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The Process of Integration of the CFSP into the Evolving Constitutional Legal Order of the EU: Article 218 TFEU

1. Introduction

The gradual integration of the Common Foreign and Security Policy (CFSP) into the general EU legal order was envisaged from the moment when the process of political integration became part of the legal system established by treaty law, which occurred with the Treaty of Maastricht.[1] Article 2 TEU then provided that one of the objectives of the Union was

> "[T]o maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community."

(Old) Article 47 TEU was intended to protect the *acquis communautaire* and, in the words of one commentator, "to prevent intergovernmental contamination of supranational decision-making".[2] With the Treaty of Lisbon came new attempts to create a more integrated legal framework for the Union external action. The specific CFSP objectives were replaced by Articles 3(5) and 21 TEU which describe the objectives of the Union

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[1] For the historic evolution of the CFSP legal order until the entry into force of the Treaty of Lisbon, see Gosalbo Bono, Some Reflections on the CFSP legal order (2006), pp. 337–394.

[2] Eeckhout: EU External Relations Law (2011), p. 173.

external action in general, including for non-CFSP areas such as trade, development cooperation, environment.[3] By making conclusion of agreements in the field of CFSP subject to a single procedure of general application set out in Article 218 TFEU, the Treaty of Lisbon also did away with a specific procedure laid down in (old) Article 24 TEU. This not only provided for an additional hook for the Court of Justice of the EU (CJEU) to claim its jurisdiction, and thus, gave it the opportunity to confirm that the CFSP—despite its specificities—is firmly embedded in the EU legal order,[4] it also raised a question as to where the limits of such integration lie under the current Treaty set-up. The CFSP remains a distinct policy framework involving specific procedural rules and a specific institutional balance set out in a separate Treaty, characterised by a major institutional innovation of a three-hatted position of the High Representative of the Union for Foreign Affairs and Security Policy (HR).[5] Moreover, a more balanced relationship between the policies under the TFEU and the CFSP with additional protection of the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the CFSP is ensured by Article 40(2) TEU. Against this background, it is possible to argue that the intention of the drafters of the Treaty of Lisbon was no longer that of preventing the "intergovernmental" contamination of the supranational decision-making but to prevent the supranational, non-CFSP contamination of the CFSP decision-making. However, this is not reflected in the CJEU case law, which seems to be using Article 218 TFEU procedures to facilitate (possibly anticipate) further incorporation of CFSP into the mainstream of the European Union law.

The present contribution will set out the specific institutional and procedural arrangements of the Union action in the area of CFSP (Section 2), examine the CJEU's case law related to the conclusion of agreements revealing, on the one hand, the CJEU's readiness to preserve the specific features of the CFSP policy area in the context of Article 218 TFEU, and on the other hand, giving evidence of the CJEU trying to minimise the scope of the CFSP[6] in broad agreements covering the CFSP and non-CFSP matters

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3 On nature and objectives of Article 21 TEU, see Lonardo, Common Foreign and Security Policy and the EU's external action objectives: an analysis of Article 21 of the Treaty on European Union (2018), pp. 584–608.

4 On the remarkable development of the role of the CJEU in relation to the CFSP, see Hillion, Wessel, 'The Good, the Bad and the Ugly': Three Levels of Judicial Control over the CFSP (2018), in Blockmans, Koutrakos (eds.), Research Handbook on EU Common Foreign and Security Policy (2018); Kuisma, Jurisdiction, Rule of Law, and Unity of EU Law in *Rosneft* (2018), pp. 1–24; Butler, The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy (2017), pp. 673–703.

5 On the triple functions of the HR, see Marquardt, The Role of the High Representative and the European External Action service in EU sanctions policy (2018), pp. 401–403.

6 A different suggestion—on the basis of an earlier case law—was made by Cremona, The position of the CFSP/CSDP in the EU's constitutional structure (2018), in Blockmans, Koutrakos (ed.),

(Section 3), explain why Article 40 TEU does not prevent combining legal bases relating to the CFSP and non-CFSP elements in the context of the Article 218 TFEU procedures (Section 4) and in conclusion highlight the risks of overzealous attempts at ensuring the assimilation of the CFSP into the general EU legal order against the constraints of the current constitutional architecture of the EU (Section 5).

2. CFSP: A Union Policy Subject to Specific Rules and Procedures

2.1. Chapter 2 of Title V TEU

It would appear that the competence to define and implement the CFSP is conferred on the Union by Article 2(4) TFEU.[7] However, the reference to the TEU in that provision makes it clear that the *sedes materiae* of the Union competence in question lies outside TFEU. The formulation of Article 4(1) TFEU[8] suggests that the CFSP falls within the category of competences that are shared between the Union and the Member States, even if not mentioned among other areas of shared competences enumerated in the same article. The exercise of the Union competence in the area of CFSP does not affect the competence of the Member States to formulate and conduct their own foreign policies. In other words, the CFSP proper is not subject to the pre-emption rule laid down in Article 2(2) TFEU, under which the Member States may only exercise their competence to the extent that the Union has not exercised its competence. Although formulated in somewhat different terms and in two separate declarations,[9] rather than in the provisions of the Treaties, this characteristic of a Union competence is, however, not CFSP-specific. The exercise of competences by the Union in the policy areas of research, technological development, space, development cooperation and humanitarian aid (Articles 4(3) and 4(4) TFEU) equally do not result in Member States being prevented from exercising theirs.[10]

Research Handbook on the EU's Common Foreign and Security Policy (2018).

7 Article 2(4) TFEU states: "The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy".

8 "The Union shall share competence with the Member States where the Treaties confer on it a competence which does not related to areas referred to in Articles 3 and 6." Article 3 lists the areas of exclusive competences while in Article 6, the areas of Union supporting competences are listed.

9 Declarations No. 13 and No. 14 concerning the common foreign and security policy, annexed to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon.

10 They are often referred to as "parallel competences", as they allow for a parallel exercise of competences both, by the Union and by its Member States. See Institutional Report (Chapter 1) by Drexler, Legal, Neergaard, De Elera in Cruz Vilaça, Piçarra, Vasconcelos, Saavedra (eds.), The external dimension of the EU policies: horizontal issues; trade and investment; immigration and asylum,

Under Article 24 TEU, the CFSP "is subject to specific rules and procedures". It is defined and implemented by the European Council and the Council acting, as a general rule, by unanimity. The CFSP is put into effect by the HR and by the Member States. The HR conducts the CFSP and contributes by making proposals to its development (Article 18(2) TEU). It is the HR (together with the President of the European Council at his level), rather than the Commission, who ensures the external representation of the Union in this area and shares the right of initiative with the Member States.[11] In other words, with the Treaty of Lisbon, the Commission's institutional role in the CFSP was substituted by that of the HR. The European Parliament is precluded from participating in the decision-making procedures.[12] Finally, the jurisdiction of the CJEU is limited to the monitoring of compliance with Article 40 TEU and to a review of the legality of decisions providing for restrictive measures against natural and legal persons (Article 275(2) TFEU). These specific procedural and institutional arrangements are to blame if the traditional description of this area as intergovernmental in nature persists after the entry into force of the Treaty of Lisbon,[13] which did away with specific legal instruments, extended the CJEU's jurisdiction and introduced a supranational actor into the mix—the HR. The limited role of the European Parliament and of the CJEU notwithstanding, even before the latest Treaty amendments it was argued that:

> "[T]he CFSP has evolved from a purely intergovernmental system based on consensus and general international law into a fully-fledged system based on treaty law which includes institutions that operate under the rule of law, and which have been given law-making powers and which have produced considerable body of secondary law."[14]

The European Council and the Council of the EU operate as such institutions, distinct from its members, and endowed with specific powers also in the area of CFSP. The legal acts adopted by them enter into force without being subject to any internal national

XXVIII FIDE Congress, Lisbon/Estoril, (23–26 May 2018), Congress Proceedings Vol. 3 (2018), p. 159.

[11] Article 30(1) TEU states: "Any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission's support, may refer any question relating to the common foreign and security policy to the Council and may submit to it, respectively, initiatives or proposals."

[12] Pursuant to Article 36 TEU, the HR shall regularly consult the European Parliament (EP) on the main aspects and the basic choices of the CFSP and inform it of how those policies evolve, and has also the obligation of ensuring that the views of the EP are duly taken into consideration. The EP may ask questions to the Council or make recommendations to both the Council and the HR. Twice a year the EP shall hold a debate on progress in implementing the CFSP, including the common security and defence policy.

[13] Rosas, Relation extérieures de l'Union, in Tizzano (ed.), Verso i 60 anni dai Trattati di Roma (2016), pp. 279–287; Quaderni della rivista Il diritto dell'Unione Europea 8, p. 285

[14] Gosalbo Bono, Some Reflections on the CFSP legal order (2006), para. 57.

approval procedures. They are, moreover, binding on the Member States, which are required to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity" and "comply with the Union's action in this area" (Article 24 TEU). The CFSP legal acts in the area of restrictive measures of individual application also confer rights and obligations on the individuals and are subject to judicial review. It is, therefore, here suggested that the persistent label of intergovernmentalism surrounding this policy area is no longer in place and should be abandoned.

Before turning to the CFSP-specific norms governing the Union treaty-making, the voting rules applicable in the area of CFSP merit a closer examination. Article 31(1) TFEU sets out that "[d]ecisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise". The general rule set out in Article 16(3) TEU according to which the Council shall act by a qualified majority, except where the Treaties provide otherwise, is therefore reversed for the area of CFSP. This CFSP Chapter, however, does provide cases where, by way of derogation from the predominant unanimity requirement, a qualified majority applies (Article 31(2) TEU). The exceptional application of the qualified majority rule concerns—except for one case which relates to the power of appointing an EU special representative in accordance with Article 33 TEU—decisions akin to implementation measures, that are taken on the basis of a position of the European Council or the Council that has been taken unanimously beforehand.[15] The European Council may decide unanimously to extend the cases to which the qualified majority-voting rule would apply beyond those stipulated in the second paragraph pursuant to Article 31(3) TEU (the so-called *passarelle* clause).[16] Besides, the institute of constructive abstention applies to the unanimity vote,[17] and a Member State may prevent the adoption of a decision by qualified majority for vital and stated reasons of national policy.[18] When exercising its powers in the area of CFSP the Council is authorised to act by qualified majority only

[15] These cases include adopting a decision defining a Union action or position on the basis of a decision of the European Council, relating to the Union's strategic interests and objectives as referred to in Article 22(1) TEU, a decision defining a Union action or position on a proposal that HR has presented following a specific request from the European Council or when adopting a decision implementing a decision defining a Union action or position.

[16] See Communication from the Commission to the European Council, the European Parliament and the Council, A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy(12 September 2018 (COM (2018) 674 final), suggesting recourse to the *passarelle* clause in a number of CFSP matters.

[17] According to the second subparagraph of Article 31(1) TEU, the abstaining member of the Council may qualify its abstention by making a formal declaration, allowing it not to be obliged to apply a decision while accepting that the decision commits the Union and refraining from taking any action likely to conflict with or impede the Union actions.

[18] The second subparagraph of Article 31(2) TEU.

in cases envisaged in Article 31(2) TEU or provided for under Article 31(3) TEU. No TFEU provision can displace that rule under the express terms of Article 31(1) TEU. Article 31(1) TEU clearly pre-empts this. This norm of a peremptory sort reflects the constitutional importance that the drafters of the Treaty placed on preserving the unanimity-voting rule in the area of CFSP.[19]

2.2. The CFSP-specific Rules Reflected in Article 218 TFEU

Article 218 TFEU determines the scope of and arrangements for exercising the Union's competences in the specific matter of negotiations and conclusions of agreements between the Union and third countries or international organisations. Article 218(2) to (6) TFEU regulates the ordinary procedure for the negotiation and conclusion of agreements by the Union (*lex generalis*), Article 218(9) TFEU lays down a specific, simplified procedure for suspending application of an agreement and for establishing the positions to be adopted on the Union's behalf in international bodies set up by agreements, when called upon to adopt acts having legal effect (*lex specialis*). Article 218(7) envisages the possibility for an *ad hoc* simplified procedure concerning both these procedures. Article 218(10), equally applying to both these procedures, lays down an obligation to inform the European Parliament immediately and fully at all stages. A more recent string of the CJEU case law clarified that Article 218(8) TFEU setting out the voting rules also applies in relation to the specific Article 218(9) TFEU procedure.[20]

Article 218 TFEU confirms the Council's role as a treaty-making institution of the EU. The Council authorises the opening of the negotiations, adopts negotiating directives, authorises the signing of agreements, decides on the provisional application, and on the conclusion of agreements. Likewise, decisions suspending the application of the agreement as well as decisions establishing the positions of the Union within a body set up by an agreement are for the Council to take. As a policy-making institution (Article 16(1) TEU), the Council also decides on the negotiations and signature of

[19] The unanimity vote applies only to legal acts that are envisaged in the Treaty. In addition to already mentioned Article 37, the following provisions of Articles 27(3), 28(1), 29, 33, 39, 42(4), 43(2) and 46(3) TEU contain specific substantive legal bases in the area of CFSP enabling adoption of legal acts, other than legislative acts, which are excluded by virtue of Article 24 TEU. In contrast, other atypical acts, including non-legal, i.e. political acts, irrespective of whether they pertain to the CFSP or non-CFSP, are approved by the European Council or Council by consensus which requires explicit agreement by all the members of the European Council or the Council and which excludes the possibility of any abstention. In contrast, abstentions are possible where the Council adopts an act by unanimity.

[20] Judgment of 18 December 2014, *United Kingdom v. Council*, C-81/13, ECLI:EU:C:2014:2449; judgment of 25 October 2017, *Commission v. Council* (WRC-15), C-687/15, ECLI:EU:C:2017:803, para. 51; and judgment of 4 September 2018, *Commission v. Council* (Agreement with Kazakhstan), C-244/17, ECLI:EU:C:2018:662, para. 27.

legally non-binding bilateral or multilateral instruments on behalf of the EU,[21] which also include joint statements. The European Parliament is precluded from participating in the conclusion of international agreements relating exclusively to the CFSP, just as it is precluded from participating in the adoption of other CFSP internal measures. The HR's prerogative to contribute by submitting proposals to the development of the CFSP is expressly reflected in Article 218 TFEU. Article 218(3) TFEU thus stipulates that "the Commission, or the High Representative […] where the agreement envisaged relates exclusively or principally to" the CFSP, submit recommendations to the Council based on which the Council adopts a decision authorising the opening of negotiations.[22] Likewise, under Article 218(9) TFEU the Council acts on the proposal from the Commission or the HR "depending on the area of Union competence". Decisions relating to comprehensive agreements with third countries covering areas of the EU activity falling within the CFSP as well as non-CFSP are currently adopted on the basis of *joint* recommendations by the HR and the Commission.[23]

3. The Operation of Article 218 TFEU in the Area of CFSP: Judicial Developments

3.1. Mauritius Case-law

The fact that Article 218 TFEU applies to all areas of the EU activity, including those lying outside the TFEU, was confirmed by the CJEU in the landmark *Mauritius* case.[24] The case was concerned with the level of involvement of the European Parliament in the conclusion of an agreement falling principally within the area of CFSP. According to the CJEU:

> "[F]ollowing the entry into force of the Treaty of Lisbon, in order to satisfy the requirements of clarity, consistency and rationalisation, [Article 218 TFEU] now lays down a single procedure of general application concerning the negotiation and conclusion of international agreements which the European Union is compe-

[21] Judgment of 28 July 2016, *Commission v Council (Memorandum of Understanding with Switzerland*, C-660/13, ECLI:EU:C:2016:616.

[22] In such a decision, the Council will also nominate the Union negotiator or the head of the Union's negotiating team, which depending on the subject of the agreement envisaged could be the Commission and/or HR.

[23] Equally, the decisions relating to the EU positions *vis-à-vis* acts concerning the agreement as a whole (typically rules of procedures of joint bodies) are adopted on the basis of joint proposals by the HR and the Commission.

[24] Judgment of 24 June 2014, *Parliament v Council*, C-658/11, ECLI:EU:C:2014:2025.

> tent to conclude in the fields of its activity, including the CFSP, except where the Treaties lay down special procedures".[25]

Article 218 TFEU replaces the specific procedure for the conclusion of agreements in the area of CFSP introduced by the Treaty of Amsterdam (old Article 24 TEU). The provision of Article 37 TEU conferring the competence to conclude the agreements in the area of CFSP is, however, maintained.

Furthermore, the CJEU held that:

> "[P]recisely because of its general nature, that procedure must take account of the specific features which the Treaties lay down in respect of each field of EU activity, particularly as regards the powers of the institutions".[26]

With respect to these powers, the CJEU observes that the distinction in the degree of the involvement of the European Parliament within Article 218(6) TFEU "is designed to reflect externally the division of powers between institutions that applies internally" and that:

> "Article 218(6) TFEU establishes symmetry between the procedure for adopting EU measures internally and the procedure for adopting international agreements in order to guarantee that the Parliament and the Council enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties".[27]

Moreover, the fact that Article 218 TFEU cannot be immune from the special institutional and procedural arrangement of the CFSP policy area is confirmed through a well-known mantra according to which it is the substantive legal basis that determines the procedures[28] and not the other way round. The underlying constitutional considerations of the ruling were confirmed by subsequent case law, including in relation to Article 218(9) TFEU procedure.[29]

3.2. A Separate, Simplified Procedure under Article 218(9) TFEU

The voting rule of Article 218(9) TFEU procedure came into focus in the *Turkey Association Agreement* case,[30] which did not concern the CFSP. However, it was highly

[25] Ibid., para. 52. Special procedures for the conclusion of agreements are laid down in Article 219 TFEU for agreements related to the European Monetary Union as well as in Article 102 EUROTOM covering agreements concluded under the EURATOM Treaty

[26] Ibid., para. 53.

[27] Ibid., para. 56.

[28] Ibid., para. 57.

[29] Judgment of 14 June 2016, *Parliament v. Council* (*Tanzania Pirate Transfer Agreement*), C-263/14, ECLI:EU:C:2016:435, para. 68; and judgment of 4 September 2018, *Commission v Council (Agreement with Kazakhstan*), C-244/17, ECLI:EU:C:2018:662, para. 22.

[30] Judgement of 18 December 2014, *United Kingdom v. Council*, C-81/13, ECLI:EU:C:2014:2449.

relevant for the CFSP as it raised the question of the applicable voting rule in the context of Article 218(9) TFEU. The dispute was about the choice of a substantive legal basis, but the CJEU also decided on the voting rule within the Council. The case was brought to the CJEU by the United Kingdom, supported by Ireland, against Council Decision 2012/776/EU of 6 December 2012 on the position to be taken on behalf of the EU within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems. The UK criticised the Council for using Article 48 TFEU as the substantive legal basis and submitted that the appropriate legal basis for the adoption of such decision was Article 79(2)(b) TFEU. By not using that provision, the UK argued, the Council denied the UK the right that it derives from Protocol No. 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice not to take part in the adoption of that decision and not to be bound by it.[31]

The CJEU dismissed the action. It did, however, hold that Article 217 TFEU (concerning the conclusion of association agreements) ought to be added alongside Article 48 TFEU (concerning measures in the field of social security in the context of free movement of workers) as a (substantive) legal basis, since the contested decision aimed at the adoption of measures coordinating social security systems was adopted in the framework of an association agreement that did not put Turkey on the same footing as the Member States in this area.[32] In a single paragraph regarding the applicable voting rule, the CJEU held:

> "As the Advocate General observed in points 97 and 123 of her Opinion, since the contested decision does not relate to the conclusion of the association agreement or is not aimed at supplementing or amending the institutional framework of such an agreement, but is aimed solely at ensuring its implementation, it is, in accordance with the combined measures of the first paragraph of Article 218(8) TFEU and Article 218(9) TFEU, by a qualified majority and without the approval of the European Parliament, that the Council should have, in any event, adopted the contested decision".

The reasoning provided by the CJEU merits a closer examination. The CJEU invokes the first subparagraph of Article 218(8) TFEU as the origin of the applicable voting rule, which, however, proves unhelpful and unclear when read in combination with the analysis of the Advocate General Kokott to which the CJEU expressly refers.[33]

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31 Similar proceedings were brought to the CJEU by the UK also in relation to the Agreement on the European Economic Area (judgment of 26 September 2013, *United Kingdom v Council*, C-431/11, ECLI:EU:C:2013:589) and Agreement with the Swiss Confederation on the Free Movement of Persons (Judgment of 27 February 2014 and Order of the president of the Court of 18 April 2012, *United Kingdom v Council*, C-656/11, ECLI:EU:C:2014, EU:C:2014:97).

32 Unlike the EEA Agreement or EC-Switzerland Agreement on Free Movement of Persons.

33 AG's Opinion delivered on 17 July 2014.

She more convincingly argued against the applicability of Article 218(8) TFEU to the procedure laid down in paragraph 9 and for the recourse to Article 16(3) TEU instead.[34] The additional argument according to which the EU position does not relate to the conclusion of an association agreement nor is it aimed at supplementing or amending the institutional framework of such an agreement, was equally ambiguous, leaving scope for an interpretation (subsequently becoming the position of the Commission) that the second subparagraph of Article 218(8) providing for exceptions to the qualified majority rule could never apply in the context of Article 218(9) TFEU procedure. The CJEU, therefore, possibly unwillingly, contributed to the interpretation according to which qualified-majority voting rule would apply within Article 218(9) TFEU procedures automatically, irrespective of the policy area to which the Union action was linked. Doubts created by this judgment over the origin of the voting rule applicable to Article 218(9) TFEU procedure could have been avoided if *Mauritius* case law was rigorously applied by the CJEU. The application of this case law would equally result in the qualified majority-voting rule. However, its application would be dictated by the substantive legal basis, i.e. Article 48 TFEU rather than procedural legal basis (Article 218(8) TFEU).[35] The addition of another substantive legal basis (Article 217 TFEU) would not have stood in the way since Article 217 TFEU cannot be considered as constituting a field of an EU activity within the meaning of the *Mauritius* case law. Article 217 TFEU is special in that it is not concerned with a single Union policy area, instead it embraces the potential panoply of different Union policies under the TFEU.[36]

It is worthwhile adding that ambiguities apart, the case contributed valuably to the conceptualisation of the Article 218(9) TFEU procedure as an autonomous, separate, and simplified procedure, where simplification by comparison to the more elaborate procedure for treaty-making is concerned exclusively with the limited participation of the European Parliament, and was never intended to cover the voting procedures within

[34] Ibid., paras. 97 and 98 of the Opinion. The same approach was suggested in the AG's Opinion of 7 September 2017, *Commission v. Council*, C- 687/15, ECLI:EU:C:2017:803, para. 81: "[I]t follows from the Court's case-law that, in accordance with Article 16(3) TEU, the Council is to adopt such decisions by the qualified majority voting procedure".

[35] In the same sense, Jacqué: La négociation de l'accord international (2016), p. 1664.

[36] The question as to whether Article 217 TFEU conferring power on the Union to conclude so-called association agreements constitutes a substantive legal basis of a general (across the Treaties) application, akin to Article 218 TFEU, potentially "absorbing" the CFSP, has not yet been addressed by the CJEU. The Council's practice suggests that this is not the case. A set of association agreements concluded with Eastern partnership countries in 2014 (Ukraine, Moldova and Georgia) was based on Article 37 TEU and Article 217 TFEU. The same question, not yet resolved by the CJEU, may be raised in relation to Article 209 (development cooperation) and 212 (economic, financial and technical cooperation with third countries other than developing countries) TFEU.

the Council. These reflections from the AG's Opinion[37] provided some comfort in the absence of a more detailed legal analysis in the judgment itself, and although they were not followed by the CJEU entirely,[38] they provided foundations for the clarifications that came with the ruling in the *Kazakhstan Agreement* case[39]. As we shall see, the latter, on the one hand, celebrates the preservation of the unanimity in the context of Article 218 TFEU in the area of CFSP, and on the other hand, marks a further step towards the inevitable integration of the CFSP into the general EU legal order.

3.3. The Kazakhstan Agreement Case

If in the *Turkey Association Agreement* case the question of the voting rule arose only following the CJEU's addition of Article 217 TFEU (there was no dispute on this question between the parties), in the *Kazakhstan Agreement* case the issue of the applicable voting rule within Article 218(9) TFEU procedure was at the heart of the dispute. The attacked decision related to the EU position within the EU-Kazakhstan Cooperation Council concerning the working arrangements of joint bodies set up under the Agreement with Kazakhstan.[40] Relying on paragraph 66 of the *Turkey Association Agreement* case, the Commission had criticised the Council for adding, in the legal basis of a Council decision Article 31(1) TEU, a procedural legal basis in the area of CFSP. The Council argued based on the *Mauritius* case law that the addition was necessary for adoption of a decision relating to the agreement based on Article 37 TEU to preserve the symmetry with the decision-making applicable for the adoption of internal acts in the area of CFSP. To the question that remained open after the *Turkey Association Agreement* case the CJEU now responded unambiguously:

> "Determination of the voting rule applicable for the adoption of such a decision by reference to the two subparagraphs of Article 218(8) TFEU helps … to ensure that the single procedure envisaged in Article 218(9) TFEU takes account of the specific features of each of field of EU activity".

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[37] The AG's Opinion confirms an earlier analysis (AG's Opinion of 7 October 2014, *Germany v. Council*, C-399/12, ECLI:EU:C:2014:2258, paras. 39–52). See in particular footnote 63: "The schematic position of Article 218(9) TFEU after Article 218(6) and (8) TFEU shows that it is a separate, simplified procedure by which the suspension of international agreements and the establishment of the Union's positions for the purpose of adopting decisions in international bodies are regulated differently from the conventional procedure for the conclusion of international agreements. Only thus it is also possible to explain why Article 218(9) TFEU expressly regulates the rights of the Commission or the High Representative to submit proposals for the decisions referred to in that provision."

[38] The Court ruled that the voting rules laid down in Article 218(8) TFEU did apply within the Article 218(9) TFEU procedure.

[39] Judgment of 4 September 2018, *Commission v Council*, C-244/17, ECLI:EU:C:2018:662.

[40] OJ EU L 73/15, 18 March 2017.

The unanimity-voting rule is therefore applicable also in the context of Article 218(9) TFEU:

> "[W]here the agreement covers a field for which unanimity is required for the adoption of an EU act, thereby establishing a link between the substantive legal basis of a decision adopted under that article and the voting rule applicable to the decision's adoption".[41]

Indeed, like this, the symmetry between procedures relating to internal activity of the EU and procedures relating to its external activity, in compliance with the institutional balance, is preserved.[42] The determination of the substantive legal basis is, therefore, (again) central to the question of the applicable voting rule.[43]

The CJEU's examination of the choice of the legal basis is carried out by reference to the settled case law that developed in the context of EU internal measures, the application of which was, however, extended to the EU decisions concerning international agreements in the *Philippines Agreement* case[44] and to the agreements containing the CFSP and non-CFSP elements in the *Tanzania Agreement* case[45]. Hence, the CJEU recalls that in cases:

> "[W]here a decision comprises several components or pursues a number of objectives, some of which fall within the CFSP, the voting rule applicable for its adoption must be determined in the light of its main or predominant purpose or component".[46]

In the application of this case law, the CJEU, however, departs from its orthodox legal basis reasoning based on the aim and content of the measure in question. It focuses straight away on the provisions "displaying a link with the CFSP", refers to (some) of them expressly[47] and holds that they "are not of a scope enabling them to be regarded as a distinct component of that agreement". Rather "they are incidental to that agreement's

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41 Judgment of 4 September 2018, *Commission v Council*, C-244/17, ECLI:EU:C:2018:662, para. 29.

42 Ibid., para. 30.

43 The *Turkey Association Agreement* case is held to be applicable exclusively to association agreements as a specific category of international agreements (ibid., paras. 33–34 of the judgment), distinct from other agreements "covering a field for which unanimity is required for the adoption of a Union act and therefore to the act's content". This makes for an artificial distinction that could have been avoided if the *Mauritius* rationale had been followed in *the Turkey Association Agreement* case.

44 Judgement of 11 June 2014, *Commission v Council*, C-377/12, ECLI:EU:C:2014:1903.

45 Judgment of 14 June 2016, *Parliament v Council*, C-263/14, ECLI:EU:C:2016:435.

46 Ibid., paras. 36–38.

47 Article 6 on dialogue and cooperation in the field of foreign and security policy and Articles 9 to 12 defining the framework of cooperation regarding conflict prevention and crisis management, regional stability, countering the proliferation of weapons of mass destruction and the fight against illicit trade in small arms and light weapons (ibid., para. 42).

two components constituted by the common commercial policy and development co-operation".[48] For the conclusion that the CFSP provisions are not substantial enough to constitute a distinct component, the CJEU offers considerations of quantitative and qualitative nature, without however considering neither the aim nor the context of the provisions in question. It underlines that the CFSP provisions "apart from being few in number in comparison with the agreement's provisions as a whole"[49], are also:

> "[L]imited to declarations of the contracting parties on the aims that their cooperation must pursue and the subjects to which that cooperation will have to relate, and do not determine in concrete terms the manner in which the cooperation will be implemented (see, by analogy, judgment [in the Philippines Agreement case], paragraph 56)".

The reference by analogy to the *Philippines Agreement* case is misleading insofar as it suggests that the test developed in that case is applied to the analysis of the area of CFSP in the *Kazakhstan Agreement* case. This is not the case. As it will be argued below, a comparison between the reasoning in both cases reveals that only the second part of the legal basis test from the *Philippines Agreement* case (content) was used in the *Kazakhstan Agreement* case. If the test from the *Philippines* case was to be applied rigorously and in full (aim and content), the outcome of the analysis may have revealed the existence of a separable, self-standing component (albeit smaller), pursuing the distinct CFSP objectives, and hence, of an independent character from other parts of the agreement.

3.3.1. Constitutional Implications

After the *Kazakhstan Agreement* case, the question as to whether the CJEU is aiming at minimising the scope of the CFSP in agreements covering a substantial CFSP part as well as other non-CFSP domains of external relations (typically trade, cooperation, development) cannot be avoided. Two indications that would support an affirmative answer to this question will be addressed. One concerns the bending of the legal basis test and the other the definite hermeneutical closure of Article 218 TFEU.

Starting with the bending of the legal basis test, it is here recalled that in the *Philippines* case the analysis revolved around the question as to whether the provisions relating to other policy areas[50] could be considered as falling within the main or predominant component, that of development cooperation policy, or whether they went beyond the framework of that policy.[51] After a detailed examination of the Framework agreement as

[48] Ibid., para. 46.

[49] Most of the provisions fall within the common commercial policy of the EU (Article 207 TFEU) or its development cooperation policy (Article 209 TFEU).

[50] The provisions in question related to the readmission of nationals of the contracting parties, transport and environment.

[51] Judgment of 14 June 2016, *Parliament v Council*, C-263/14, ECLI:EU:C:2016:435, para. 35; see also in para. 44: "[E]ven if a measure contributes to the economic and social development of devel-

well as of the development policy as defined in the European Consensus, the CJEU held that these other provisions "contribute to the pursuit of the objective of development cooperation" (aim).[52] It is only in the second step that the CJEU looked at the extent of the obligations set out in those provisions (content) and found that they could not constitute "objectives" distinct from those of development cooperation on the ground of being limited to declarations on the aims and subjects of that cooperation without determining the manner in which the cooperation will be implemented.[53] In other words, the ancillary nature of the provisions in question was demonstrated following a two-step classic legal basis test based on the aim and objective, reinforced by the references to the legal and policy context. The fact that provisions in the agreement relating to migration, transport and environment contributed to the pursuit of the *objective* of development cooperation was decisive.

The first part of this standard test is absent in the reasoning of the *Kazakhstan Agreement* case. Nothing is said about the objectives of Title II related to Political dialogue and cooperation in the area of CFSP, nor about the aims of the agreement as a whole or its structure. In accordance with the *Philippines Agreement* case, it would have been essential to establish that the CFSP provisions contributed to the objectives of other policy fields (*in casu* trade and development cooperation), before a conclusion about their incidental nature could have been reached. This would not have been an easy task, as "the CFSP part" of the agreement pursues objectives transcending parts related to trade and business or cooperation in other areas. Promotion of international peace, stability and security, strengthening of the role of the UN and the Organisation for Security and Cooperation in Europe (OSCE) (objectives underlying political dialogue), countering the proliferation of weapons of mass destruction or commitment to work together to counter-terrorism globally,[54] to give a few examples, do not fall within the framework of common commercial policy. Nor, were they demonstrated as falling within the area of development cooperation. Moreover, a level of commitment displayed in the CFSP part of the agreement hardly differs from a level of commitment pertaining to the cooperation part of the agreement (Titles IV to VII). And yet, the CJEU seems to be "condemning" the CFSP provisions in agreements with other non-CFSP components, to "ancilliarity" on the ground of them being quantitatively (numerically) or qualitative-

oping countries, it does not fall within development cooperation policy if it has as its main purpose the implementation of another policy." See also judgment of 20 May 2008, *Commission v. Council* (SALW), C-91/05, ECLI:EU:2008:288, para. 72.

52 Ibid., paras. 38–55.

53 The examination of the aim was also central in the *Tanzania Agreement* case, at note 30, where the CJEU concluded that the EU-Tanzania Agreement pursuing objectives of Operation Atalanta to preserve international peace and security falls predominantly within the scope of the CFSP (ibid., paras. 54–56).

54 Articles 4, 11 and 13 of the Agreement respectively.

ly inferior in comparison to other non-CFSP provisions. Besides, in the application of this unorthodox approach no place was given to a specific consideration related to the composition of broad agreements with the CFSP and non-CFSP areas of a separable, stand-alone character, combined into one agreement for reasons of political expediency rather than law.[55] It is therefore suggested that the technique applied in the *Kazakhstan Agreement* case is indicative of a result-oriented approach and would require further refining and better reconciliation with the earlier case law.

The second indication of the CJEU's intention to minimise the CFSP in the context of a procedure for concluding broad international agreements concerns hermeneutical closure of Article 218 TFEU. This is illustrated by a position according to which:

> "[T]he provisions of Article 218 TFEU themselves take account of the specific features of each field of EU activity, in particular those laid down in respect of the CFSP and reflect in that regard the institutional balance established for each of those fields by the Treaties"[56].

The Council position according to which recourse to Articles 37 TEU would require adding of Article 31(1) TEU was rejected on the ground of the unanimity-voting rule being reflected in the second subparagraph of Article 218(8) TFEU. In other words, no space for further importing of specific features of policy areas into Article 218 TFEU, beyond those already built in it, is allowed. For the CFSP area, this means that the above-discussed prohibition of displacement of the unanimity by rules other than those contained in Chapter 2 of Title V of the TEU will not be taken into account in the context of Article 218 TFEU procedures. While ignoring the latter sits squarely with the principles of the *Mauritius* case law, it is here submitted that ignoring the former is not policy neutral and has some far-reaching constitutional implications.

As regards constructive abstention, it is of note that the *Mauritius* decision-making symmetry does not imply that all the procedural arrangements of internal decision-making must be replicated externally. As the CJEU explained, the aim of preserving the institutional balance is to guarantee that the European Parliament and the Council enjoy the same powers in relation to a given field externally as they do for the adoption of internal acts. Constructive abstention is formulated as a prerogative of a *member* of the Council and as such can hardly be attributed to the powers of the Council. Hence, ignoring this feature in the context of Article 218 TFEU cannot be regarded as having an impact on the institutional balance.

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[55] While separate internal legal acts are adopted for CFSP and non-CFSP matters (unless they are inextricably linked), international agreements may, and often will, straddle the CFSP and non-CFSP policies as a matter of political choice to ensure that the Union can conclude a single, comprehensive agreement with a third party covering a range of distinct subject areas.

[56] Judgment of 14 June 2016, *Parliament v Council*, C-263/14, ECLI:EU:C:2016:435, para. 24. See also paras. 23 as well as 28 and 29.

In contrast, a displacement of the unanimity-voting rule laid down in Article 31(1) TEU by a rule from outside the CFSP Chapter has some critical constitutional implications. Depriving Article 31(1) TEU of its peremptory character in proceedings for conclusion of agreements heralds a shift in the EU constitutional structure. It has been observed already that the CJEU's approach to legal basis treating the CFSP and other policies in the same way is evidence of the assimilation of the CFSP into the Union legal order. [57] In other words, the CJEU refused to recognise a special constitutional status to the CFSP, based on its positioning in a separate Treaty with special protection (Article 40 TEU) and definition of the voting rule (Article 31(1) TEU). However, by refusing penetration of specific features of the CFSP into Article 218 TFEU and allowing for displacement of unanimity voting rule laid down in Article 30(1) TEU by a rule laid down in Article 218 TFEU, the CJEU made a step further. It endowed Article 218 TFEU with a special status of supra-constitutional nature that places it above other provisions of the Treaties. The question remains as to whether the unanimity-voting rule in the area of CFSP could be derogated from also pursuant to the simplified procedure under Article 218(7) TFEU, in which case a displacement of the rule of a primary law laid down in Article 31(1) TEU would be effected by a rule of a secondary law.

3.3.2. Other Implications

Full implications of the *Kazakhstan* Agreement case are yet to be seen. The long-standing practice of concluding EU agreements with third countries based on a double or multiple legal bases involving joint exercise of competences in the area of CFSP and non-CFSP[58] may be put into question. The *Kazakhstan* Agreement case could also sug-

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[57] Cremona, The position of the CFSP/CSDP in the EU's constitutional structure (2018), in Blockmans, Koutrakos (ed.), Research Handbook on the EU's Common Foreign and Security Policy (2018), p 13.

[58] Most recent cases include Council Decision (EU) 2018/1197 of 26 June 2018 on the signing, on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and **Japan**, of the other (OJ L216/1, 24.8.2018) based on Article 37 TEU and 212(1) TFEU in conjunction with Article 218(5) and the second subparagraph of Article 218(8) TFEU; Council Decision 2018/104 of 20 November 2017 on the signing, on behalf of the Union, and provision application of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States of the one part, and the Republic of **Armenia,** of the other (OJ L23/1, 26.1.2018) based on Articles 37 TEU and Articles 91, 100(2), 207 and 209 TFEU in conjunction with Article 218(5) and (7) and the second subparagraph of Article 218(8) TFEU; Council Decision (EU) 2016/2018 of 28 October 2016 on the signing, on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and **Canada**, of the other part (OJ L 329/43, 3.12.2016) based on Articles 31(1) and 37 TEU and Article 212(1), in conjunction with Article 218(5) and the second subparagraph of Article 218(8) TFEU; and Council Decision

gest the CJEU's willingness to narrow down the scope of the CFSP, which previous research has already anticipated due to difficulties in defining the contours of the CFSP in relation to other areas of external action. Leaving out CFSP legal basis necessarily implies that the negotiations of broad agreements between the EU and third countries are no longer initiated by a joint recommendation by the HR and the Commission to the Council, which authorises the opening of negotiations.[59] Only recommendations by the Commission will be required if a CFSP legal basis is not retained.[60] This may be regarded as a weakening of the HR role *vis-à-vis* that of the Commission with a possible impact on the working arrangements agreed between the EEAS and the Commission in 2012 according to which the HR acts as chief negotiator for the EU for negotiations of comprehensive international agreements.[61] This raises a question as to whether HR could benefit from the extension of the *Mauritius* decision-making symmetry, revolving in the case-law hitherto only around the powers of the Parliament and the Council. A more worrying implication would consist of an outvoted Member State (if unanimity ceases to apply) objecting to the Union action related the CFSP field in the implementation of the agreement (e.g. conduct of a political dialogue on a contentious CFSP issue) on the grounds that the CFSP competence in this area had not been exercised by the conclusion of the agreement in question. Without recourse to Article 37 TEU, demonstrating the exercise of the Union competence in the area of CFSP becomes more difficult. Consequently, claims according to which commitments related to the foreign and security policy matters were not exercised by the EU are more likely to prosper. In particular,

(EU) 2016/2232 of 6 December 2016 on the signing, on behalf of the Union, and provision application of the Political Dialogue and Cooperation agreement between the European Union and its Member States, of the one part, and the Republic of **Cuba**, of the other part (OJ L337/I, 13.12.2016) based on Articles 31(1) and 37 TEU and Articles 207 and 209, in conjunction with Article 218(5) and the second subparagraph of Article 218(8) TFEU.

59 It is arguable whether joint action is permissible under Article 218 TFEU. One interpretation of Article 218(3) TFEU is that the right of initiative for the HR is contingent on the envisaged agreement relating "exclusively or principally" to the CFSP. Also, Article 218(9) TFEU envisages proposal by the Commission and the HR in the alternative. A joint action by the HR and the Commission is however expressly envisaged for the adoption of some internal acts (Article 22(2) TEU and Article 215 TFEU).

60 According to Article 296(2) TFEU, legal acts must refer to any proposals, initiatives, recommendations, requests or opinions **required** by the Treaties. Without the CFSP legal basis, recommendations or proposals by the HR are no longer required.

61 See Marquardt, The institutional framework, legal instruments and decision-making procedures (2018), in Blockmans, Koutrakos (ed.), Research Handbook on the EU's Common Foreign and Security Policy (2018), pp. 39–40, mentioning the EEAS lead in the negotiations for Association Agreements, Partnership and Cooperation Agreements or similar comprehensive agreements inter alia with Armenia, Australia, Japan (already concluded) as well as Azerbaijan, Chile, Mercosur and Mexico.

in the cases of mixed agreements, concluded by the Union and its Member States, commitments related to the foreign policy issues could be claimed to have been exercised by the Member States, rather than the EU.[62] Or the Member States may not agree to the Commission negotiating CFSP parts of the agreement. On the same ground, opposition to the provisional application of the CFSP part of the agreement could arise.[63] It is easy to see that such developments would lead to the weakening of the Union external action as a whole.

Finally, the ruling represents also a lost opportunity for the CJEU to engage in the interpretation of the relationship between the CFSP and non-CFSP decision-making procedures.[64] The question of the operation of Article 40 TEU post-Lisbon[65] only arises when an act of the Union is concerned with the combined exercise of the Union's competence in the area of CFSP and another area of EU external action under the TFEU without one being ancillary to the other. Although chances of this happening in the context of Article 218 TFEU seem to have been considerably reduced after the judgment of the *Kazakhstan Agreement* case, this question nonetheless merits a legal examination.

4. A Post-Lisbon Relationship between the CFSP and non-CFSP in the Context of Article 218 TFEU

The Treaty of Lisbon replaced the former Article 47 TEU, which granted a privileged treatment of the exercise of competence under the TEC *vis-à-vis* the exercise of competence under TEU, with a new provision, Article 40 TEU, which conversely enhanced the status of the CFSP in the constitutional architecture of the EU. Under the terms of Article 40(2) TEU, the implementation of EU policies under TFEU shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the CFSP. It has been argued that the new clause protecting both decision-making methods can only be effectively applied by splitting of the act into two acts, one with the main or predominant CFSP purpose or component

62 This possibility is explained by the *de facto* parallel nature of the CFSP competence.

63 To note that only parts of the Agreements pertaining to the Union exercise of the competences may be provisionally applied pending the entry into force of a mixed agreement concluded between the EU and its Member States, on the one hand, and a third country, on the other hand.

64 See also Jacqué, La négociation de l'accord international (2016), p. 1666. Marquardt, The Role of the High Representative and the European External Action service in EU sanctions policy (2018), predicting that a dispute of the kind would only arise in the context of a preliminary ruling procedure.

65 See for the discussion of Article 47 TEU, pre-Lisbon the leading Case judgment of 20 May 2008, *Commission v. Council* (SALW), C-91/05, ECLI:EU:2008:288. Commented also in Jacqué, La négociation de l'accord international (2016), p. 1665.

and the other with a main or predominant non-CFSP purpose or component.[66] While this proposition appears attractive also for agreements (since the splitting may be limited to the Council decisions relating to signature or conclusion of the agreement without involving the splitting of the agreement itself), it still implies a package approach, whereby inevitably non-adoption of one of the two decisions would block the agreement as a whole. However, it is here submitted that such approach is unnecessary in the context of Article 218 TFEU, which provides for a single procedure of general application. Neither Article 40 TEU nor the CJEU's case law related to the incompatibility of procedures[67] preclude combining the CFSP with the non-CFSP method within a single procedure.[68]

Starting with the powers of the European Parliament, under the terms of Article 218(6) TFEU, its role will be reduced (to the mere right of being informed) only where agreements "relate exclusively" to the CFSP. Therefore, its role is fully preserved when a CFSP legal basis is added alongside a non-CFSP legal basis. In fact, in case of agreements relating to the CFSP and non-CFSP matters the prerogatives of the European Parliament are enhanced: the level of its involvement in the non-CFPS area (consultation or consent) is extended to the CFSP matters where only right to be informedexists under the Treaty. The same approach can be argued in relation to the voting rules within the Council: the voting rule required for the exercise of powers in the area of CFSP (unanimity) would apply in addition to the qualified majority vote applicable in the non-CFSP area. This would not affect the extent of the powers of the institutions. The voting rule within the Council can have no bearing on the extent of its powers or on the extent of powers of the European Parliament when the decision-making powers are vested exclusively within the Council, as is the case for Article 218 TFEU procedures. An even stronger case of compatibility could be made if the CJEU was to permit the operation of the unanimity voting rule laid down in Article 31(1) TEU within Article 218 TFEU, thereby recognising a degree of superiority of the CFSP, for which support, as argued above, can be found

66 Eeckhout: EU External Relations Law (2011), p. 186.

67 The incompatibility of procedures was concerned with the combining of co-operation procedure later replaced by co-decision and ordinary legislative procedure with procedures involving unanimity of the Council (the *Titanium dioxide* case law). See also judgment of 10 January 2006, *Commission v. Parliament and Council*, C-178/03, ECLI:EU:C:2006:4, para. 57 and the case law cited therein.

68 Cremona expresses the same view and argues on the basis of the CJEU's case law that "the Court, while not expressing a direct view, has proceeded on the basis that there is no barrier in principle". See Cremona, The position of the CFSP/CSDP in the EU's constitutional structure (2018), in Blockmans, Koutrakos (ed.), Research Handbook on the EU's Common Foreign and Security Policy (2018), p 13. More hesitations in this regard are expressed by Jacqué, La négociation de l'accord international (2016), pp. 1665–1667.

in the Treaties and scholarship.[69] In other words, paying full respect to the express terms and purpose of Article 31(1) TEU helps reconcile (i.e. combine) it with the voting rules laid down in the TFEU.

As submitted above, Article 31(1) TEU is characterised by preclusion of displacement of the voting rule by provisions laid down outside the CFSP Chapter. By contrast, the default-voting rule for non-CFSP laid down in Article 16(3) TEU is subject to any provision of the Treaties.[70] Respect for the procedures laid down by the Treaties for the exercise of the CFSP in compliance with Article 40(2) TEU is thus ensured if the unanimity-voting rule laid down in Article 31(1) TFEU applies whenever the CFSP legal basis is involved. Also, reliance on Article 31(1) TEU does not affect non-CFSP procedures as the application of the unanimity rule remains within what is permissible under Article 16(3) TEU, i.e. derogations by provisions laid down in the Treaties. Article 40(1) TEU is respected. In contrast, displacing the unanimity rule laid down in Article 31(1) TEU by any qualified-majority rule outside the CFSP Chapter (be it in Article 16(3) TEU, the first subparagraph of Article 218(8) TFEU or in the measure adopted pursuant to Article 218(7) TFEU) encroaches upon Article 31(1) TEU and, as a result, on Article 40(2) TEU. Under this scenario, the implementation of the non-CFSP policies affects the CFSP procedure.

To sum up on this point, it is suggested that the CJEU should not shy away from accepting a joint exercise of the CFSP and non-CFSP competences in the context of Article 218 TFEU. Not only no procedural incompatibilities arise in this context, the specific feature of the CFSP voting arrangements provide—were it allowed to penetrate Article 218 TFEU—for an answer to a possible conflict of norms related to the voting rule. In any event, in the institutional set-up with different internal decision-making procedures, the extended powers of the European Parliament and the addition of the unanimity within the Council appear to be unavoidable for greater consistency and rationalisation of the Union's external action. The two "additions" ensure the overall institutional balance and are supported by the *Mauritius* case law according to which the symmetry between the internal and external decision-making is ensured when the specificities of the decision-making procedures, including the voting rules, of the areas of EU activities concerned, are also respected in the external action of the Union.

[69] By virtue of Article 40 TEU, the CFSP, which is regulated in the same Treaty (TEU) as opposed to other policies integrated in the TFEU, is constitutionally juxtaposed to other EU external policies. Eeckhout: EU External Relations Law (2011), p. 189.

[70] The Council acts by qualified majority "except where the Treaties provide otherwise".

5. Conclusion

The purpose of the present contribution was to shed some light on the intricacies of the Union decision-making in the area of external action, which, Treaty changes notwithstanding, remains fragmented. The so-called cross-pillar mixity[71] appears to be still possible, albeit in the institutional set-up without pillars. The odd-one-out is the CFSP and its specific decision-making procedure, comprising the general requirement for the Council to act unanimously. The tension between the orthodox Community method and the CFSP method becomes apparent when competences are combined for the purpose of concluding Union agreements pursuant to Article 218(2)–(8) TFEU or adopting decisions suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement pursuant to Article 218(9) TFEU. The principles that must guide the application of Article 218 TFEU in all cases were clarified by the CJEU in the *Mauritius* case. The underlying imperative is clear: Article 218 TFEU must be applied in a manner that ensures a symmetry between the procedure for adopting EU internal measure and the procedure for adopting EU external measures. This can only be achieved when "account is taken of the specific features which the Treaties lay down in respect of each field of EU activity, particularly as regards the powers of the institutions". Taking into account specific features of the CFSP entails the application of the unanimity-voting rule whenever the Union exercises its competences in the area of CFSP. Moreover, this contribution suggests that the Treaties preclude a displacement of the voting rule laid down in Chapter 2 of the Title V TEU by any provision laid down outside this Chapter. Also, it is argued that Article 40 TEU would not prevent the combined exercise of the Union competences in the area of CFSP and non-CFSP in the context of Article 218 TFEU. In contrast, the recent case law signals reluctance on the part of the CJEU to recognise a combined exercise of the CFSP and non-CFSP competences in the context of Article 218 TFEU. Minimising the scope of CFSP in this context will affect the institutional practice. It may also lead to the weakening of the unity of the external action of the EU, in particular if exercise of the competences in the area of CFSP is contested by the outvoted Member States not coming to terms with the loss of their prerogatives under the unanimity voting system. While it is still too early to see what turn the practice may take following the most recent judicial developments, neither sector-specific agreements nor splitting of a Council decision relating to the agreement are excluded. Due to unconvincing approach by the CJEU, insisting on the current institutional practice is equally possible. If this happens, further

[71] On forms of mixity Drexler, Legal, Neergaard, De Elera, The external dimension of the EU policies: horizontal issues; trade and investment; immigration and asylum, XXVIII FIDE CONGRESS, Lisbon/Estoril, (23–26 May 2018), Congress Proceedings Vol 3 (2018), pp. 157–168; Wessel, Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements, in C. Hillion, P. Koutrakos: Mixed Agreements revisited (2010), p. 30.

litigation seeking more convincing response from the CJEU is likely. Hence, it is in the interest of the effective external action of the EU if limits of the current Treaty set-up are recognised and temptation to precipitate further integration of the CFSP into the mainstream legal order resisted. It perhaps needs recalling that accepting unanimity whenever the exercise of the CFSP competences is involved, in particular in the context of broad agreements, is not inconsistent with propositions according to which for a meaningful consistency "some degree of political superiority of the CFSP over other external policies seems unavoidable", and not necessarily detrimental for effective EU decision-making.[72]

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[72] Eeckhout: EU External Relations Law (2011), pp. 187–188.

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Proces integracije skupne zunanje in varnostne politike v razvijajoči se ustavnopravni red EU: 218. člen PDEU

Prispevek obravnava odločanje na področju zunanjega delovanja Evropske unije (EU), ki kljub spremembam Lizbonske pogodbe ostaja razdrobljeno. Posebnost je še vedno skupna zunanja in varnostna politika (SZVP), ki je podvržena posebnim institucionalnim in postopkovnim aranžmajem in soglasnemu pravilu odločanja. Člen 40 Pogodbe o EU (PEU) omogoča kombiniranje metode odločanja SZVP s prevladujočo metodo odločanja po Pogodbi o delovanju Evropske unije (PDEU) v okviru enotnega splošnega postopka za sklepanje sporazumov. Čeprav je Lizbonska pogodba okrepila ustavnopravni status SZVP ter posebej zaščitila soglasno odločanje na tem področju, sodna praksa temu ni sledila. Nasprotno, s sprejetjem stališča, po katerem volilno pravilo iz prvega odstavka 31. člena PEU v postopku sklepanja sporazumov nadomesti pravilo iz osmega odstavka 218. člena PDEU, je Sodišče EU 218. členu PDEU podelilo posebno veljavo, ki ga umešča nad Pogodbi. Tak pristop pospešuje proces integracije SZVP v splošni ustavnopravni red EU, vendar prinaša tveganja, ki lahko zunanje delovanje EU tudi oslabijo.

Ključne besede: skupna zunanja in varnostna politika, zunanje delovanje EU, 218. člen PDEU, 40. člen PEU, pravna podlaga, postopki odločanja, volilna pravila, sklepanje sporazumov EU, institucionalno ravnotežje, Sodišče EU.

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The Process of Integration of the CFSP into the Evolving Constitutional Legal Order of the EU: Article 218 TFEU

The article discusses intricacies of the EU decision-making in the area of EU external action, which despite the Treaty changes remains fragmented. The odd-one-out is still Common Foreign and Security Policy (CFSP) with its specific institutional and procedural arrangements, including the general requirement of unanimity. Article 40 TEU enables combining of non-CFSP and CFSP decision-making methods in the context of a single procedure of general application for conclusion of agreements. Although Treaty of Lisbon enhanced the position of the CFSP with a special protection of the unanimity-voting rule, this is not reflected in the case law. Rather, by allowing for a displacement of the unanimity-voting rule laid down in Article 30(1) TEU by provisions of Article 218(8) TFEU, the Court of Justice of the EU endowed Article 218 TFEU with a special status of supraconstitutional nature that places it above the Treaties. While this facilitates further integration of the CFSP into the EU's general legal order, it also entails risks that may lead to the weakening of the Union external action.

Keywords: Common Foreign and Security Policy, Union's external action, Article 218 TFEU, Article 40 TEU, legal basis, decision-making procedures, voting rules, EU treaty-making, institutional balance, Court of Justice of the EU.