. The Paris Accords, amending the Brussels Treaty of 1948, were signed on 23 October 1954.¹¹ Accordingly, Germany and Italy joined the Western Union (Article 1) and the name of the organisation changed to Western European Union (WEU). The Paris Agreement ended occupational regime and restored the sovereignty of the Federal Republic of Germany by regulating the presence of foreign troops on German territory.

A provision was added to the preamble of the Brussels Treaty, stating that Member States would assist each other in ensuring international peace and security by refraining from aggression. This provision legitimised possible actions of WEU outside the territories of its members, while creating the need for the organisation's security policy to consider two dimensions: the defence of Member States' territories against external aggression and a defence policy in a broader sense, considering areas beyond the borders of WEU members.¹² The preamble to the modified Brussels Treaty also defined the tasks of WEU as the defence of democratic values, human rights and civil liberties, constitutional traditions and respect for the law.

Article IV of the modified Brussels Treaty institutionalised the WEU's cooperation with NATO. It provided that, to avoid unnecessary duplication of NATO military structures, the WEU Council and its agencies would consult with NATO military authorities on matters of military nature. These provisions gave the WEU the role of the European pillar of the transatlantic security system, which had been demanded by the United States from the beginning. The WEU was thus, a non-self-dependent

¹⁰ Ibid.

¹¹ *Protocol Modifying and Completing the Brussels Treaty (Western European Union)*, 1954; in: Bloed and Wessel, 1994, pp. 7–15.

¹² Macalister-Smith and Gebhard, 2013, p. 46.

organisation militarily from the beginning, and its creation did not fundamentally change the political and military situation on the continent.

Despite the establishment of links between the WEU and NATO, the modified Brussels Treaty did not abandon the alliance clause obliging WEU Member States to provide military or other assistance to any party in the event of armed aggression (Article V).

The modified Brussels Treaty equipped the WEU with the institutional structure necessary to fulfil its tasks. Article VIII established the WEU Council as the body set up to strengthen peace and security, enhance unity among states and promote progressive integration of Europe by strengthening cooperation among States that are Parties to the treaty. The WEU Council was supposed to be a forum for considering all issues covered by the treaty. It could be convened at any time, at the request of any Member State, in the event of a threat to peace or economic stability, regardless of where the threat occurred. Article VIII also announced the creation of an Arms Control Agency, whose tasks are defined in Protocol IV.

Article VIII of the modified Brussels Treaty also determined the voting method in the WEU Council, introducing unanimity as a rule.

The modified Brussels Treaty provided a formal legal basis for the coordination of Western European States' actions in the field of defence and international security in the face of escalating threat posed by the Cold War and Western Europe's progressive confrontation with the United States–Soviet Union. It was an expression of the willingness of Western European allies to contribute to the development of defence capabilities and was intended to demonstrate that European States did not intend to rely solely on the protective umbrella of U.S. forces. The inclusion of an alliance clause in the provisions of the Brussels Treaty gave it the character of a defence pact, obliging Parties to pursue a coordinated and solidarity-based security policy and seek ways to jointly counter threats.

Although the purpose of the modified Brussels Treaty was to equip WEU with real competencies regarding security matters, the international situation led it to abandon its efforts to strengthen European security rather quickly. Faced with the growing military potential of the Soviet Union and its satellite states, Western Europe based its security on its alliance with the United States and the development of NATO rather than on developing its own collective defence organisation.¹³ Admittedly, the WEU's exclusive competence includes arms control within the framework of the Arms Control Agency. However, in reality, it was only applied in Germany and terminated by a Council decision in 1987.¹⁴ In May 1972, efforts to convene the WEU Council sessions were abandoned and the organisation suspended the exercise of its core functions.¹⁵

13 Gadkowski et al., 2019, p. 88.

14 Howorth, 2012, pp. 7–8.

15 Schmidt, 2020, p. 36.

It was only in the 1980s and 1990s that an attempt was made to reactivate the WEU and link it to European Communities, and subsequently to the emerging EU. In the 1980s, discussions began to define European security and defence interests.¹⁶ Within the WEU, the issue was considered at a session of the Council of Foreign and Defence Ministers on 23 April 1990 in Brussels.¹⁷ The meeting initiated a discussion that lasted several years on whether the WEU should continue in its present form or be incorporated into the emerging EU.

2.3. Developing defence integration within the EU

A breakthrough in the development of political and defence cooperation between the Member States of European Communities was the signing of the Single European Act (SEA) in 1986.¹⁸ The SEA had two dimensions: revision of existing founding treaties of the three Communities and regulation of EPC, which until then functioned without a treaty.

In the preamble to SEA, signatories declared that they intended to be guided by ‘the will to continue the work undertaken on the basis of the Treaties establishing the European Communities and to transform all relations between their States into a European Union, in accordance with the Solemn Declaration of Stuttgart of 19 June 1983’. They declared that they were ‘determined to establish a European Union’, based on European Communities and EPC, and endow ‘the Union with the necessary means to act’. In Article 1, Title I of the Treaty, the signatories also stated that ‘the European Communities and European Political Co-operation accept as their objective to make a joint contribution to achieving visible progress towards (the establishment of) the European Union’.

Provisions for cooperation in the foreign-policy sphere are included in Title III of SEA (Article 30 SEA). The SEA contained a general commitment that EEC Member States should jointly endeavour to formulate and implement European foreign policy. It also included the obligation to exchange information between Member States and consult with each other on all foreign policy issues of general interest (Article 30(2) (c)). Furthermore, in accordance with SEA regarding the adoption of its position and national measures, each Member State should take full account of the positions of other partners and appropriately discern the desirability of adopting and implementing common European positions. Member States should endeavour to avoid any action or position that diminishes their effectiveness in international relations (Article 30(2)(d)). Meetings of foreign ministers, also attended by members of the Commission, were held at least four times a year. Foreign Ministers could also consider matters relating to the activities of EPC at EEC Council meetings (Article 30(3a) SEA). EPC Leadership was assigned to the Member State currently holding

¹⁶ Howorth, 2012, pp. 7–8.

¹⁷ de Waele, 2023, p. 63.

¹⁸ *Single European Act*, 1987.

the Presidency of the EEC Council. It is responsible for initiating, coordinating and directing the activities of Member States in the EPC (Article 30(10a-b) SEA).

The inclusion of cooperation in European security matters in the EPC (Article 30(6a) SEA) was groundbreaking. The Member States of European Communities recognised the need to maintain the technological and industrial conditions necessary for their security and cooperated at the national level. However, cooperation in the field of security could not in any manner affect the obligations of certain states of European Communities arising from their membership of NATO and WEU (Article 30(6c) SEA).

The SEA also established a permanent secretariat for EPC, based in Brussels, to assist Presidency in the administrative preparation and implementation of foreign-policy cooperation (Article 30(10g) SEA).

The SEA further confirmed the participation of the Commission and European Parliament in EPC work. The Commission was to be “fully associated” (Article 30(3b) SEA) and the European Parliament “closely associated” with the activities of EPC (Article 30(4) SEA). The European Parliament should also be regularly informed of foreign policy issues dealt with by the EPC, and the latter should consider the European Parliament’s foreign policy opinions (Article 30(4) SEA). The Treaty did not extend the jurisdiction of the Court of Justice to EPC (Article 31 SEA).

The signatories of SEA also reserved the possibility of amending the provisions of EPC five years after the entry into force of the agreement (Article 30(12) SEA).

The 1980s and 1990s brought about significant political and economic changes that influenced the expansion of European integration. The collapse of communism and the disintegration of Soviet Union led to the dismemberment of the military structures of the Eastern Bloc, postponing the risk of war on the European continent. Western Europe’s economic integration has achieved its goals. The EEC established a customs union in the 1970s and a single market was to be achieved before 1992. Simultaneously, the political importance of European Communities in the international arena was not very high. Against this backdrop, a decision was made in December 1989 to convene an intergovernmental conference to draft a new treaty.¹⁹ From the outset, discussions on strengthening cooperation in the fields of foreign, security and defence policies were extremely controversial.²⁰ The Member States of European Communities agreed on the text of the Treaty on European Union (TEU) in December 1991. It was signed on 7 February 1992 in Maastricht and came into force on 1 November 1993. In Ireland, France and Denmark, ratification of the treaty required national referenda. The TEU was concluded for an indefinite period.

The TEU ushered in a new phase in the process of European integration.

First, it established the EU, which in legal terms meant changes to the treaties establishing European Communities (the EEC was replaced by European Community) and the introduction of new forms of cooperation between Member States. The EU

¹⁹ European Council, 1989.

²⁰ Mik, 2000, p. 60.

was shaped as a structure for cooperation between States of a different nature than traditional international organisations. It was not endowed with legal subjectivity at the international legal level. As history has shown, the EU was intended to be an intermediate stage on the road to full economic, political and monetary integration of European States. The EU is a type of “superstructure” with three pillars:

- Pillar I (economic) comprising the European Community, ECSC and Euratom;
- Pillar II covering CFSP;
- Pillar III representing cooperation in the field of justice and home affairs.²¹

The CFSP provisions in Title V of TEU (‘Provisions on CFSP’) were a consequence of a compromise. During deliberations at the Intergovernmental Conference, differences in opinion emerged regarding the nature of CFSP. Some States (Germany, Denmark, Portugal and Greece) agreed that CFSP should be based on inter-State cooperation; meanwhile, France, Belgium, the Netherlands, Luxembourg and Ireland supported giving the policy more autonomy, and in the long run, advocated communitarisation of CFSP.²² There were also divergent views on defence cooperation, with some states (including Germany, France, Belgium, Luxembourg and Spain) seeking to establish – in some time perspective – CSDP.²³ Others, led by the United Kingdom, demanded respect for their national identities in the defence and preservation of NATO’s dominant role in Europe.

As envisaged in TEU, CFSP was to become an expression of the EU’s aspiration to raise its profile worldwide. These aspirations are made visible in the EU’s objectives. According to Article B, one of EU’s objectives was to assert its identity on the international arena, in particular, through CFSP, including ultimately defining a common policy that could lead to common defence. This objective was further detailed in Article J.1; accordingly, the objectives of CFSP include:

- safeguarding EU’s common values, fundamental interests and independence;
- strengthening the security of EU and its Member States in all ways;
- preserving peace and strengthening international security in accordance with the principles of the UN Charter, Helsinki Final Act and Paris Charter.
- promoting international cooperation;
- developing and consolidating democracy and rule of law, and respect for human rights and fundamental freedom.

CFSP was equipped with its own legal instruments separate from those of European Communities. The principles and general guidelines of CFSP as defined by the European Council (Article J.8(1) TEU) were fundamental. These were adopted unanimously, but were not legally binding to Member States. The principles and general guidelines could not deal with matters affecting military or defence.

²¹ de Waele, 2023, p. 34.

²² Lonardo, 2023, p. 50.

²³ Ibid.

In implementing the principles and general guidelines, the Council could adopt common positions (Article J.2(2) TEU) or joint actions (Article J.3 TEU) that were binding on Member States. In addition to these legal acts, the TEU established systematic cooperation (Article J.1(3) TEU). However, the legal acts adopted under CFSP were not covered by the fundamental principles developed for the first pillar (principle of primacy of law and direct effect of community law). TEU also contained specific provisions governing its decision-making mechanism, underlining the inter-governmental nature of CFSP. As a rule, all CFSP decisions were made unanimously. The exception was joint actions, which could be adopted by a qualified majority, but only if decided unanimously (Article J.3(2) TEU).

The TEU gave the European Commission and European Parliament limited competences in the development and implementation of CFSP. Notably, it excluded these institutions from legislative processes. Therefore, the creation and application of CFSP legislation was entrusted exclusively to intergovernmental bodies (the European Council and the Council). Furthermore, CFSP was excluded from the jurisdiction of the Court of Justice (Article L).

The TEU did not include many provisions on defence policies. According to Article J.4(1), 'The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which may in time lead to a common defence'. This provision did not establish any obligations for now, but left it to Member States to take future actions, leading to a common defence. States, therefore, did not agree to transfer their sovereign defence rights to the newly-created European structure in 1992. The Maastricht Treaty also emphasised the specific character of security and defence policies of certain Member States and respected the obligations of certain Member States under NATO. Article J.4(5) gave two or more Member States legal basis for closer bilateral cooperation, in the framework of WEU or Atlantic Alliance.

Elevating defence policies to the EU level requires regulating the relationship of Member States with the WEU. Therefore, the Maastricht Treaty attempted to revitalise the WEU by recognising it as 'an integral part of the development of the Union' (Article J.4(2) TEU). However, the Maastricht Treaty did not provide for any institutional link between the EU and WEU, although it did grant the EU the competence to request that the WEU develop and implement EU decisions and undertakings with defence implications. Accordingly, the WEU Council and Council could work out "the necessary practical arrangements".

It is worth noting that some EC/EU Member States attached two declarations to TEU regarding the relationship between the EU and WEU. The first declaration (by Belgium, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom of Great Britain and Northern Ireland) emphasised that WEU would become an integral part of the development process of the EU and strengthen its contribution to solidarity within NATO. The WEU should be developed as a defence component of the EU and as a means of strengthening the European pillar of NATO. Therefore, the WEU should define a common European defence policy and

practically implement it by further developing its operational role. Therefore, EU Member States and the WEU agreed to provide a new developmental impetus to the WEU, in which the WEU would be part of EU's defence. The Member States also said they would prepare the WEU to develop and implement EU decisions and actions relevant to defence at EU's request.

The second declaration (accomplished by Belgium, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom of Great Britain and Northern Ireland) encouraged all EU Member States to join the WEU or obtain observer status.

Following the arrangements of the Maastricht Treaty, the WEU Ministerial Council at its Bonn session on 19 June 1992 adopted a declaration establishing the so-called Petersberg Missions.²⁴ These covered the conduct of the following military operations outside the territory of Member States by WEU Member States' military units operating under WEU authority: humanitarian and rescue, peacekeeping and crisis management operations.

The establishment of Petersberg Missions was linked to the building of WEU's operational capabilities, establishment of a European nuclear deterrent, development of the arms regime, and commitment to arms control and the disarmament process. Therefore, the Petersberg Declaration stipulated that military units capable of conducting Petersberg Missions should be drawn from the armed forces of WEU Member States, including those serving in NATO missions, and organised on a multinational basis. The Petersberg Declaration also contained a general commitment to develop and use appropriate capabilities to enable the deployment of WEU military units on land, sea or air for Petersberg Missions.

A tangible result of the Petersberg Declaration was the establishment of a Planning Cell within the WEU structures responsible for:

- preparing contingency plans for employment of forces under the auspices of WEU;
- drafting recommendations on necessary command, control and communication arrangements, including standing operating procedures for selected commands;
- maintaining an updated list of units that can be allocated to WEU for specific operations.²⁵

However, the WEU's linkage with the EU and the adoption of the Petersberg Declaration did not lead to the revitalisation of the WEU or an increase in the EU's standing on the international stage. The only such moment occurred between 1992 and 1995 when the WEU conducted an operation in the Adriatic Sea to oversee compliance with the arms embargo and economic sanctions against Yugoslavia.

24 Western European Union Council of Ministers, 1992.

25 Ibid.

2.4. CFSP reforms introduced by the Amsterdam and Nice Treaties

The convening of another intergovernmental conference in March 1996 in Turin was motivated by the need to promote European Community/EU's actions in international relations.²⁶ Its aim was to revise the Maastricht Treaty, inter alia in the field of CFSP and the relationship between the EC/EU and WEU. The Intergovernmental Conference lasted for more than a year until April 1997. The draft Reform Treaty was accepted by the European Council in Amsterdam in June 1997²⁷ and was formally signed on 2 October 1997. The Amsterdam Treaty came into force on 1 May 1999 after ratification by all Member States.²⁸ In accordance with the Amsterdam Treaty, CFSP was defined and implemented by the EU (Article 11.1 TEU) and not, as before, by the EU and Member States. The Treaty of Amsterdam also expanded the catalogue of EU objectives pursued under CFSP to include:

- maintaining the territorial integrity of the EU in accordance with the principles of the UN Charter,
- maintaining international peace and security, including the protection of EU's external borders (Article 11(1) TEU).

The Treaty of Amsterdam introduced changes to the CFSP legal instruments and decision-making procedures. While maintaining existing instruments (principles and general guidelines, common positions, joint actions and systematic cooperation), it added common strategies. The common strategies were non-binding instruments for Member States adopted by the European Council on their common interests (Articles 12 and 13(2) TEU). They define the objectives, duration and means to be made available by the EU and Member States. The Amsterdam Treaty also changed the name of systematic cooperation to strengthening systematic cooperation. Contrary to the name, strengthening systematic cooperation was informal and served to coordinate activities in international organisations and intergovernmental conferences.

The Treaty of Amsterdam, while maintaining the principle of unanimity, extended qualified majority voting in CFSP matters. Common positions, joint actions and implementing decisions were adopted by a qualified majority. If a Member State opposed a particular decision on the grounds of its national interest, then the Council could, by a qualified majority, request that the matter be referred to the European Council, which acted unanimously on the matter (Article 23(2) TEU). The Amsterdam Treaty also established the principle of constructive abstention (Article 23(1)–(2) TEU), under which even if a Member State abstained, the decision was understood to be taken unanimously. The State was not obliged to implement this decision. If abstaining Member States had more than one-third of weighted votes, they could block the decision.

²⁶ Mik, 2000, p. 69.

²⁷ European Council, 1997.

²⁸ *Treaty of Amsterdam*, 1997.

The Treaty of Amsterdam also introduced institutional changes in CFSP. It established the High Representative for CSFP, Secretary-General of the Council and a Planning and Early Warning Cell. The High Representative was expected to support the Presidency and Council by formulating, preparing and implementing political decisions, and conducting political dialogue with third countries (Articles 18(3) and 26 TEU).

The Treaty of Amsterdam was also significant in relation to the defence policy. First, it gave the European Council the competence to decide on principles and general guidelines in common defence matters and set common strategies in the field of CSDP.

Second, it attempted a new arrangement of relations between the EU and WEU, giving the EU the authority to commission various types of missions to WEU. According to the wording of Article 17(1) TEU at the time, the EU should promote closer institutional relations with the WEU ‘with a view to integrating the WEU into the Union, if the European Council so decides’. Accordingly, the EU took over Petersberg Missions from WEU (Article 17(2) TEU): humanitarian and rescue, peacekeeping and armed crisis management missions, and their implementation was decided by the European Council (Article 17(1) TEU). The WEU, as an integral part of EU’s development, provided it with access to operational capabilities for the implementation of these missions. All EU Member States, including those with observer status in the WEU, namely Austria, Sweden, Finland, Ireland and Denmark, could participate in the implementation of Petersberg Missions (Article 17(3) TEU).

Third, the Treaty of Amsterdam also created the possibility of establishing co-operation in the field of armaments among EU Member States (Article 17(1) TEU).

Despite the formal establishment of CFSP and takeover of the Petersberg Missions from the WEU, the EU did not have any military capability to conduct these missions. The milestone decision to start building the CSDP was the Saint-Malo Declaration²⁹ that concerned the need for European capabilities against the background of the failure of the sole European engagement in tackling the Yugoslavian war crisis through UN peacekeeping. The declaration underlined that the Union was required to have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so in order to respond to international crises.³⁰ The next European Council (in Cologne, 3–4 June 1999) decided to – in the framework of the CFSP – build CSDP.³¹ The European Council stated that the following:

29 *Joint Declaration on European Defence, Joint Declaration issued at the British–French Summit* (Saint-Malo, 4 December 1998). [Online]. Available at: https://www.cvce.eu/content/publication/2008/3/31/f3cd16fb-fc37-4d52-936f-c8e9bc80f24f/publishable_en.pdf. (Accessed: 5 January 2024).

30 Koutrakos, 2013, pp. 18–19.

31 European Council, 1999a.

We are now determined to launch a new step towards the construction of the EU. Towards this end, we task the General Affairs Council to prepare the conditions and measures necessary to achieve these objectives, including the definition of modalities for the inclusion of those functions of WEU, which will be necessary for the EU to fulfil its new responsibilities in the area of the Petersberg tasks. Our aim is to make the necessary decisions by the end of 2000. In that event, the WEU, as an organisation, would have completed its purpose.³²

At the next European Council meeting in Helsinki (10–11 December 1999), the so-called European Operational Target was proclaimed,³³ which stipulated that by the end of 2003, a corps of 50–60,000 troops would be formed, capable of carrying out Petersberg Missions of at least one year's duration within 60 days. These troops include land, sea, and airforces. However, this goal was never accomplished and the EU has never achieved the capacity to conduct military operations involving armed forces of this capacity.

In this context, the Santa Maria da Feira European Council of 19–20 June decided to develop civilian and military crisis management capabilities.³⁴ It was completed at the Nice European Council (7–9 December 2000), when it was decided to develop political–military structures and establish a Political and Security Committee (PSC), EU Military Committee (EUMC) and EU Military Staff (EUMS).³⁵

Another decision by the Laeken European Council in December 2001 was the declaration of the Union's operational capabilities.³⁶ European defence policy was fully activated after the creation of the European Defence Agency (EDA) by the Thessaloniki European Council in June 2003.³⁷

A major problem was defining the geographical scope of the Petersberg Missions. At the EU Defence Ministers' meeting in Sintra on 28 February 2000, it was decided that a joint force would be used on a larger scale for operations in Europe and its periphery and in smaller numbers around the world.³⁸

Subsequent decisions by the European Council prepared the ground for another revision of CFSP and CSDP treaties. A new Reform Treaty was signed in Nice on 26 February 2001 and, after ratification by all Member States, entered into force on 1 February 2003.³⁹ The Nice Treaty sanctioned the decisions of the 1999–2001 European Council. Most notably, the provision pertaining to WEU was removed from TEU. Accordingly, the ground was prepared for the dissolution of WEU. However, it

³² Ibid.

³³ European Council, 1999b.

³⁴ European Council, 2000a.

³⁵ European Council, 2000b.

³⁶ European Council, 2001.

³⁷ European Council, 2003.

³⁸ 22 *Meeting of European Union Defence Ministers*, 2000.

³⁹ *Treaty of Nice*, 2001.

was not until the Treaty was signed in Lisbon on 13 December 2007 that the EU's actions in foreign relations under the CFSP were fundamentally restructured.⁴⁰

3. Legal bases of the CSDP

The CSDP is not explicitly separated from all the provisions governing CFSP. In light of treaty systematics, a component of CFSP is CSDP, to which a separate section is devoted within the CFSP provisions. When analysing the common provisions on CFSP issues overall (Articles 23–41 TEU) and provisions on CSDP only (Articles 42–46 TEU), it is difficult to identify regulations on CSDP alone. Security and defence issues are inextricably linked. Therefore, when analysing the legal basis of CSDP, it cannot be isolated from other provisions governing CFSP.

The current legal basis for CSDP was shaped by the 2007 Lisbon Treaty, which brought significant changes to CFSP, including abolishing the three-pillar structure of the EU. The Union became a single legal order with a legal personality under which CFSP (especially CSDP) became one of EU's policies. The Treaties unified the EU's objectives in external relations, both for all aspects of CFSP and external actions. The EU was also given new tasks in the field of defence. In addition to the so-called Petersberg Missions, the Lisbon Treaty enabled the EU to conduct missions related to military advice or post-conflict stabilisation (Article 43(1) TEU).⁴¹ A commitment to collective self-defence in the event of armed aggression was incorporated into the treaties (Article 42(7) TEU). Therefore, the existence of WEU as a separate organisation became redundant.⁴² In 2010, President of the WEU Council declared that WEU had fulfilled its historic role, and its Member States had jointly decided to terminate the modified Brussels Treaty and dissolve WEU.⁴³ The Agency for the Development of Defence Capabilities, Research, Acquisition and Armaments (European Defence Agency) was given a treaty basis (Article 45 TEU). The Lisbon Treaty has also enabled Member States to deepen defence integration within the framework of permanent structured cooperation (Article 46 TEU).

40 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing European Community*, 2007.

41 Neuhold, 2013, point 34.

42 Geiger et al., 2015, p. 159.

43 *Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty—Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom*, 2010.

3.1. Characteristics of the treaty regulations in the area of CSDP

CFSP, of which CSDP is a part, is the only EU policy and activity set out in the provisions of TEU rather than TFEU. The CFSP provisions are contained in Title V of TEU (“General Provisions on the Union’s External Action and Specific Provisions on the Common Foreign and Security Policy”), comprising Articles 21–46 TEU. Other external actions of EU such as the common commercial policy, development cooperation, solidarity clause in the event of a natural disaster and humanitarian aid are regulated by TFEU. Those who drafted Lisbon Treaty singled out from all the provisions of CFSP regulations concerning only CSDP, to which Articles 42–46 TEU are devoted. It follows from the systematics of the Treaties that certain announced provisions contained in Articles 23–41 TEU also apply to the CSDP, as these are common to all activities carried out under CFSP and are also applicable to CSDP.

The provisions of TEU set out objectives for CSDP (Article 21). It is worth noting that these objectives are universal in nature and are uniformly defined for all EU external actions (not only for CSDP). It follows from Article 21 TEU that the EU will be guided on the international scene by the 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 and respect for the principles of the United Nations Charter and international law’. The EU also aims to develop relationships and build partnerships with third countries and international, regional or global organisations that adhere to the aforementioned principles. The specifications of these general objectives are formulated in Article 21(2) TEU, and the common objectives of all EU external actions, not so much the CSDP, were identified. Owing to the broadly-formulated objectives of the EU’s actions in the international arena, the objectives pursued under CSDP may conflict with or overlap with other external actions of the EU.⁴⁴ Article 21 TEU does not allow for a distinction between objectives that concern only the CSDP, CFSP or other EU external actions. Therefore, it is of utmost importance to ensure coherence between EU actions undertaken in different areas of external EU activity.

The separation of CFSP and CSDP from the catalogue of other EU policies and activities (including the EU’s external actions) is intended to underline their distinctiveness and specificity.⁴⁵ According to Article 24(1) TEU, CFSP is subject to specific rules and procedures and is primarily implemented by intergovernmental EU institutions (European Council and the Council). TEU provisions essentially maintain the intergovernmental nature of all CFSP and provide Member States with an enhanced ability to protect their national interests.⁴⁶ The Treaties provide considerable autonomy to Member States to formulate and implement their own security and defence policy, including the formation and accession to military alliances and specific

⁴⁴ Cremona, 2018, p. 15.

⁴⁵ Mikos-Sitek, 2022, p. 198.

⁴⁶ de Waele, 2023, p. 36.

character of the security and defence policy of Member States. The special nature of CFSP is underlined in two declarations attached to these treaties.

In line with Declaration No. 13 on CFSP, the TEU provisions do not affect the current responsibility of Member States for the formulation and conduct of their own foreign and security policy or the manner in which they are represented in third countries and international organisations. Furthermore, they do not affect the specific nature of some Member States' security and defence policies. Declaration No. 13 emphasises that the EU and its Member States will remain bound by the provisions of the UN Charter and, in particular, by the primary responsibility of the Security Council and of its Members for the maintenance of international peace and security.

CFSP Declaration No. 14 emphasises that the existing legal basis, responsibility or powers of each Member State in the formulation and conduct of its own foreign policy, national diplomatic service, relations with third countries and participation in international organisations, including its membership in the UN Security Council, will not be affected by CFSP provisions.

Therefore, there is no doubt that the core competences in security and defence policy have been reserved to Member States.⁴⁷

3.2. Nature of EU competence in CSDP

The distinctiveness of CSDP from other EU policies and actions in the external sphere is evident at the level of the distribution of competences between the EU and its Member States.

The basis of the EU's competence is the delegation of sovereign powers of Member States to the organisation. The CJEU has repeatedly emphasised that the EC/EU acts only within the limits of its competence.⁴⁸ The principle of conferral powers is the basic principle on which the structure of EU is based; that is, the vertical division of competences between the EU and its Member States. This implies that the EU can only act within its competences and has only as much competence as has been conferred on it by Member States. The principle of conferral of competences follows from Article 5 TEU, which states that *'The limits of the Union's competences shall be determined by the principle of conferral. The exercise of these competences shall be subject to the principles of subsidiarity and proportionality'*. The second sentence of Paragraph 2 of the TEU clarifies that any competence not conferred on the Union by the Treaties remains with Member States. Therefore, the EU does not have the same competences as its Member States; in particular, it does not possess metacompetence. The EU acts only to the extent conferred on it by the Treaties. The EU's powers are, therefore not

⁴⁷ Geiger et al., 2015, p. 126.

⁴⁸ Judgement of the Court of Justice of 12 September 2017, *Alexios Anagnostakis v European Commission*, C-589/15 P (ECLI:EU:C:2017:663), § 97.

unlimited, but specific and require proof.⁴⁹ The EU does not have general lawmaking powers, and every piece of legislation must have a legal basis and must be adopted in accordance with a specific procedure.⁵⁰

Against this backdrop, Declaration 18, attached to the Treaties on the Delimitation of Competences, is particularly important. According to the declaration, all competences not conferred on the Union in the Treaties belong to Member States, and competences, even those already exercised by the Union, may revert to Member States if the Union has not exercised or has decided not to exercise its competences. The Declaration also indicates that a Member State may modify the scope of the Union's competences by amending the treaties.

The Lisbon Treaty is the first in the history of European integration, which introduced into the European legal order and defines the basic concepts pertaining to the division of competences between the EU and the Member States. Article 2 TFEU distinguishes between three main categories of EU competence: exclusive competence (Paragraph 1), shared competence (Paragraph 2) and competence to carry out actions to support, coordinate or supplement the actions of Member States (Paragraph 5) by assigning specific areas of the EU's activity in Articles 3–6 TFEU. However, CFSP has not been mentioned in any of its parts, including the CSDP.⁵¹ However, Article 2(4) TFEU states that the EU is competent to define and implement CFSP, including the progressive definition of CSDP. This competence is exercised in the manner detailed in Title V of TEU. Therefore, Article 24 TEU is fundamental to the division of competences. According to this provision, the EU's competence in relation to the CFSP covers 'all areas of foreign policy and all matters relating to the Union's security, including the progressive definition of a common defence policy that may lead to a common defence' (Paragraph 1). The provision further stipulates that the Union shall define, conduct and implement this policy within the framework of the principles and objectives of its external action and that it shall be 'based on the development of mutual political solidarity between Member States, the identification of issues of general interest and the achievement of an ever-increasing degree of convergence between Member States' actions' (Paragraph 2). For their part, Member States shall actively and unreservedly support the Union's CFSP in a spirit of loyalty and mutual solidarity and shall respect the Union's actions in this area. They shall act in concert to strengthen and develop mutual political solidarity. Therefore, they shall refrain from any action that would be contrary to the interests of the Union or may damage its effectiveness as a cohesive force in international relations (Paragraph 3).

Determining the nature of CSDP's competence is difficult. This is certainly not exclusive, as it is not indicated in the catalogue of exclusive competences contained in Article 3 TFEU.⁵² Furthermore, two declarations to Treaties (Nos. 13 and 14)

49 Cremona, 2018, p. 12.

50 de Waele, 2023, p. 7.

51 Butler, 2021, p. 41.

52 Wouters et al., 2021, p. 214.

are relevant for determining the nature of CSDP's competences. According to their wording, CFSP does not affect the responsibility of Member States for the formulation and implementation of their defence policies. Combining the wording of these declarations with the wording of Article 24 TEU, it can be concluded that EU's competences in the field of CSDP are *sui generis*.⁵³ What distinguishes them from shared competences is that, in the field of CFSP, the principle of "occupying the field", which is the essence of shared competences, meaning the exercise of competence by the EU and regulation of an issue precludes Member States from regulating that issue to the same extent, does not operate.⁵⁴ In the field of CFSP, EU competences can be "parallel" in the sense that both the EU and Member States can take action, including the conclusion of international agreements, on the same aspects of security and defence policy.⁵⁵

When considering the nature of EU's competences in the field of CFSP, it should be noted that the conduct of policy on public order and protection of security has been expressly reserved in the Treaties to the Exclusive Competence of Member States (Articles 4 and 72 TEU). In contrast, under CSDP, Member States are committed to progressively improving their military capabilities (Article 42(3) TEU) and having the military capacity necessary for the EU to perform missions (outside the Union) for peacekeeping, conflict prevention and strengthening international security (Article 42(1) TEU). Building this capacity is directly related to the maintenance of public order and security. However, the boundaries between the EU's CSDP competence and exclusive competence of Member States to determine their national security are blurred, and the CJEU interprets Article 72 TFEU in a manner that narrows Member States' competence.⁵⁶

3.3. Secondary law created under CSDP

The intergovernmental nature of CSDP affects the acts of secondary legislation adopted under it.⁵⁷ The TEU has explicitly ruled out the adoption of legislative acts under CFSP, thereby excluding the adoption of regulations and directives (*a contrario* Articles 289(1) and (2) TFEU, in conjunction with Article 24(1) TEU).

In place of the classic legal acts adopted in all EU policies and activities listed in Article 288 of TFEU, the TEU introduced legal instruments specific only to CFSP, that is, general guidelines (defined by the European Council) and decisions (adopted by European Council and the Council). The nature of these acts differs from legal acts adopted under the TFEU provisions, especially when it comes to the question of

⁵³ Cremona, 2018, pp. 6–7.

⁵⁴ Eckes, 2015, p. 543.

⁵⁵ Butler, 2021, p. 41.

⁵⁶ Judgement of the Court of Justice of 4 December 1974, 41/74, *Yvonne van Duyn p. Home Office*, ECLI:EU:C:1974:133; judgement of the Court of Justice of 15 December 2009, C-461/05, *Commission v. Denmark*, § 53.

⁵⁷ Neuhold, 2013.

whether CFSP acts have a primacy and direct effect.⁵⁸ Neither Treaties, nor the CJEU has provided a clear answer to this question. However, decisions adopted under CFSP are not addressed to individuals, but to Member States.⁵⁹

On the institutional side, the lack of possibility of adopting legislative acts under CFSP means that supranational institutions (the European Parliament and the European Commission) were practically excluded from the law-making process.⁶⁰ In accordance with Article 24(1) TEU, the definition and implementation of CFSP has been entrusted to European Council and the Council, that is, to intergovernmental EU institutions. Practically, CFSP is implemented by the High Representative for Foreign Affairs and Security Policy, supported by the European External Action Service (EEAS) and Member States. The TEU also significantly limited the competence of the CJEU in dealing with complaints and preliminary questions related to CFSP.

The Lisbon Treaty introduced significant changes to the entire system of application of the law, including possible forms of action under CFSP. These are reflected in the current wording of Article 24 TEU, according to which the legal instruments in the area of CFSP are general guidelines and decisions. Article 25 TEU adds to this catalogue the strengthening of systematic cooperation between Member States in the conduct of their policies, while Article 37 TEU authorises the EU to conclude international agreements in the field of CFSP. With the Lisbon Treaty entering into force, these legal instruments have replaced joint strategies, actions and positions.

None of the acts referred to in Article 24 TEU are legislative.⁶¹ This means that the decisions of the European Council and Council are always non-legislative.

In accordance with Article 26 TEU, general guidelines are adopted by the European Council and concern not only foreign policy matters, but also issues with defence implications. The general guidelines are the basis for the development of CFSP and CSDP by the Council and the basis for decision-making. General guidelines are most often included in the conclusions of European Council summits and play a vital role in politics.

The legal instrument of primary importance for CFSP is a decision issued by the Council or European Council. Decisions may particularly concern defence issues (Article 42(4) TEU). Article 25 TEU lists three types of decisions: those that determine actions to be conducted by the EU, those that determine positions to be taken by the EU and those of an executive nature.

Decisions defining actions to be carried out by the Union are adopted by the Council, *inter alia*, when the international situation indicates the need to take certain operational actions (Article 28(1) TEU). These decisions make it possible to define the purpose, scope and necessary measures, and may also concern the

⁵⁸ Wouters et al., 2021, p. 221.

⁵⁹ Marquardt, 2018, p. 29.

⁶⁰ *Ibid.*, p. 215.

⁶¹ Geiger et al., 2015, p. 126.

allocation of financial resources for the activities to be carried out. These decisions are reminiscent of former Joint Actions and are key instruments of CFSP and CSDP in launching civilian and military operations and missions. In accordance with Article 28(2) TEU, these decisions are binding on Member States in relation to the positions they take and the activities they conduct, and Member States are obliged to ensure that their national policies are consistent with the EU position.⁶² Only Member States that formally declared that they wanted to make use of a “constructive abstention” are not obliged to execute the decision.⁶³

Decisions on the position to be taken by the EU follow so-called Common Positions and either concern how to deal with a particular crisis or describe the position to be taken by Member States in negotiations within international organisations.⁶⁴ These decisions, in accordance with Article 29 TEU, may define the Union’s approach to a given problem from a geographical or subject-matter perspective.

Finally, the third category of decisions is executive, in that it refers to the implementation of the two previous categories of decisions.

Essentially, distinguishing between the first and second types of decisions is extremely difficult. In its judgement of 27 July 2022 (T-125/22), the General Court pointed to three elements characterising the decisions indicated in Article 29 TEU; the decision falls within the framework of CFSP, addresses ‘a problem of a geographical or thematic nature’ and is not of an “operational nature” within the meaning of Article 28 TEU (actions of a civilian or military nature carried out by one or more Member States outside the territory of the Union).⁶⁵ These decisions therefore include not only acts of a programmatic nature or declarations of intent, but also decisions providing for measures that may directly alter the legal situation of individuals (§ 51).

The EU also makes decisions when it establishes military and civilian missions (Article 42(4) TEU) and when it undertakes joint disarmament operations, humanitarian and rescue tasks, conflict prevention and post-conflict stabilisation measures (Article 43(2) TEU). Determining the relationship between Articles 42(4), 43(2), and 28 TEU is extremely difficult, primarily because of the lack of uniform council practice. It should be postulated that the legal bases for the adoption of decisions under Articles 42(4) and 43(2) TEU are *lex specialis* vis-à-vis Articles 28 and 29 TEU, all the more because decisions based on Articles 42(4) and 43(2) TEU are always adopted unanimously.

Decisions listed in Article 25 TEU are covered by the principle of the primacy of EU law, so that commitments entered into by Member States in the sphere of its own foreign and security policy cannot constitute grounds for non-application of

62 Geiger et al., 2015, p. 134.

63 Ibid.

64 Mikos-Sitek, 2022, p. 206.

65 Judgement of the General Court (Grand Chamber) of 27 July 2022, T125/22, *RT France v Council of the European Union*, ECLI:EU:T:2022:483, § 50.

decisions adopted by the EU in the field of CFSP.⁶⁶ This takes on a particular context in relation to membership of the UN and obligations under the UN Charter.

3.4. International agreements in the field of CSDP

According to Article 37 TEU, the EU is competent to conclude agreements with one or more States or international organisations in the CSDP field. The EU's competence to conclude international agreements is, in principle, limited because, as an international organisation, it has only the power to conclude treaties that have been delegated to it by its Member States. Such agreements may vary in nature depending on whether they relate exclusively or mainly to CSDP.⁶⁷

Treaties do not define what an international agreement is. One of the first cases in which the CJEU addressed the problem of defining an international agreement was *European Parliament and European Commission v Council* (C-103/12)⁶⁸. This case concerned the nature of a declaration issued by the Council and addressed to the Bolivarian Republic of Venezuela. The subject of the declaration was the granting of fishing opportunities in the exclusive economic zone, off the coast of Guyana, to fishing vessels carrying Bolivarian Republic of Venezuela flags. In its judgement of 26 November 2014, the CJEU noted that the term international agreement must be understood in a general sense, as any commitment entered into by the subjects of international law and having the force of law, regardless of its formal qualification (§ 83). The CJEU also highlighted several elements that determine the existence of an international agreement:

- the expression of consensual will of at least two States; in this particular case, it was the conclusion of an agreement through an exchange of documents; the CJEU considered the Council's declaration to be an offer by the Union to the Bolivarian Republic of Venezuela with a view to concluding an international agreement; when the declaration in question was presented to the Bolivarian Republic of Venezuela, that State acknowledged its receipt and agreed to the terms proposed by the EU;
- the agreement contains mutual rights and obligations;
- under international law, it is not important to determine whether such an agreement is embodied in one, two or more documents.

In the aforementioned case, the CJEU did not explicitly refer to the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations,⁶⁹ although it applied

⁶⁶ de Waele, 2023, p. 57.

⁶⁷ Geradin, 2015.

⁶⁸ Judgement of the Court of Justice (Grand Chamber) of 26 November 2014, C103/12 and C165/12, *European Parliament and European Commission v Council*, ECLI:EU:C:2014:2400.

⁶⁹ *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 1986.

the criteria for the qualification of an international agreement derived from this Convention. Formally, this Convention has not entered into force, and the EU is not bound by it.⁷⁰

International agreements within the CSDP framework are concluded in accordance with the procedures described in Article 218 TFEU.⁷¹ This provision sets out a uniform procedure of general scope concerning the negotiation and conclusion of such agreements, except where treaties provide for special procedures.⁷² Considering its general nature, the procedure for the conclusion of international agreements must consider the specificities defined by the treaties for each sphere of action of the Union, particularly with regard to competences of institutions.⁷³ Therefore, establishing symmetry is intended to mirror externally the distribution of powers between the institutions applied internally, in particular, to ensure that the Parliament and Council have the same powers in the area concerned, while respecting the institutional balance defined by the Treaties.⁷⁴ The conclusion of international agreements related to CSDP is not subject to a separately regulated procedure. However, Article 218 TFEU provides for several departures from the standard procedure for the conclusion of such agreements,⁷⁵ considering the specificities of this policy. First, the position of the High Representative was strengthened, with the power to make recommendations to the Council to enter into negotiations and the power to conduct negotiations (Article 218(3) TFEU). Second, when concluding international agreements, the Council acts unanimously without the European Parliament's participation (Articles 218(6) and (8) TFEU). Nevertheless, it is obligatory to keep the European Parliament fully informed at all stages of the procedure for the conclusion of such an agreement.⁷⁶

Pursuant to Article 216(2) TFEU, international agreements concluded by the EU in the field of CSDP are binding on the institutions of the EU and its Member States. This provision also applies to international agreements within the CSDP.⁷⁷ This means that as soon as such an agreement comes into force, its provisions form an integral part of the Union's legal order. Therefore, such agreements take precedence over legal acts issued by institutions.

70 As at 31 January 2024; data for: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXIII-3&chapter=23&clang=_en (Accessed: 5 January 2024).

71 Geiger et al., 2015, p. 145.

72 Judgement of the Court of Justice of 4 September 2018, C-244/17, *European Commission v Council*, EU:C:2018:662, § 21.

73 Judgement of the Court of Justice of 24 June 2014, C-658/11, ECLI:EU:C:2014:2025, § 53.

74 Ibid., § 22.

75 Judgement of the Court of Justice of 24 June 2014, C-658/11, *European Parliament v Council*, EU:C:2014:2025, §§ 52, 72.

76 Judgement of the Court of Justice (Grand Chamber) of 14 June 2016, C-263/14, *European Parliament v Council*, ECLI:EU:C:2016:435, § 68.

77 Butler, 2021, p. 63.

4. Decision-making mechanism in CSDP

The decision-making process under CSDP shows far-reaching distinctiveness. The exclusion of the possibility of adopting legislative acts means that the CSDP legislative competence of the two supranational institutions (the European Parliament and the European Commission) has been significantly reduced, and intergovernmental institutions, namely the European Council and Council, participate in the legislative process. Under Article 31 TEU, CFSP decisions are taken by the European Council and the Council as a rule by unanimity. This interpretation is supported by Article 42(4) TEU, according to which 'decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously [...]'.

Exceptionally, when required by a specific treaty provision, decisions may be made by a qualified majority of votes, in accordance with the general principles set out in Article 16(4) TEU. As a general rule, a qualified majority is, therefore, a so-called double majority, that is, at least 55% of Member States (but no less than 15) whose combined population makes up at least 65% of the Union's population. However, when the Council does not act on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, a qualified majority shall be defined as at least 72% of Council members representing Member States, comprising at least 65% of the Union's population (Article 238(2) TEU). The exception described in Article 238(2) TFEU is relevant to CFSP insofar as the right of initiative for the adoption of a legislative act is also conferred on Member States or the High Representative of the Union for Foreign Affairs and Security Policy. Whenever Member States propose the adoption of a legal act, the rules for determining the qualified majority, as described in Article 238(2) TEU, will apply.

In the case of CFSP, majority voting occurs only in situations specified in the Treaties. Currently, according to Article 31(2) TEU, majority voting occurs in the council in four cases. However, if a proposed decision has military or defence implications, it must always be taken unanimously (Article 31(4) TEU). This means that the principle of unanimity will always apply to decisions made by the Council regarding CSDP. When the European Council makes a decision, it must achieve unanimity in all situations.

Unanimity means that, *de facto* each Member State has veto rights. The weakening of the veto right is the institution of constructive abstention, which was introduced in Article 31 TEU. This institution also applies to decisions adopted in the CSDP framework based on Articles 42(4) and 43(2) TEU. This is prejudiced by the wording of Article 31(1) TEU, according to which the decision-making procedure (and therefore constructive abstention) applies to all decisions adopted under CFSP and, therefore, also to decisions adopted under specific provisions governing CSDP.

The institution of constructive abstention is that any member of the Council who abstains may simultaneously make a formal declaration. By making such a declaration, the effect is that the submitting Member State is not obliged to implement the

decision, but accepts that the decision binds the Union and, in a spirit of mutual solidarity, must refrain from any action that would conflict with or impede EU action. In return, the TEU has an obligation to respect the position of Member States and make such a declaration. However, a decision cannot be made if such declarations are made by at least one-third of the Council's members, representing at least one-third of the EU population. Under these circumstances, the decision is not adopted. The population of Member States making the declaration is determined according to the same rules as those for qualified majority voting and is set out in an annex to the Council's Rules of Procedure.

An important feature of CSDP is its solutions to legislative initiatives. In principle, under EU law, such an initiative is vested in the European Commission (Article 17(2) TEU). However, the exclusion of the adoption of legislative acts in CFSP and subjection of this policy to specific rules and procedures also influenced the lawmaking process. The TEU excluded the European Commission's power of direct legislative initiative and conferred the right of legislative initiative on any Member State or the High Representative of the Union for Foreign Affairs and Security Policy (Article 30(1) TEU). Such an interpretation is reinforced by the wording of Article 42(4) TEU, which entrusts the initiative to adopt CSDP decisions to the High Representative or an EU Member State. The TEU only empowered the European Commission to "assist" the High Representative in exercising the power of legislative initiative.

5. CSDP and the sovereignty of EU Member States

European integration in the defence sphere is not without its impact on the autonomy of EU Member States in the internal and external spheres, that is, on the principle of state sovereignty. Despite this, the Treaties contain no provisions explicitly referring to the sovereignty of EU Member States. Article 4 TEU is one of the few provisions that does not explicitly address the issue of sovereignty. This provision does not use the term state sovereignty. In Paragraph 1, this provision emphasises that all competences not conferred on the Union by the Treaties belong to Member States. In contrast, Paragraph 2 of the Treaty emphasises respect for the equality of Member States before the Treaties, their national identities (including their fundamental political and constitutional structures) and respect for the essential functions of the State. According to the Treaties, the Union respects the functions designed to ensure its territorial integrity, maintain public order and protect national security. The TEU emphasises that national security remains the exclusive responsibility of individual Member States.

While there is no mention of the sovereignty of Member States in any provision of the Treaties, it refers to the principle of State sovereignty when they indicate the objectives of the EU's external action vis-à-vis third countries and international

organisations. However, they do not do so explicitly, but by general reference to the principles of the UN Charter and international law. Therefore, the objective of the EU in its external relations is to contribute to the strict observance and development of international law, particularly the principles of the UN Charter (Article 3(5) TEU). The EU's action on the international scene is based, *inter alia*, on the principles of the UN Charter and international law (Article 21(1) TEU). Undoubtedly, a fundamental principle of international order is the sovereign equality of states, which is the source of other principles of international law.⁷⁸ The principle of sovereign equality of States is explicitly indicated in Article 2, Paragraph 1 of the UN Charter and General Assembly Resolution 2625(XXV) of 24 October 1970 – Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the UN Charter.⁷⁹

The process of democratisation of state systems and formation of the nation as the subject (rather than the object) of power led to the formation of a modern understanding of sovereignty, where the sovereign is not the ruler (monarch) but the nation. Initially, it was generally accepted that the sovereign enjoyed supreme and unlimited power within national territory, both in internal relations of the state and external relations.⁸⁰ However, the institutionalisation of the international community, as reflected in the development of integration processes and increased interdependence of states, has altered this perception of sovereignty. The doctrine of international law reflects the notion that absolute unlimited sovereignty is something of the past.⁸¹ International law literature views sovereignty as meta-sovereignty, that is, competence to ultimately decide whether and how to exercise particular attributes and functions of a state.⁸² Attributes of sovereignty so understood include, exclusive jurisdictional competence over individual territories and citizens; exercise of foreign policy powers; deciding on war and peace; freedom in the recognition of states and governments; establishing diplomatic relations; deciding on military alliances and membership in international political organisations; and conducting independent financial, budgetary and fiscal policies.

Understood in this way, sovereignty is an intrinsic feature of a state that distinguishes it from other subjects of international law (including inclusive international organisations). If a state loses its ability to exercise meta-sovereignty, it forfeits its sovereignty and ceases to exist as a subject of international law. However, a consequence of this understanding of sovereignty is that a state may restrict the exercise of certain sovereignty attributes.⁸³ A distinction is made between restrictions on sovereignty that result from the will of the state (which is compatible with international

78 Cassese, 2001, p. 88.

79 *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, A/RES/2625(XXV), 1970.

80 Anand, 1986, p. 25.

81 *Ibid.*, p. 27.

82 Mik, 2022, p. 436.

83 Anand, 1986, p. 34.

law) and violations of sovereignty that occur against the will of the state and are incompatible with international law.⁸⁴ Voluntary restrictions by a state on the attributes of sovereignty are generally imposed by international agreements and do not imply a loss of sovereignty or statehood. Such action does not limit (or deprive) sovereignty; rather, it is an evidence of sovereignty.⁸⁵ The ability of a state to enter international obligations is inherent in its legal nature and constitutes its identity in international law.⁸⁶

The discussion on the importance of sovereignty in the process of European integration has been ongoing since the beginning of Communities/Union and intensified in the 1990s, after European integration was extended to the political–military fields. In particular, following the 2007 Lisbon Treaty reform, the CFSP encompasses all areas of foreign policy and issues relating to the Union’s security, including the progressive definition of CSDP, which may lead to a common defence (Article 24(1) TEU). Therefore, CFSP, especially CSDP, encompasses activities that are traditionally part of the attributes of sovereignty and are conducted by States. This includes, in particular, the exercise of foreign-policy competences, establishment and maintenance of diplomatic relations, maintenance of armies and deciding on political–military alliances. These areas are partly covered by the process of European integration, but CFSP and CSDP have maintained their far-reaching autonomous character within the EU legal order.

However, the process of transferring competencies from the Member State-level to the EU has neither led to a loss of sovereignty for EU Member States nor a permanent reduction in the sovereign rights of Member States.⁸⁷ The process of political–military integration is irreversible. Although dynamic in nature, Member States retain meta-competence and are entitled to decide the pace and degree of European integration.⁸⁸ The decision to deepen integration, including into the political and defence spheres, is reserved exclusively for Member States and can only be taken through an amendments to existing Treaties. Against this background, the simplified procedure for amending TEU, as described in Article 48(7) TEU, does not concern the extension of EU’s competences in the field of CFSP or the voting system in the European Council. Nor can the simplified procedure for amending the TEU concern the mode of decision-making by the council affecting military or defence matters. Possible amendments to TEU concerning these matters can only be made in an international agreement amending existing treaties.

Treaties contain several other arrangements that safeguard the sovereignty of Member States in the field of integration in defence matters.⁸⁹ First, the treaties preserve unanimity in determining the policy directions and priorities of the CFSP, as

84 Muszyński, 2011, p. 178.

85 Permanent Court of International Justice, *S.S. “Wimbledon”* Case, Serie A, no. 1, p. 25.

86 Kwiecień, 2004, p. 128.

87 Judgement of the Polish Constitutional Court of 24 November 2010, OTK ZU 9A/2010, item 108.

88 Mik, 2022, pp. 437–438.

89 Muszyński, 2011, p. 179.

well as in many legally binding decisions (Article 31 TEU). Wherever treaties require unanimity, the lodging of a veto by a Member State prevents EU institutions from making a decision. According to the Treaties, an EU Member State may also veto any decision taken by a qualified majority if compelling reasons of national policy so warrant (Article 31(2) TEU). In such a case, a vote does not take place, and Member States should find a solution that satisfies not only the majority of states but, above all, the State issuing the veto.

Safeguarding the sovereignty of States in the process of politico–defence integration also emphasises the primary responsibility of Member States for the formulation and conduct of their own foreign policy, the formation of their national diplomatic service and shaping of their relations with third countries, their participation in international organisations, and for the exercise of the active right of legation to ensure the representation of those Member States in third countries and international organisations (Declaration Nos. 13 and 14 of the Treaties). The Treaties also emphasise that the establishment and operation of CFSP may not affect the specific character of the security and defence policies of certain Member States (Article 42(2), TEU).

An expression of State sovereignty is the possibility of withdrawing from the EU, as stated in Article 50 TEU. The transfer of competencies from the level of a Member State to the EU is therefore not irreversible, and a Member State may withdraw from the EU the attributes of sovereignty previously transferred to it. The guaranteed nature of Article 50 TEU was also highlighted by the CJEU in its preliminary ruling of 10 December 2018 in Case C-621/18.⁹⁰ The CJEU emphasised that the purpose of Article 50 TEU is to recognise the sovereign right of a Member State to withdraw from the Union (§§ 56–57). It is a unilateral decision by that State not dependent on the consent of other Member States or the EU institutions (§ 72). The decision to withdraw is subject to the sole will of that Member State, respecting its constitutional requirements, and consequently depends on its sole sovereign choice (§ 58). Nor is the decision to withdraw from the EU conditional on the negotiation of a withdrawal agreement that sets the framework for the future relationship between the EU and such a State. While the negotiation of such an agreement is conducive to structuring the process of a Member State’s withdrawal from the EU, past practice has shown that such negotiations are extremely difficult and complicated.

The mechanism protecting the sovereignty of EU Member States is the aforementioned obligation to respect the national identities inherent in their basic political and constitutional structures. Article 4 TEU formulates certain non-transferable attributes of sovereignty from the level of Member States to the level of the EU, which relate to the exercise of core functions of the State, notably to ensure its territorial integrity, maintain public order and protect national security. Article 4(2) TEU formulates only an exemplary catalogue of such non-transferable state functions, but

⁹⁰ Judgement of the Court of Justice of 10 December 2018, C-621/18, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999.

this undoubtedly includes the prohibition on the transfer of powers to create competences. The prohibition on the transfer of competencies to the EU level is particularly relevant in view of the CJEU's repeated emphasis that the process of European integration (and thus, the transfer of state attributes and functions to the EU level) is not yet complete.⁹¹

6. The institutional structure of the CSDP

The CSDP is managed by several EU institutions, bodies, and agencies. Of primary importance are institutions of an intergovernmental nature (the European Council and Council), while the importance of supranational institutions (above all, the European Commission and European Parliament) is limited.⁹² Meanwhile, the role of CJEU requires a separate discussion. In the CSDP, there are dedicated bodies established by TEU (including the High Representative for Foreign Affairs and Security Policy and the Political Committee) and numerous *sui generis* bodies (bodies established under secondary law), whose competences are limited exclusively to CSDP.

6.1. Importance of EU institutions in the field of CSDP

Of the seven EU institutions listed in Article 13(1) TEU, the European Council and Council have the most significant influence on CSDP. Their competences in this area are set out under Article 26 TEU.

The task of the European Council is to set general orientations for foreign and security policies and to define the interests of the EU (Article 26 TEU). The European Council may introduce common defence if it decides unanimously (Article 42(2) TEU). In the framework of the European Council or the Council, all Member States must consult each other before making any decision or commitment affecting the interests of the Union (Article 32 TEU). The European Council may then define a common EU approach on a particular matter. It is also responsible for electing the President of the European Council, who manages the work of the European Council, represents the Union externally, and convenes meetings of the European Council

91 In Opinion 2/13 of 18 December 2014. The CJEU noted that '[...] the founding Treaties, which constitute the Union's basic constitutional charter [...], have, unlike ordinary international agreements, established a new legal order with its own institutions, in favour of which States are increasingly restricting their sovereign rights and whose subjects are not only Member States but also individuals from them'. Similarly, Opinion of the Court of Justice 1/09 of 8 March 2011, ECLI:EU:C:2011:123, § 65 and Judgement of the Court of Justice of 10 December 2018, C-621/18, *Andy Wightman and Others v Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999, § 44.

92 Eckes, 2015, p. 539.

when international developments require the definition of lines of action for the EU (Article 15(5) TEU).

The European Council is also competent in appointing the High Representative of the Union for Foreign Affairs and Security Policy; it may also terminate his/her terms of office (Article 18(1)).

Should the need arise, the President of the European Council may convene an extraordinary meeting in order to define the strategic lines of the Union's policy in the wake of such a situation (Article 26(1) TEU).

The Council, in terms of the CSDP, has policy setting and coordination functions. Its key CSDP functions include:

- developing CSDP (Article 26(2) TEU),
- making decisions necessary to define and implement this policy (Article 26(2) TEU),
- ensuring unity, consistency and effectiveness of EU action (together with the High Representative; Article 26(2) TEU),
- enabling the exchange of views and information between Member States,
- authorising the opening of negotiations, issuing negotiating directives and authorising the signing and conclusion of agreements (Article 218(2) TFEU).

The CSDP (and in general, CFSP) is the only area in which the European Commission does not exercise day-to-day policy and legislative functions, and its competences are significantly limited. The President of the European Commission is a member of the European Council; if the agenda so requires, he/she may be accompanied by another member of the Commission (Article 15(2) TEU). One of its vice presidents is the EU High Representative (Article 18(4), TEU).

As part of its CSDP tasks and competences, the European Commission:

- ensures consistency of different areas of the Union's external action (together with the Council and assisted by the High Representative, Article 21(3) TEU),
- may request an opinion from the CJEU on the compatibility of the envisaged international agreement with treaties (Article 218(11) TFEU),
- supervises relations with the organs of the United Nations and its specialised organisations, the Council of Europe, the Organisation for Security and Co-operation in Europe, the Organisation for Economic Cooperation and Development and other international organisations (Article 220 TFEU),
- may, together with the High Representative for Foreign Affairs and Security Policy, address any questions to the Council related to the CFSP and CSDP,
- may, where appropriate, propose the use of both national means and union instruments with the High Representative when deciding to undertake peace-keeping, conflict prevention and international security enhancement missions.

The European Parliament's role under CFSP also remains limited. As the adoption of legislative acts is excluded under the CFSP, the European Parliament does not

perform its main function (the legislative function). The European Parliament primarily has control and advisory functions (Article 36 TEU):

- is regularly consulted and informed by the High Representative of developments in the CFSP and CSDP,
- holds a debate twice a year on the progress in implementing the CFSP, including the CSDP.
- the High Representative must consider this view when deciding on foreign and security policy,
- may ask questions of the Council and the High Representative or make recommendations regarding CFSP, including CSDP.

6.2. Competence of the Court of Justice of EU in the area of CSDP

The CJEU's competence in the field of CSDP has been significantly limited. Pursuant to Article 24(1) TEU, the CJEU has no jurisdiction over these provisions, except for its jurisdiction to review compliance with Article 40 TEU and the legality of certain decisions provided for in Article 275(2) TEU. This means that the CJEU's jurisdiction is almost entirely excluded from this area, so the legal instruments adopted under the CSDP are practically beyond judicial control.⁹³ Article 24(1) TEU and Paragraph 1, Article 275 TFEU must be interpreted restrictively.⁹⁴ Therefore, it cannot interpret primary law in this field by way of a preliminary ruling, nor can it review the legality of CSDP decisions. However, the case law of CJEU emphasises that the CJEU has the jurisdiction to give a preliminary ruling under Article 267 TFEU on the validity of an act adopted on the basis of CSDP legislation, provided that the request for a preliminary ruling concerns either a review of the compatibility of that decision with Article 40 TEU or a review of the legality of restrictive measures adopted against natural or legal persons (Article 275 TFEU).⁹⁵ However, the CJEU's competence to give preliminary rulings on the interpretation of laws created in the CSDP appears to be excluded. Also excluded is a proceeding against a Member State under Article 258 TFEU with a complaint of failure to comply with CSDP obligations under TEU.⁹⁶

However, the current treaties provide for the CJEU's competence to rule on CSDP matters in two situations, as set out in Articles 40 TEU and 275 TFEU.

First, the CJEU has jurisdiction to monitor compliance with Article 40 TEU. Under this, the implementation of all issues belonging to CFSP (also CSDP) is without prejudice to the application of the procedures and powers of the institutions provided

93 Judgement of the Court of Justice of 24 June 2014, C-658/11, *European Parliament v Council*, EU:C:2014:2025, § 69; Judgement of the Court of Justice of 6 October 2020, C-134/19 P, *Bank Refah Kargaran*, ECLI:EU:C:2020:793, § 26.

94 Judgement of the Court of Justice of 6 October 2020, C-134/19 P, *Bank Refah Kargaran*, ECLI:EU:C:2020:793, § 32.

95 Judgement of the Court of Justice of 28 March 2017, C-72/15, *Rosneft*, ECLI:EU:C:2017:236, § 81.

96 Contartese, 2017, p. 1630.

for in the treaties for the exercise of EU competence. Conversely, the implementation of EU policies is without prejudice to the application of the procedures and powers of the institutions provided for in the Treaties for exercising the EU's CFSP competences.

Under this jurisdiction, the CJEU acts as the “guardian of the borders” between the CSDP and other EU policies and actions (in particular the so-called “external actions of the Union” set out in Articles 206-216 TFEU).⁹⁷ Article 40 TEU statutes distinguishes the two regimes: the ordinary EU regime (EU policies and actions of a supranational nature, including external actions such as humanitarian aid) and CSDP (and other aspects of CFSP).⁹⁸ Article 40 TEU emphasises that the Union's competences under CSDP and under other provisions of the TFEU relating to Union policies and actions are not mutually exclusive but complementary, each with its own scope of application and pursuing different objectives.⁹⁹

Under Article 40 TEU, the CJEU has no general competence to assess the legality of acts adopted under CSDP, and the only issue it may consider is the inappropriateness of the legal basis, that is, that the act should have been adopted under procedures applicable to Union policies and activities other than the CSDP.¹⁰⁰ This implies that an action alleging infringement of Article 40 TEU may be brought under Article 263 TFEU by the three categories of entities specified in that provision (including, inter alia, natural or legal persons). The CJEU has emphasised on several occasions that, based on Article 40 TEU, it is obliged to ensure that decisions adopted in the field of the CFSP do not encroach on the competences which the provisions of TFEU confer on the EU in the field of policies other than CFSP.¹⁰¹

Second, CJEU has the competence to review the legality of decisions that provide restrictive measures against natural or legal persons as adopted by the Council (Article 275(2) TFEU). It should be emphasised that the right of individuals to bring direct actions against decisions providing for restrictive measures against them is a *novelty* introduced by the Lisbon Treaty. Interestingly, the CJEU has developed jurisprudence whereby Article 24(1) TEU refers to Article 275(2) TFEU not to define the type of procedure by which the Court may review the legality of certain decisions but to define the type of decisions whose legality may be reviewed by the Court in the context of any procedure for such review of legality.¹⁰² To clarify, the review of the legality of decisions of the Union takes place under two complementary procedures set out in Article 263 TFEU (the so-called action for annulment) and Article

⁹⁷ Schmidt, 2020, p. 282; Eckes, 2016, p. 500.

⁹⁸ Geiger et al., 2015, p. 149.

⁹⁹ Judgement of the Court of Justice of 19 July 2012, C-130/10, *European Parliament v Council*, EU:C:2012:472, § 66.

¹⁰⁰ Hillion and Wessel, 2018, pp. 71–72.

¹⁰¹ Judgement of the Court of Justice of 19 July 2012, C-130/10, *European Parliament v Council*, EU:C:2012:472, § 66 et seq.; Judgment of the General Court of 27 July 2022, T-125/22, *RT France v Council*, §§ 6-64.

¹⁰² Judgement of the Court of Justice of 28 March 2017, C-72/15, *Rosneft*, ECLI:EU:C:2017:236, § 70.

267 TFEU (the question for a preliminary ruling). Both procedures establish a complete system of legal remedies and procedures to ensure the review of the legality of Union acts, entrusting them to Union Courts.¹⁰³ Inherent in that complete system of legal remedies and procedures is the right of individuals to challenge the legality of Union acts either by bringing an action under Article 263 TFEU or by raising a plea for their invalidity before a national court and having the national court, which has no jurisdiction to declare such invalidity itself, submit a question to the Court of Justice for a preliminary ruling in that regard.¹⁰⁴ Interpreting Article 275(2) TFEU narrowly and excluding the possibility for the courts of Member States to refer for a review to the CJEU the validity of a Council decision taken in the field of CFSP would be, according to the CJEU, contrary to the structure of the system of effective judicial protection established by the treaties.¹⁰⁵

The recent jurisprudence of the CJEU extends the scope of application of Article 275(2) TFEU to actions containing a claim for compensation for damage and harm allegedly suffered by the applicant as a result of the restrictive measures provided against him in the decision based on Articles 25 and 29 TEU.¹⁰⁶ Article 275 TFEU does not expressly mention the jurisdiction of CJEU to rule on the damage and harm allegedly suffered owing to the restrictive measures provided for in CFSP decisions.¹⁰⁷ Since the CJEU has jurisdiction to rule on actions for damages and compensation insofar as they relate to restrictive measures provided for in regulations made pursuant to Article 215 TFEU, the necessary coherence of the system of judicial protection under Union law requires that, in order to avoid a gap in the judicial protection of natural or legal persons affected by restrictive measures, the Court of Justice of the EU should also have jurisdiction to rule on the damages and harm allegedly suffered by reason of the restrictive measures provided for in CFSP decisions.¹⁰⁸

CJEU's jurisdiction concerns decisions adopted by the Council. Therefore, neither does it cover the acts of the European Council, nor are all Council decisions subject to CJEU review, except those that 'provide for restrictive measures against natural or legal persons'. Article 275 TFEU primarily concerns decisions imposing "smart sanctions", consisting, inter alia, of freezing the funds of persons linked to terrorists. The application of such sanctions typically occurs in two stages. First, a unanimous CFSP decision of the Council providing for the possibility of imposing restrictive measures is taken. This is implemented by the Council, which, based on the basis of Article 215 TFEU, issues the necessary acts imposing restrictive measures against natural or legal persons. In doing so, the Council acts by a qualified majority on a joint proposal

103 Judgement of the Court of Justice of 25 June 2020, C-14/19 P, *European Union Satellite Centre*, ECLI:EU:C:2020:492, § 60.

104 *Ibid.*, § 67.

105 *Ibid.*, § 76.

106 Judgement of the Court of Justice of 6 October 2020, C-134/19 P, *Bank Refah Kargaran*, ECLI:EU:C:2020:793.

107 *Ibid.*, § 31.

108 *Ibid.*, §§ 37–39.

from the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission. The European Parliament shall be informed of the adoption of the act.

The procedure indicated in Article 275 TFEU for the CJEU to review Council decisions concerns those taken within the framework of the CFSP. In contrast, the measures imposing these restrictions adopted by the Council on the basis of Article 215 TFEU assume the form of an ordinary act of EU law. Therefore, they are subject to a full review by CJEU.

However, not all decisions issued under CSDP and the restrictive measures imposed can become the subject of complaints under Article 275(2) TFEU. The condition for challenging these acts before EU courts is their individual nature.¹⁰⁹ Therefore, if the restrictive measures provided in the decision are general, as they apply to objectively defined situations and to categories of persons and entities indicated generally, such a decision cannot be regarded as providing restrictive measures against natural or legal persons within the meaning of Article 275(2) TFEU. In this regard, it is irrelevant that the applicant challenged the provision insofar as it concerned him.

It is debatable whether the CJEU has the competence to give an opinion on the compatibility of international agreements concluded on the basis of Article 37 TEU with the Treaties.¹¹⁰ According to Article 218(11) TFEU, a Member State, the European Parliament, the Council, or the Commission may obtain the opinion of the CJEU on the compatibility of an envisaged agreement with the Treaties. The competence of CJEU to provide such an opinion is, of course, not doubtful in the case of international agreements concerning external actions regulated by TFEU. This is disputable when the envisaged agreement relates exclusively or primarily to CFSP. Article 218(11) TFEU is part of the uniform procedure for the conclusion of international agreements by the EU, which also applies to CFSP, and argues in favour of giving CJEU the competence to provide an opinion on the compatibility of such an agreement with the Treaties.¹¹¹ Meanwhile, Article 218(11) TFEU also confers competence to request that the CJEU give an opinion to the European Commission and the European Parliament, which are generally excluded from the scope of CFSP. Interestingly, Article 218 TFEU does not confer any power on the High Representative. The Court has not yet had the opportunity to rule out the admissibility of issuing such opinions.

Neither Article 218 TFEU nor any provision of CFSP exclude the competence of supranational institutions to request that CJEU provide an opinion on the compatibility of an international agreement with the provisions of CSDP.¹¹² It must be expressed that the CJEU has the competence to give an opinion on draft international agreements, which exclusively or predominantly concern CSDP. Moreover, a request

109 Judgement of the General Court of 4 June 2014, T67/12, *Sina Bank v Council*, EU:T:2014:348, § 38.

110 Hillion and Wessel, 2009; Butler, 2021, p. 98.

111 Wouters et al., 2021, p. 217.

112 Eckes, 2016, p. 501.

for such an opinion may come from all entities identified in Article 218(11) TFEU. However, the scope of these requests remains unclear. According to the established CJEU case law, a request for an opinion may concern the substantive or formal validity of an agreement in light of the Treaty. Therefore, the CJEU's ruling on the compatibility of a proposed agreement with the Treaties may concern not only EU substantive law but also provisions concerning competence, procedures or the institutional organisation of the EU.¹¹³ The CJEU's opinion may relate, in particular, to the division of competences between EU and Member States under CSDP.

6.3. Treaty bodies in-charge of dealing with CSDP

Bodies dealing with CSDP include the EU High Representative for Foreign Affairs and Security Policy, EEAS and PSC. The first two bodies conduct tasks not restricted to CSDP, while the PSC is a treaty body operating only in CFSP, especially CSDP.

6.3.1. EU High Representative for Foreign Affairs and Security Policy

The EU High Representative for Foreign Affairs and Security Policies has a strong influence on decisions taken in the CFSP. The High Representative is elected by the European Council by a qualified majority with the consent of the President of the European Commission (Article 18(1) TEU). However, the informal meeting of the European Council, on 19 November 2009, abandoned majority voting in favour of a consensual political agreement.

The High Representative represents the EU in the field of foreign and security policy and conducts political dialogue with third countries and other international organisations (Articles 27(1) and (2) TEU). He implements the decisions taken by the European Council and the Council in the field of CFSP (Article 27(1) TEU). However, it should be stressed that the High Representative exercises this competence jointly with Member States (Article 26(3) TEU). They may also make proposals and initiatives concerning CFSP, especially CSDP, to the Council, including a direct legislative initiative that the High Representative shall conduct alone or with the support of the European Commission (Article 30(1) TEU). He also informs the European Parliament about policy orientations in areas concerning CFSP (Article 36 TEU).

Defining the status and formal position of the High Representative within EU institutions is relatively complicated. The High Representative is closely connected to three institutions: the European Council, the Council, and the European Commission.

The status of the High Representative is not identical within intergovernmental institutions (European Council and Council). In the European Council, the High Representative participates in principle (Article 15(2) TEU). He is therefore not formally its member, and Treaties exclude him from the European Council's decision-making

¹¹³ Opinion of the Court of Justice of 30 November 2009, 1/08, ECLI:EU:C:2011:123, §§ 108–109.

powers. According to Article 15(4) TEU, as a rule, the European Council takes decisions by consensus, which is reached among its members (i.e. the President of the European Council, the Heads of State or Government of the Member States and the President of the European Commission). This aligns with the European Council's move to make decisions by vote. Therefore, the role of the High Representative in the European Council concerns participating in debates, initiating certain solutions and sharing external representation of the EU in CFSP matters with the President of the European Council. Regarding the latter, the Treaties provide that this competence is exercised by the President of the European Council without prejudice to the powers of the High Representative (Article 15(6) *in fine* TEU).

In the Council, the position of the High Representative is defined by Article 18(3) TEU. According to this provision, the High Representative chairs *ex officio* one of the Council configurations (i.e. the Foreign Affairs Council). The High Representative is not a member of the Council, and does not have the right to vote (Article 16(2) TEU). Giving the High Representative leadership of the Foreign Affairs Council certainly strengthens the coherence of the EU's external policies. The Foreign Affairs Council is not only responsible for CFSP, but also for other external actions of EU (such as the Common Commercial Policy and humanitarian aid).

By law, the High Representative remains one of the Vice-Presidents of the European Commission (Article 18(4) TEU). The Treaties do not attach any specific role or competence to the status of the Vice President of the European Commission. It is the President of the European Commission who is responsible for the division of responsibilities within the European Commission and determining the guidelines within which the European Commission performs its tasks as well as the internal organisation of the European Commission. Therefore, it determines how the relationship between the High Representative and other Commissioners is shaped.

6.3.2. *European External Action Service*

The Treaty of Lisbon established the European External Action Service (EEAS, which functions on the basis of Article 27(3) TEU and the Council Decision of 26 July 2010.¹¹⁴ The seat of EEAS is Brussels (Article 1(2) of the Decision).

According to TEU, EEAS is responsible for the EU's diplomatic relations with third countries and third international organisations and conducts the EU's foreign and security policy. These tasks were further detailed in the 2010 decision and included the following:

- supporting the High Representative in the conduct of CFSP;
- cooperation with the diplomatic services of Member States;
- responsibility for diplomatic relations and promotion of strategic partnerships with non-EU countries (Article 2 of the Decision).

¹¹⁴ Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, 2010.

The 2010 Decision contains provisions on the organisation of EEAS. The High Representative of the Union for Foreign Affairs and Security Policy (Article 1(3) of the Decision) heads the EEAS. According to Article 27 TEU, the EEAS comprises officials from the General Secretariat of the Council and the European Commission, as well as staff from national diplomatic services. The EEAS is composed of officials performing their tasks in Brussels and in EU Delegations (Article 1(3) of the Decision).

The central administration of EEAS, which performs its tasks in Brussels, is divided into directorates (Article 4 of the Decision). The Decision lists six directorates distinguished by geography (Asia and the Pacific, Africa, Europe and Central Asia, North Africa, Middle East, Arabian Peninsula, Iran and Iraq, Directorate for the Americas and Directorate for Global and Multilateral Issues) and two directorates based on theme (Directorate for Crisis Response and Operational Coordination and Directorate for Administration and Finance).

The managing directors of the directorates, together with PSC Chairman, formed the Political Council. In addition to the Policy Board, there is also a Governing Board comprising the High Representative, Secretary-General and Chief Operating Officer.

According to the 2010 Decision, the decision to open or close a delegation shall be adopted by the High Representative in agreement with the Council and the European Commission (Article 5(1)). Each delegation shall be led by a Head of Delegation who shall have authority over all staff employed in the delegation (Article 5(2)). The Head of Delegation is directly responsible for the High Representative, from whom he receives instructions and to whom he is accountable for their implementation. In specific cases, such instructions may also be provided to the Head of Delegation by the Commission.

Each Union Delegation shall be subject to periodic financial and administrative audits by the Executive Secretary-General of EEAS (Article 5(5)).

The Head of the EU Delegation was appointed by the President of the European Council and the President of the European Commission based on a proposal by the High Representative. He/she shall be selected from among candidates drawn from the EEAS, the European Commission, the European Council and the 27 Ministries of Foreign Affairs of the Member States (Article 5(6) of the Decision).

EU delegations enjoy diplomatic privileges and immunities in accordance with the provisions of the Vienna Convention on Diplomatic Relations of 18 April 1961 (Article 5 of the Decision). This is intended to ensure not only security but also full freedom of the delegation's diplomatic activity.

The tasks of the delegations are defined in Article 5 of the Council Decision:

- Facilitating contact between EU institutions and third countries or international organisations to which they are accredited;
- The Head of Delegation represents the EU as a whole in a third country or before an international organisation to which he/she is accredited, including

the power to conclude agreements and appear before courts as a party to proceedings;

- Delegations are obliged to maintain regular contact with the diplomatic missions of EU Member States and to exchange information;
- At the request of Member States, delegations support them in their tasks, including providing consular care for EU citizens.

The EU is currently represented by 140 countries and international organisations. The EU is delegated to the UN headquarters in New York, Geneva, Paris, Rome, Vienna and Nairobi, among others.

The EU Intelligence and Situation Centre (INTCEN) is an integral part of EEAS. It is the EU's civilian intelligence unit, and its tasks include providing intelligence analysis, early warning and situational awareness to the High Representative, Member States and various EU decision-making bodies. INTCEN collects information, produces its own documentation and receives data from national secret services. Central to its work is a cell composed of intelligence officers from Member States for the exchange of classified information.

INTCEN acts as a 24/7 operational focal point, monitoring and assessing international events and offering immediate facilities to support the Crisis Task Force.

6.3.3. Political and Security Committee

The Political and Security Committee (PSC), which functions on the basis of Article 38 TEU, is composed of permanent representatives of Member States and chaired by representatives of EEAS delegated by the High Representative. The PSC's tasks include:

- observing the international situation and implementing policies agreed under CFSP;
- contributing to the definition of policies by issuing opinions to the Council;
- exercising political control and the direction of crisis management operations, under the responsibility of the Council and High Representative.

The PSC is advised by the Committee on Civilian Aspects of Crisis Management (CIVCOM), which provides information, develops recommendations and presents its views on civilian aspects of crisis management to the PSC and the Political–Military Group.

6.3.4. European Defence Agency

The European Defence Agency (EDA) was established in 2004 and currently has its legal basis in Article 45 TEU, supplemented by Council Decision 2015/1835 of 12 October 2015 defining the EDA's statute, seat, and rules of operation.¹¹⁵

The Agency is under the authority of the Council and has its seat in Brussels (Article 45(1), TEU).

The Agency's tasks regulated in Article 45 TEU include:

- contributing to the definition of Member States' military capability objectives and assessment of the implementation of Member States' capability commitments;
- promoting harmonisation of operational requirements and establishing effective and consistent procurement methods;
- proposing multilateral projects to achieve military capability objectives and ensuring the coordination of programmes implemented by Member States and management of specific cooperation programmes;
- supporting defence technology research, coordinating and planning joint research activities and studying technical solutions for future operational requirements.
- contributing to the identification of any useful measures to strengthen industrial and technological base of the defence sector and enhancing the efficiency of military expenditure and, where appropriate, implementing these measures.

The 2015 Decision elucidates that the agency's mission does not prejudice the competence of Member States in defence matters (Article 2(3)).

The Agency is open to all Member States wishing to participate in its activities and is funded by the participating States. Any Member State wishing to participate in the Agency's work shall notify the Council of its intention and inform the High Representative (Article 1 of the Decision).

6.4. *Organs sui generis*

Sui generis bodies operate on the basis of a European Council or Council decision. They are intended to support the EU's civilian or military crisis management missions, and thus contribute to CSDP's tasks.

Military bodies include the EUMC, EUMS and Military Planning and Conduct Cell (MPCC). The structures that improve the conduct of civilian crisis management missions are Civcom and Civilian Planning and Conduct Cell.

¹¹⁵ Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the Statute, seat and functioning of the European Defence Agency (recast), 2015.

6.4.1. *Military bodies*

The EUMC was created and operated based on the Council Decision of 22 January 2001.¹¹⁶ The decision follows the political decision taken by the Nice European Council in 2000 to strengthen CFSP and prepare the EU institutionally to conduct a full range of tasks related to the implementation of Petersberg Missions.¹¹⁷

It is the highest military body established within the Council. It is composed of the Chiefs of Defence of Member States, represented by their military representatives (Article 1 of the Decision). The EUMC's task is to provide military advice to PSC and make recommendations on all military matters within the EU. In crisis management situations, at the request of the PSC, the EUMC issues an Initial Directive to the Director General of EUMS to draw up and present strategic military options. The EUMC also assesses the strategic military options developed by the EU Military Staff and forwards them to PSC, together with its assessment and military advice. Based on the military options selected by the Council, it approves the Initial Planning Directive for the Operation Commander. It also advises PSC on options for terminating military operations.

The EUMC exercises military direction for all military activities within the EU, monitoring proper execution of military operations under the responsibility of the Operation Commander.

The EUMC is headed by a President appointed by the Council, whose term is three years.

The EU Military Staff (EUMS) was created based on the Council Decision of 22 January 2001 on the establishment of the Military Staff of the EU.¹¹⁸

The EUMS is composed of military personnel seconded by Member States. All EUMS members must be nationals of EU Member States (Articles 1 and 3 of the Decision). The EUMS works under the guidance of the EUMC, receives regular feedback and assists in all practical aspects of strategic planning (Annex to the Decision).

In 1999, the Helsinki European Council emphasised that the EUMS should provide military expertise and support to the Common European Security and Defence Policy, including the conduct of EU-led military crisis management operations. Accordingly, the tasks of the EUMS include dealing with early warnings, situation assessments and strategic planning for Petersberg Missions, together with the identification of European national and multinational forces and the implementation of policies and decisions as recommended by EUMC.¹¹⁹

The EUMS operates in the military direction of EUMC to which it reports (Annex to the Decision). The EUMS is now part of the EEAS. EUMS is directed by an Admiral.

¹¹⁶ Council Decision of 22 January 2001 setting up the Military Committee of the European Union, 2001.

¹¹⁷ European Council, 2000b.

¹¹⁸ Council Decision of 22 January 2001 on the establishment of the Military Staff of the European Union, 2001.

¹¹⁹ European Council, 1999.

During crisis management or exercises, the EUMS may establish Crisis Action Teams, drawing upon its own expertise, the state of the army and infrastructure. In addition, it may, if necessary, draw upon external forces from EU Member States for temporary reinforcement requested by the EUMC from EU Member States.

Within EUMS structures, the MPCC was created following a proposed by the Council in its conclusions of 6 March 2017¹²⁰ and the current legal basis is provided by Council Decision (EU) 2017/971 of 8 June 2017, which defines the arrangements for planning and conducting EU military CSDP missions without an executive mandate.¹²¹

The MPCC is based in Brussels, and is tasked with the operational planning and conduct of non-executive mandate missions, that is, non-combat missions deployed in a third country, where the EU supports the host country in an advisory role only (Article 1 of the Decision). This includes the establishment, mobilisation, sustainment and reconstitution of EU forces. The MPCC operates under the political control and strategic direction of the PSC (Article 1(3) of the Decision). The MPCC is led by the Director General of EUMS who simultaneously serves as Mission Commander for military missions without an executive mandate.

6.4.2. Civilian bodies

The structures that improve the conduct of civilian crisis management missions are Civcom and CPCC.

The CPCC is a permanent structure operating within the EEAS and is responsible for the preparation and implementation of civilian CSDP operations. The CPCC is under the political control and strategic direction of PSC and the overall authority of the High Representative.

Civcom operates on the basis of Council Decision 2000/354/CFSP of 22 May 2000 establishing a Committee on the Civilian Aspects of Crisis Management.¹²² The Committee is composed of representatives of Member States and acts as a working group for the Council (Article 1).

Civcom's provides information, recommendations and advice on civilian aspects of crisis management to PSC and other relevant Council bodies, in accordance with their respective competences (Article 2). Accordingly, Civcom's tasks include:

- preparing plans for new missions;

¹²⁰ European Council, 2017.

¹²¹ Council Decision (EU) 2017/971 of 8 June 2017 setting out the arrangements for planning and conducting EU military missions in the field of CSDP without an executive mandate and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on the European Union military mission to contribute to the training of Malian forces (EUTM Mali) and (CFSP) 2016/610 on the European Union military CSDP training mission in the Central African Republic (EUTM CAR), 2017.

¹²² Council Decision of 22 May 2000 setting up a Committee for the Civilian Aspects of Crisis Management, 2000/354/CFSP, 2000.

- making recommendations to PSC;
- developing civilian crisis management and civilian capability strategies.

Another EU agency is the Institute for Security Studies, which was established in 2002, and its legal basis is now Council Decision 2014/75/CFSP of 10 February 2014.¹²³

The Institute is headquartered in Paris. To facilitate the organisation of its work in Brussels, it also has a liaison office in that city (Article 1(3)).

The Institute's tasks include (Article 2):

- contributing to the development of EU strategic ideas on CFSP and CSDP, particularly conflict prevention and peacebuilding;
- conducting analysis and disseminating knowledge on the CFSP;
- promoting contacts with the academic world, think tanks and relevant civil society actors.

Political oversight of the Institute's activities is exercised by PSC, under the direction of the Council. Operational guidelines for the Institute may be issued by High Representatives (Article 3).

The Institute shall have the legal personality necessary to perform its functions and attain its assigned objectives. In particular, it may enter into contracts, acquire or dispose of movable and immovable property and be a party to legal proceedings. The Institute is not profit-oriented (Article 4).

It works under a Director appointed by its Council (Articles 5–6).

The EU Satellite Centre is another EU agency, established in January 2002 by the Council Joint Action of 20 July 2001.¹²⁴

It is headquartered in Torrejón de Ardoz, Spain (Article 1(2)).

Its tasks include supporting EU decision-making in the field of CFSP, including EU crisis management operations, by providing material derived from the analysis of satellite imagery and ancillary data such as aerial imagery (Article 2).

Political oversight is exercised by PSC, which may make recommendations on the matter (Article 3).

7. CSDP and NATO

Since the Lisbon Treaty, the EU has not only become an organisation of economic and social integration, but also a military alliance. The EU has acquired the capacity to autonomously carry out civilian and military missions for peacekeeping,

¹²³ Council Decision of 10 February 2014 on the European Union Institute for Security Studies, 2014.

¹²⁴ Council Joint Action of 20 July 2001 on the establishment of the European Union Satellite Centre, 2001.

conflict prevention and strengthening of international security (Article 42(1) TEU). The Lisbon Treaty also added an obligation to mutual defence (Article 42(7) TEU). According to it, Member States are obliged to assist their counterparts in the event of an “armed attack” on its territory. It also states that ‘commitments and cooperation in this area shall be consistent with commitments under NATO, which, for those States that are members of it, remains the foundation of their collective defence and the forum for its implementation’.

This provision refers to Article 5 of the NATO, in which State parties

agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against all of them, and therefore agree that if such an armed attack occurs, each of them, in the exercise of the right of individual or collective self-defence recognized under Article 51 of the Charter of the United Nations, will render assistance to the Party or Parties attacked by taking promptly, alone as well as in concert with other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Article 4 of the 1948 Brussels Treaty contained a similar clause:

Should any of the High Contracting Parties become the target of an armed attack in Europe, the other High Contracting Parties shall, in accordance with the provisions of Article 51 of the Charter of the United Nations, render to the party attacked such military and other assistance as is within their power.

The immediate reason for enshrining the self-defence clause in Article 42(7) TEU was the dissolution of WEU and termination of the Brussels Treaty of 1948. In a situation where not all Member States were NATO members in 2009, these States would have been left without security guarantees from other Member States. In addition, the formulation of the self-defence clause in the TEU was the desire of some Member States to strengthen European security space at the expense of non-European NATO Member States.¹²⁵

The transformation of the EU into a political and defence alliance raises the question of its relationship with NATO. Currently, virtually all EU Member States have become NATO members (except for Ireland, Austria and Sweden; however, the latter has the prospect of becoming a NATO member as early as 2024). However, besides one passage in Article 42(7) of TEU, there is no other provision regulating the relationship between the EU and NATO.

The importance of Article 42(7) TEU was underlined by the EU Heads of State and Government at their informal meeting in Versailles in March 2022 in the context of the Russia–Ukraine war.¹²⁶ In this declaration, the European Council stressed that

¹²⁵ Macalister-Smith and Gebhard, 2013.

¹²⁶ *Informal meeting of Heads of State or Government. Versailles Declaration, 2022.*

a stronger and more capable EU in the field of security and defence would make a positive contribution to global and transatlantic security and would complement NATO, which remains the basis of collective defence for its members. Solidarity between Member States is reflected in Article 42(7) TEU.

The Versailles Declaration of March 2022 is part of the construction of a mutual relationship between the EU and NATO. Over the decades, since the CSDP began to be built, these relations have evolved, with the European Council setting the pace and direction of these ties and their interdependencies.¹²⁷

The first joint meeting of EU and NATO representatives was held on 19 September 2000, between ambassadors of NATO's North Atlantic Council and PSC.¹²⁸ The NATO Secretary General underscored the need for complete cooperation between the EU and NATO, while also indicating that building structures and shaping procedures were not substitutes for building adequate defence capabilities. The meeting marked the beginning of regular contacts in this format.

Fundamental decisions on the shape of EU–NATO relations were made at the European Council meeting in Nice.¹²⁹ The EU Heads of State and Government decided on the creation of permanent political and military bodies, and their composition, competence and rules of operation. Formal decisions were also adopted through consultation and cooperation between the EU and NATO. The formal expression of cooperation became an exchange of letters in January 2001 between the NATO Secretary-General and the then President of the EU Council.¹³⁰ The NATO Secretary-General underlined NATO's willingness to hold at least one NATO–EU ministerial meeting and three North Atlantic Council and PSC meetings during one EU Presidency, as well as expert meetings, military committees and secretariats. He proposed that each organisation could request additional meetings when needed and that the NATO and EU should increase the frequency of their contacts during crises. NATO also announced that representatives of EU Presidency would be invited to meetings organised by NATO. The President of the EU Council confirmed the proposals of the NATO Secretary-General and expressed expectations of further cooperation.

These arrangements were never transformed into a binding international agreement between the two organisations, and the mutual relationship between the EU and NATO was expressed in a series of declarations between 2016 and 2023. These declarations began a new phase in the history of EU–NATO relations and elevated them to the status of a strategic partnership.

The Declaration of 8 July 2016 was signed in Warsaw by the Presidents of the European Council, the President of the European Commission, and the NATO Secretary

¹²⁷ Bugajski, 2023, p. 95.

¹²⁸ *Intervention by Dr Javier Solana High Representative for CFSP*, 2000.

¹²⁹ European Council, 2000.

¹³⁰ *Exchange of letters between George Robertson, Secretary-General of NATO and Anna Lindh, Swedish FM and Chairman of the Council of the European Union*, 2001.

General.¹³¹ Its aim was to strengthen cooperation in seven areas: combating hybrid threats; operational cooperation in the field of irregular migration; cyber-security and defence; defence capabilities; defence sector and defence research; exercises; and supporting partners' efforts to build capacity in the Western Balkans, Eastern and Southern neighbourhoods, and strengthening their resilience. The Declaration emphasised that cooperation between the EU and NATO would be conducted in the spirit of openness and transparency with full respect for decision-making autonomy and procedures of both organisations and without prejudice to the specific nature of the security and defence policy of any Member State. The 2016 Declaration materialised in the form of the Council Conclusions of 6 December 2016 in which the Member States endorsed a common set of 42 proposals representing concrete actions for the implementation of the Joint Declaration.¹³² These were jointly developed by the EU (EEAS, Commission Services and EDA) and NATO.

The second EU–NATO Joint Declaration was signed on 10 July 2018 in Brussels, reaffirming the importance and need for cooperation between the two organisations, and emphasising the mutual benefits of security and defence initiatives. The Declaration highlighted three fields of current cooperation, that is combating smuggling and trafficking of migrants in the Mediterranean, enhancing the capacity to respond to hybrid threats and supporting the defence and security capabilities of our neighbours to the east and south. However, it is imperative to deepen cooperation in new areas such as military mobility; counterterrorism; strengthening resilience to chemical, biological, radiological and nuclear threats; and promoting women's peace and security agendas. The EU's parallel efforts to develop CSDP and NATO's efforts to fulfil the organisation's core tasks received significant support, particularly the need to develop defence capabilities that are coherent, complementary, and interoperable and accessible to both organisations.

The arrangements made therein were reviewed periodically according to both declarations. The final review was conducted in 2022 and covered the period following the Russian invasion of Ukraine.¹³³ The review report highlighted the progress made in terms of political dialogue and ongoing political consultations in PSC and the North Atlantic Council, and in briefings in various committees and working groups. The report highlighted the results of joint work in agreed-upon areas (including strategic communications and countering information manipulation, and interference by foreign actors). The Seventh Report also noted the adoption of the EU Strategic Compass.

The next EU–NATO Joint Declaration of Cooperation was signed on 10 January 2023, where they noted that their strategic partnership is based on shared values,

131 *Joint declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization*, 2016.

132 European Council, 2016.

133 *Seventh progress report on the implementation of the common set of proposals endorsed by NATO and EU Councils on 6 December 2016 and 5 December 2017*, 2022.

determination to face common challenges, and an unequivocal will to promote and protect peace, freedom and prosperity in the Euro–Atlantic region. Both organisations noted the security threat posed by Russia’s aggression against Ukraine and the People’s Republic of China’s policies. In the current situation, transatlantic ties are becoming increasingly important than ever before, necessitating closer EU–NATO cooperation. The Declaration emphasised NATO’s overarching role in Euro–Atlantic security, recalling that NATO remains the foundation of allies’ collective defence, while EU capabilities are complementary and interoperable with NATO. As security threats and challenges facing the EU and NATO evolve in scope and scale, the two organisations have pledged to take their partnership to the next level, strengthen cooperation in existing fields and expand it, notably on increasing geostrategic competition, resilience challenges, critical infrastructure protection, new and disruptive technologies, space, the security implications of climate change and foreign information manipulation and interference.

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