

Legal basis litigation in relation to international agreements: *Commission v. Council (Enhanced Partnership and Cooperation Agreement with Kazakhstan)*

Case C-244/17, *European Commission v. Council of the European Union*.
Judgment of the Court (Grand Chamber) of 4 September 2018, EU:C:
2018:662

1. Introduction

Almost ten years after the entry into force of the Lisbon Treaty, the demarcation between the Common Foreign and Security Policy (CFSP) and the external policy areas defined in the Treaty on the Functioning of the EU still gives rise to inter-institutional conflicts before the European Court of Justice.¹ These conflicts essentially concern the choice of the appropriate legal basis for EU external action. As is well known, this choice has “constitutional significance” in the EU legal order in the sense that it determines the EU’s competence to act and the decision-making procedures which have to be followed.² This explains why the Council’s addition of a CFSP legal basis (Art. 31(1) TEU) requiring unanimity for the adoption of a decision determining the EU’s position within the Cooperation Council established under the Enhanced Partnership and Cooperation Agreement (EPCA) with Kazakhstan was challenged by the Commission before the ECJ, leading to the present judgment. In the Commission’s view, the decision should have been adopted on the basis of qualified majority voting (QMV) with Article 218(9) TFEU as the sole procedural legal basis.

What appears to be at first sight a rather classic inter-institutional turf battle regarding a largely technical issue, is actually part of a more broader constitutional debate concerning the post-Lisbon legal framework for EU external action.³ In particular, the determination of the CFSP as a special yet

1. Van Elsuwege, “The potential for inter-institutional conflicts before the Court of Justice: Impact of the Lisbon Treaty” in Cremona and Thies (Eds.), *The European Court of Justice and External Relations: Constitutional Challenges* (Hart, 2014), pp. 115–136.

2. Opinion 2/00, *Cartagena Protocol*, EU:C:2001:664, para 5.

3. See e.g. Van Elsuwege, “EU external action after the collapse of the pillar structure: In search of a new balance between delimitation and consistency”, 47 *CML Rev.* (2010), 987–1019; Govaere, “Multi-faceted single legal personality and a hidden horizontal pillar: EU external relations post-Lisbon”, (2011) *Cambridge Yearbook of European Legal Studies*, 87–111; Wouters and Ramopoulos, “Revisiting the Lisbon Treaty’s constitutional design of EU

fully integrated part of the EU legal order has given rise to a series of judgments, notably dealing with the limitations to the jurisdiction of the ECJ,⁴ the legal basis for the adoption of restrictive measures,⁵ and the role of the European Parliament in the conclusion of international agreements.⁶ The dispute surrounding the legal basis for the adoption of a Council Decision determining the EU's position within the Cooperation Council of the EPCA with Kazakhstan adds a new element to this discussion. For the first time, the ECJ was asked to clarify the delimitation between CFSP and non-CFSP competences with respect to the *implementation* of an international agreement, more precisely in relation to the adoption of EU positions on the basis of Article 218(9) TFEU.⁷ This has a particular relevance for the determination of the applicable voting rights in the Council.

Remarkably, the action for annulment did not concern the legal basis for signature and provisional application of the EPCA itself, but only the Council Decision on the EU's position for the adoption of working arrangements in the joint bodies established on the basis of this agreement. Nevertheless, this action may be regarded as a response to an evolving practice in the EU's treaty-making procedure whereby the Council increasingly includes a CFSP legal basis in broad framework agreements with third countries that involve CFSP references.⁸ Hence, the implications of the inter-institutional dispute between the Commission and the Council go far beyond the adoption of the rules of procedure in this particular Cooperation Council. They essentially concern the position of the CFSP in the EU legal order and the institutional balance in the framework of Article 218 TFEU.

external relations" in Rossi and Casolari (Eds.), *The EU after Lisbon: Amending or Coping with the Existing Treaties?* (Springer, 2014), pp. 215–237.

4. Case C-439/13, *Elitaliana SpA v. Eulex Kosovo*, EU:C:2015:753; Case C-455/14 *H v. Council*, EU:C:2016:569; Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, EU:C:2017:236.

5. Case C-130/10, *Parliament v. Council*, EU:C:2012:472.

6. Case C-658/11, *Parliament v. Council (Mauritius)*, EU:C:2014:2025; Case C-263/14, *Parliament v. Council (Tanzania)*, EU:C:2016:435.

7. The ECJ already ruled on the interpretation of Art. 218(9) TFEU in a series of other cases, but these cases did not concern the delimitation between CFSP and non-CFSP competences. See e.g. Case C-431/11 *United Kingdom v. Council (EEA)*, EU:C:2013:589; Case C-656/11, *United Kingdom v. Council (Switzerland)*, EU:C:2014:97; Case C-81/13, *United Kingdom v. Council (Turkey)*, EU:C:2014:2449.

8. Naert, "The use of a CFSP legal basis for EU international agreements in combination with other legal bases", in Czuczai and Naert (Eds.), *The EU as a Global Actor: Bridging Legal Theory and Practice. Liber Amicorum in Honour of Ricardo Gosalbo Bono* (Brill, 2016), pp. 394–423.

2. Factual and legal background

The EPCA between the EU and its Member States of the one part and the Republic of Kazakhstan of the other part was signed in Astana on 21 December 2015 and provisionally entered into force on 1 May 2016. The Council Decision on the signature and provisional application of this agreement was adopted on the legal basis of Articles 37 and 31(1) TEU and Articles 91, 100(2) and 207 and 209 TFEU in conjunction with Article 218(5) and the second subparagraph of Article 218(8) TFEU.⁹ Like most framework agreements, the EPCA provides for the establishment of joint institutions, including a Cooperation Council, Cooperation Committee and specialized subcommittees. In order to ensure the effective implementation of the Agreement, the rules of procedure of these institutional bodies are to be adopted as soon as possible.¹⁰ For this purpose, the High Representative and the European Commission jointly proposed a Council Decision on the position to be adopted on behalf of the EU with regard to this issue. Significantly, the proposal referred to Articles 37 TEU and Articles 207 and 209 TFEU as the substantive legal bases for this decision, with Article 218(9) TFEU as the sole procedural legal basis. The Council, however, modified the proposal and used exactly the same legal bases as were used for the decision on the signature and provisional application of the agreement. This implied, *inter alia*, the addition of Article 31(1) TEU involving the requirement of unanimity for the adoption of the decision. The Commission fundamentally disagreed and argued that the decision should be adopted on the basis of qualified majority voting.

In the Commission's view, the voting rules for the adoption of any Council decision under Article 218(9) TFEU are to be found in the first subparagraph of Article 218(8) TFEU, which states that "the Council shall act by qualified majority voting throughout the procedure". It referred to a judgment from 2014 where the ECJ had found that a position to be established in the context of the EEC-Turkey Association Agreement – regarding the extension of social security legislation to Turkey – was to be adopted by qualified majority voting "in accordance with the combined measures of the first paragraph of Article 218(8) TFEU and Article 218(9) TFEU".¹¹ Accordingly, the voting requirement for the adoption of the EU's position within the Association Council deviated from the requirements for the conclusion of association

9. Council Decision (EU) 2016/123 on the signing, on behalf of the European Union, and provisional application of the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, O.J. 2016, L 29/1.

10. See Art. 268 EPCA.

11. Case C-81/13, *United Kingdom v. Council (Turkey)*, para 66.

agreements, which imply a unanimous decision of the Council and the consent of the European Parliament.¹² The Commission derived from the Court's case law that Article 218(9) TFEU must be regarded as a *lex specialis* in the sense that it lays down a simplified procedure to be followed by the Council as long as the decision does not supplement or amend the institutional framework of the agreement.¹³ Moreover, it claimed that the Council's addition of Article 31(1) TEU violated Article 40(1) TEU in the sense that it resulted in the application of CFSP procedures in relation to non-CFSP policies.¹⁴

The Council, on the other hand, stressed the link between the substantive and institutional provisions of the Agreement, claiming that the decision on the adoption of the EU's position in the Cooperation Council should follow the legal basis for the decision authorizing the signature and provisional application of the EPCA.¹⁵ In addition, the Council argued that the specific features of the CFSP must also be taken into account in the application of Article 218(9) TFEU in order to avoid a violation of the second paragraph of Article 40 TEU.¹⁶ Whereas Article 218(9) TFEU provides for a separate and simplified procedure for the adoption of EU positions in bodies set up by an agreement, this does not, in the Council's view, affect the voting rules in the Council, but only concerns the limited participation of the European Parliament.

Hence, the dispute reveals the existence of divergent views between the Commission and the Council regarding the procedural aspects for the implementation of so-called framework agreements with third countries. Such agreements typically include a wide range of policy areas, including CFSP and non-CFSP aspects, and are not unsurprisingly the legal battleground for inter-institutional conflicts. The rather technical and politically not very sensitive question concerning the choice of legal basis for the adoption of the EU's position as regards the workings arrangements in the joint institutions with Kazakhstan provided an opportunity to bring this issue before the ECJ.¹⁷ As will be argued further, the significance of this judgment goes far beyond the actual subject matter of the case in the sense that it affects the EU's treaty-making practice after Lisbon as well as the position of the CFSP in the EU legal order.

12. See Art. 218(6)(a)(i) and Art. 218(8) TFEU.

13. Judgment, para 12.

14. *Ibid.*, para 13.

15. *Ibid.*, paras. 14–15.

16. *Ibid.*, para 16.

17. As also observed by Kuijper, it is noteworthy that not a single Member State nor the European Parliament intervened in this procedure. See Kuijper, "Case C-244/17 – Commission v. Council: The centre of gravity test revisited in the context of Article 218(9) TFEU", *European Law Blog*, Nov. 26, 2018, at: <europeanlawblog.eu>.

3. Opinion of Advocate General Kokott

Advocate General Kokott quickly ruled out the Commission's view that all Council decisions establishing the EU's position under the terms of Article 218(9) TFEU have to be adopted by qualified majority voting. A detailed contextual interpretation of Article 218(8) TFEU, which refers to qualified majority voting as the general rule in the procedure, reveals that this reference concerns the different stages for the *conclusion* of an international agreement as defined in the preceding paragraphs of this provision. Article 218(9) TFEU, on the other hand, concerns the *implementation* of the agreement and provides "a separate, simplified procedure that is subject to its own rules and differs from the conventional procedure for concluding international agreements".¹⁸ Since Article 218(9) TFEU does not include a specific reference to the majority requirements in the Council, the general provisions on the adoption of decisions in the Council are applicable. Depending on the subject area, these provisions are found either in Article 16(3) TFEU, which defines qualified majority voting as the main rule except where the Treaties provide otherwise, or in Article 31(1) TEU, which provides that decisions with respect to the CFSP are in general to be adopted unanimously.

In order to decide on this matter, the Advocate General proposed a traditional centre of gravity test based upon an analysis of the EPCA in its entirety.¹⁹ The EPCA is a comprehensive framework agreement covering provisions relating to political dialogue and cooperation in the area of foreign and security policy, trade and business, and a wide variety of areas of sectoral cooperation. This implies that "in principle a very broad spectrum of legal bases in substantive law can be taken into consideration".²⁰ However, the Advocate General underlined that a cumulation of legal bases is to be regarded as an absolute exception which has only rarely been accepted in the case law of the ECJ.²¹ Accordingly, she proceeded with an analysis of the aims, content and context of the partnership with Kazakhstan in order to determine the centre of gravity.

After observing that the aims and content of the EPCA contain a number of subjects related to the CFSP, the Advocate General concluded that they "are far from being the centre of gravity of that Agreement".²² In order to come to this conclusion, she observed that the overwhelming majority of the provisions relate to trade and business whereas other parts can be connected to

18. Opinion, para 43.

19. *Ibid.*, para 51.

20. *Ibid.*, para 57.

21. *Ibid.*, para 63.

22. *Ibid.*, para 69.

development cooperation and cooperation in the area of freedom, security and justice.²³ Significantly, she also pointed out that a waiver of the CFSP legal basis does not lead to a weakening of the foreign and security component of the Agreement since the cross-cutting clause of Article 21(1) TEU ensures that the latter can also be implemented on the basis of non-CFSP instruments. In this sense, a particular reference is made to the broad scope of the EU's competences in the area of development cooperation involving a link with clauses on political dialogue and respect for human rights.²⁴ As a result, the Advocate General concluded that the Council incorrectly added Article 31(1) TEU and its concomitant requirement of unanimity.

4. Judgment of the Court of Justice

After recalling its case law regarding Article 218 TFEU, which holds that this provision lays down a single procedure of general application concerning the negotiation and conclusion of international agreements which the EU is competent to conclude in the fields of its activity, including CFSP,²⁵ the ECJ observed that Article 218(9) TFEU lays down a simplified procedure for the adoption of positions on behalf of the EU in the context of decision-making bodies set up by an international agreement. In line with the Opinion of Advocate General Kokott – and contrary to the view of the Commission – the Court pointed out that this simplification consists exclusively of a limitation of the Parliament's participation. It does not affect the voting rule in the Council, which must be determined in each individual case.²⁶ The question whether the Council decides by unanimity or on the basis of qualified majority voting depends upon the substantive legal basis of the decision, which is subject to a centre of gravity test. Accordingly, the symmetry between procedures relating to the internal activity of the EU and procedures relating to its external activity is guaranteed.²⁷ In other words, the Council has to decide unanimously under Article 218(9) TFEU in those cases where the subject matter of the decision involves an area where unanimity is required for the adoption of an EU act, which is the case with respect to the CFSP. This rule reflects the principle of institutional balance, as already defined in the Court's

23. *Ibid.*, para 76.

24. *Ibid.*, paras. 77–78.

25. To that effect, see Case C-658/11, *Parliament v. Council*, para 51.

26. Judgment, paras. 25–27.

27. *Ibid.*, para 29.

previous case law regarding the negotiation and conclusion of international agreements.²⁸

It is noteworthy that the Court explicitly clarified that the reference to the first subparagraph of Article 218(8) in conjunction with Article 218(9) TFEU in the *UK v. Council* case concerning the implementation of the association agreement with Turkey, does not imply that each and any decision establishing a position to be adopted on behalf of the EU in a body set up by an agreement requires qualified majority voting. In that particular case, the subject matter concerned the coordination of social security legislation as covered in Article 48 TFEU, which could not be equated to a decision concerning the conclusion of an agreement amending the association agreement. The latter situation would require unanimity in the Council, in line with the second subparagraph of Article 218(9) TFEU. Significantly, the Court explicitly distinguished the situation regarding association agreements and their implementation – which form “a specific category” of international agreements – from “Council decisions covering a field for which unanimity is required for the adoption of a Union act”.²⁹ In the latter case, the requirement of unanimity “relates to the field which the act adopted covers, and therefore to the act’s content”.³⁰ Without explicitly referring to the area of CFSP, the Court thus suggested that Council decisions establishing an EU position in a body set up by an international agreement are to be adopted on the basis of unanimity if the position relates to an area covering the CFSP (or another area requiring unanimity for the adoption of a Union act). Whether or not this is the case, depends upon the substantive legal basis of the decision, which is determined on the basis of a traditional centre of gravity test.

With respect to the application of the centre of gravity test to the case at stake, the ECJ largely followed the reasoning of Advocate General Kokott. In particular, the Court also proceeded from an analysis of the aims and content of the EPCA as a whole in order to find that the links with the CFSP are insufficient to justify the addition of a CFSP legal basis. The Court used both quantitative (i.e. the relatively limited number of CFSP related provisions in the agreement) and qualitative (i.e. the largely declaratory nature of the provisions) criteria to come to the conclusion that the CFSP provisions cannot be regarded as a distinct component of the Agreement and are incidental to the areas of common commercial policy and development cooperation.³¹

28. Case C-658/11, *Parliament v. Council*. See for comments: Van Elsuwege, “Securing the institutional balance in the procedure for concluding international agreements: *European Parliament v. Council* (Pirate Transfer Agreement with Mauritius)”, 52 CML Rev. (2015), 1379–1434.

29. Judgment, paras. 33–34.

30. *Ibid.*, para 34.

31. *Ibid.*, paras. 43–46.

Consequently, the Court found that the contested decision must be annulled. Taking into account the negative consequences for the implementation of the EPCA, the effects of this decision should be maintained on grounds of legal certainty.

5. Comments

Formally speaking, the Court's judgment only concerned the choice of the correct legal basis for the adoption of the EU's position within the Cooperation Council established under the EPCA with Kazakhstan. However, this case should be considered in the context of a wider controversy regarding the position of the CFSP in the EU legal order. It confirms the Court's "integrationist approach" known from previous judgments concerning the scope of judicial review in relation to the CFSP.³² Also in those cases, the Court proceeded on the basis of the unity of the EU legal order and refused to regard the CFSP as a separate framework for cooperation. The same logic applies with respect to the procedure for the conclusion and implementation of international agreements on behalf of the EU. Hence, the ECJ is fairly consistent in approaching the post-Lisbon architecture for the EU's external action. This, however, does not mean that this approach is without criticism. It may well be argued that the Court minimizes or even ignores the intention of the drafters of the Treaties to retain a special status for the CFSP in comparison to the EU's other policy areas. Moreover, the judgment has significant implications for the EU's treaty-making practice.

5.1. *The centre of gravity test as a tool to overcome the duality of EU external action*

The division between CFSP and non-CFSP external action is one of the key constitutional challenges of the EU's post-Lisbon legal order. On the one hand, the CFSP is fully integrated in the EU's single legal framework and subject to the same principles and objectives as the other EU policy areas.³³ On the other hand, it remains subject to specific rules and procedures, including the absence of legislative acts, the use of unanimity as a general rule in the Council, a right of initiative for the High Representative and the

32. On this point, see Koutrakos, "Judicial review in the EU's Common Foreign and Security Policy", 67 ICLQ (2017), 1–35 and Case C-455/14, *H v. Council*, EU:C:2016:569 and Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, EU:C:2017:236.

33. Art. 23 TEU.

Member States, no participation in the decision-making process for the European Parliament, and a limited jurisdiction for the ECJ.³⁴ The CFSP particularity is visible in the sense that it is the only policy area defined in the TEU instead of the TFEU. Moreover, Article 40 TEU explicitly provides that the implementation of the CFSP may not affect the EU's non-CFSP external action and *vice versa*. It has been argued that this provision reflects “the continuing bipolarity of EU external action” requiring a pragmatic approach to decide on the correct legal basis depending upon the nature and the context of the action.³⁵

It is noteworthy that both the European Commission and the Council explicitly referred to Article 40 TEU in order to defend their respective positions in the case (see above, section 2). Strikingly enough, the ECJ completely ignored this provision in its deliberation. Rather, it stressed the significance of “the institutional balance established by the framers of the Treaties” as the key guiding principle to deal with the inter-institutional conflict at stake.³⁶ In other words, the Court does not proceed from a fundamental division between CFSP and non-CFSP competences, but applies the general constitutional principle of institutional balance horizontally.³⁷ This is essentially derived from the unified nature of the procedure for negotiation and conclusion of international agreements, as laid down in Article 218 TFEU.³⁸ The logical consequence is that the decision regarding the correct legal basis for the adoption of the contested decision is based on a centre of gravity test. This is a well-known mechanism to solve disputes regarding the horizontal division of competence in the EU legal order.³⁹

However, the application of a centre of gravity test in relation to the EU's external action is not uncontroversial, especially when it concerns the choice of legal basis for the conclusion of international agreements – such as the EPCA – which cover a wide range of policy areas. In such a context, the outcome of the test is always somewhat unpredictable and subject to

34. Art. 24(1) TEU.

35. Dashwood, “The continuing bipolarity of EU external action”, in Govaere, et al. (Eds.), *The European Union in the World. Essays in Honour of Professor Marc Maresceau* (Martinus Nijhoff, 2014), pp. 3–16.

36. Judgment, para 30.

37. On this point, see also Bosse-Platière, “A propos de la mise en oeuvre de l'APC avec le Kazakhstan, la Cour confirme la banalisation du contentieux de la base juridique PESC”, RTDE (2019).

38. Judgment, para 24.

39. It is noteworthy that A.G. Kokott explicitly provides that the centre of gravity approach should always be restricted to the horizontal division of powers in order not to interfere with the principle of conferral (see Opinion, para 59), an argument that she also made in her Opinion in the *Antarctica cases*, which was delivered on the same day (see Opinion of A.G. Kokott in Joined Cases C-626/15 & C-659/16, *European Commission v. Council*, EU:C:2018:925).

discussion. For instance, it is very difficult to draw a precise borderline between provisions that constitute a distinct component of the agreement, and therefore warrant a specific legal basis in the Council decision, and provisions that are only ancillary in nature.⁴⁰ Arguably, the Treaty of Lisbon only complicated this exercise due to the introduction of a single set of external action objectives, listed in Article 21 TEU, and the absence of specific objectives for the CFSP. Moreover, as a result of Article 40 TEU, the old delimitation rule that priority should be given to the non-CFSP legal basis whenever possible no longer applies.⁴¹

Nevertheless, the new constitutional framework did not prevent the ECJ from continuing its settled case law regarding the choice of legal basis, be it with certain nuances. Whereas the centre of gravity test is still formally based on an analysis of the “aims and content” of the contested decision, the “context” of the measure is also increasingly taken into account.⁴² It is noteworthy that Advocate General Kokott explicitly referred to the “context” as a third element next to aim and content, but added that “the subjective assessment and the general political intentions of the parties involved have no significance for the choice of legal basis”.⁴³ In solving the dispute regarding the correct legal basis for the conclusion of an agreement on the transfer of pirates with Tanzania, the Court relied heavily on the context of Operation Atalanta to confirm the CFSP legal basis of the contested decision.⁴⁴ Also in its recent judgment in the *Antarctica* cases, the ECJ analysed in detail the broader context of the contested decisions, which were adopted in the context of the Commission for the Conservation of Antarctic Marine Living

40. See e.g. Klammert, “Conflicts of legal basis: No legality and no basis but a bright future under the Lisbon Treaty?”, 35 *EL Rev.* (2010), 497; Cremona, “Balancing Union and Member State interests: Opinion 1/08, choice of legal base and the Common Commercial Policy after the Treaty of Lisbon”, 35 *EL Rev.* (2010), 690; Adam, “The legal basis of international agreements of the European Union in the post-Lisbon area”, in Govaere, et al. (Eds.), *The European Union in the World. Essays in Honour of Professor Marc Maresceau* (Martinus Nijhoff, 2013), pp. 65–86; De Baere, Van den Sanden, “Interinstitutional gravity and Pirates of the Parliament on Stranger Tides: The continued constitutional significance of the choice of legal basis in post-Lisbon external action”, 12 *EuConst* (2016), 85–113.

41. Ex Art. 47 TEU as interpreted in Case C-91/05, *Commission v. Council*, EU:C:2008:288, paras. 58–62. For comments, see e.g. Van Elsuwege, “On the boundaries between the European Union’s first pillar and second pillar: A comment on the ECOWAS judgment of the European Court of Justice”, 15 *CJEL* (2009), 531–548.

42. On this point, see the Court’s case law mentioned in note 7 *supra*.

43. Opinion, para 53. The A.G. also mentions that the context of the EPCA was discussed during the hearings of the case, together with its proceedings, aims and content (para 61).

44. See Case C-658/11, *Parliament v. Council*. For comments, see Sánchez-Taberero, “The choice of legal basis and the principle of consistency in the procedure for conclusion of international agreements in CFSP contexts: *Parliament v. Council* (Pirate-Transfer Agreement with Tanzania)”, 54 *CML Rev.* (2017), 899–920.

Resources, in order to determine their legal bases (e.g. discussing the Canberra Convention).⁴⁵

This contextual approach was not explicitly followed by the Court in the *Kazakhstan* case, apart from the observation that the EPCA as a whole provides the context for deciding on the correct legal basis of the contested Council decision. Taking into account that the EPCA is a comprehensive framework agreement, this context cannot as such be linked to a particular CFSP or non-CFSP legal basis. As a result, and given the difficulties identified above in applying an objectives-based approach, the Court relied heavily on the content of the agreement, focusing on the large number of provisions falling within the areas of common commercial policy and development cooperation in comparison to the CFSP, on the one hand, and the less detailed commitments under the latter policy area, on the other. In this respect, the Court noted that the CFSP provisions in the EPCA are “limited to declarations of the contracting parties on the aims that their cooperation must pursue . . . and do not determine in concrete terms the manner in which the cooperation will be implemented”.⁴⁶ Hence, the Court’s judgment combined both quantitative and qualitative criteria in an attempt to operationalize the rather abstract centre of gravity test.⁴⁷

Whereas this operationalization may be regarded as a significant evolution in the Court’s case law regarding legal basis litigation, some critical remarks could be made. First of all, the question arises whether these criteria appropriately reflect the interests and intentions of the parties.⁴⁸ Counting the number of provisions related to a particular policy area and assessing the nature of the commitments may underestimate the significance of certain parts of an agreement.⁴⁹ For instance, Advocate General Kokott pointed out that the CFSP-related provisions of the EPCA can be found “at an extremely important location in the Partnership Agreement” without, however, drawing any conclusions regarding the implications of this finding for the choice of

45. Joined Cases C-626/15 & C-659/16, *European Commission v. Council*, EU:C:2018:925, paras. 76–100.

46. Judgment, para 45.

47. However, in its more recent judgment in the *Antarctica* cases, the ECJ mainly analysed the broader context and objectives of the subject of the contested decisions, which were adopted in the context of the Commission for the Conservation of Antarctic Marine Living Resources, in order to determine their legal bases. Hence, as far as the analysis of the content of the agreement is concerned, the ECJ did not apply a detailed quantitative analysis as in the *Kazakhstan EPCA* case (in Joined Cases C-626/15 & C-659/16, *Commission v. Council*, paras. 76–100).

48. Cremona, *op. cit. supra* note 40.

49. A.G. Kokott’s quantitative analysis was more detailed than the one applied by the Court. For example, she counted literally the total number of provisions in the EPCA to identify the proportion of provisions dedicated to specific TFEU areas such as the CCP (Opinion, para 71).

legal basis.⁵⁰ Second, the focus on quantitative and qualitative criteria seems to overlook the rather special nature of the CFSP competence. The latter does not have specific policy objectives and is, almost by definition, bound to be less detailed and less far-reaching in comparison to other areas.⁵¹ Third, the treatment of the CFSP on par with every other EU policy area sits somewhat uncomfortably with the intention of the drafters of the Treaty to retain a special status for the CFSP under Article 40 TEU. The Court's striking silence on the substantive interpretation of this provision implies that Article 40 TEU is considered to be a largely redundant repetition of the general constitutional principle of institutional balance. However, the question arises whether this view is compatible with the objectives of this provision. It may, for instance, be argued that Article 40 TEU, and in particular the addition of a second paragraph in comparison to ex Article 47 TEU, has a more fundamental function, which is to safeguard the specific features of the CFSP in the EU legal order.⁵² From this perspective, the question arises whether a traditional centre of gravity test is appropriate to distinguish between CFSP and non-CFSP competences.

Whereas the Court's judgment does not solve the inherent ambiguity surrounding the application of a centre of gravity test in practice, it nevertheless clarifies the logic behind the choice of legal basis in relation to Article 218 TFEU. The latter lays down a single procedure of general application for the negotiation and conclusion of international agreements covering the entire scope of EU competences, including the CFSP. It follows that the choice of legal basis for decisions adopted within the framework of Article 218 TFEU has to respond to the same criteria as those applicable for the adoption of all EU acts, in compliance with the principle of institutional balance. Proceeding from the unity of the EU legal order, the Court thus confirms the symmetry between the rules for the adoption of EU measures internally and those applying in the context of its external action.⁵³ This implies that decisions must preferably be adopted on a single legal basis reflecting the predominant subject matter, with the latter determining the procedural rules to be followed. The *Kazakhstan* case clarified that entirely the same logic applies with respect to the adoption of EU positions in bodies set up by an international agreement as foreseen under Article 218(9) TFEU.⁵⁴

50. Opinion, para 68.

51. Engel, *The Choice of Legal Basis for Acts of the European Union. Competence Overlaps, Institutional Preferences and Legal Basis Litigation* (Springer, 2018), p. 45.

52. Adam, op. cit. *supra* note 41.

53. Judgment, para 22. The Court made this explicit for the first time in Case C-658/11, *Parliament v. Council*.

54. The only exception is that the European Parliament is not involved in the simplified decision-making procedure under Art. 218 (9) TFEU. See Judgment, para 26.

Hence, the correct legal basis depends upon the predominant subject matter of the particular position. When the scope of the position is as broad as the scope of the agreement itself, as was the case with respect to the adoption of the rules of procedure for the bodies set up under the EPCA, the position is to be adopted on the same legal basis as the agreement itself.

Finally, in applying a general centre of gravity test to decide on the applicable voting rules for the adoption of a Council decision under Article 218(9) TFEU, the Court also puts its previous case law in perspective. In Case C-81/13, which concerned the implementation of the EU-Turkey Association Agreement (see above), the main criterion was whether or not a Council decision could be equated to a decision concerning the conclusion of an agreement amending the association agreement.⁵⁵ This criterion is irrelevant for non-association agreements such as the EPCA; but, of course, also in this case the substantive legal basis of a Council decision determines the procedural requirements. Accordingly, the key element is whether or not the outcome of a centre of gravity test results in the use of a legal basis determining the use of unanimity.

5.2. *Implications for the EU's treaty-making practice*

The Council's approach with respect to the adoption of EU positions under Article 218(9) TFEU has not always been consistent in the context of framework agreements with a CFSP dimension. For example, whereas in the case of the EPCA with Kazakhstan the Council added a reference to Article 31(1) TEU to its decision on the EU's position for the adoption of working arrangements in the joint bodies established on the basis of the Agreement, it did not insist on an additional CFSP legal basis for similar decisions adopted in the context of other framework agreements with CFSP provisions.⁵⁶

55. Judgment, para 33.

56. See e.g. Council Decision (EU) 2018/1714 on the position to be taken on behalf of the European Union within the Joint Committee established by the Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part, as regards the adoption of the rules of procedure of the Joint Committee and the adoption of the terms of reference of its sub-committees and working groups (O.J. 2018, L 286/22); Council and Commission Decision (EU, Euratom) 2015/55 on the position to be taken on behalf of the European Union and the European Atomic Energy Community within the Association Council established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, as regards the adoption of decisions of the Association Council on the Rules of Procedure of the Association Council and those of the Association Committee and of Sub-Committees, the establishment of two Sub-Committees and the delegation of certain powers by the Association Council to the Association Committee in Trade configuration, O.J. 2015, L 9/46.

However, in the light of the ECJ's judgment in the *Kazakhstan* case, from now on decisions on implementation of international agreements can only have a CFSP legal basis (and therefore trigger unanimity in the Council's decision-making procedure under Art. 218(9) TFEU) if their centre of gravity falls within the CFSP. In practice, this is unlikely to happen, as such joint bodies are rarely mandated to implement CFSP-related elements of the agreements.

Significantly, the Court's judgment in the *Kazakhstan* case also has broader implications. In particular, it affects a practice developed in recent years to combine the use of a CFSP legal basis with TFEU legal bases for the adoption of Council decisions on the signature and provisional application, and sometimes also the conclusion, of international agreements.⁵⁷ Whereas this combination was ruled out for the adoption of unilateral measures in the *Smart sanctions* case,⁵⁸ no procedural incompatibilities exist as far as international agreements are concerned.⁵⁹ This is a direct consequence of the single procedural code of Article 218 TFEU and its direct link with the substantive legal basis of the Council decision for concluding the agreement. In other words, when an agreement equally concerns CFSP and TFEU competences, the interpretation of Articles 218(6) and (8) TFEU implies that the consent of the European Parliament can be perfectly combined with a unanimous decision in the Council. Such a particular form of CFSP-TFEU mixity has been applied in practice, for instance, with regard to the Treaty of Amity and Cooperation in Southeast Asia,⁶⁰ the Agreement continuing the International Science and Technology Centre⁶¹ and the Agreement establishing the EU-LAC International Foundation.⁶² Nevertheless, the centre of gravity test implies that such a combination of legal bases is of an exceptional nature and only possible when a measure "simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other".⁶³

It is noteworthy that the combination of CFSP and TFEU legal bases has been increasingly used in relation to framework agreements such as association agreements and different types of partnership and cooperation

57. See on this evolution Naert, *op. cit. supra* note 8.

58. Case C-130/10, *Parliament v. Council*, para 46.

59. Adam, *op. cit. supra* note 40, p. 82.

60. Council Decision 2012/308/CFSP on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia, O.J. 2012, L 154.

61. Council Decision (EU) 2015/1989, O.J. 2015, L 290/7.

62. Council Decision (EU) 2016/1873, O.J. 2016, L 288/1.

63. See e.g. Case C-263/14, *Parliament v. Council*, para 46; Judgment, para 37.

agreements. Such agreements almost always include references to the CFSP in dedicated titles on “Political Dialogue and Cooperation” and/or “Foreign and Security Policy”, or even in the preamble. It is true that the importance of these CFSP references varies in qualitative and quantitative terms between these different agreements. However, if one were to apply the ECJ’s approach in the *Kazakhstan* case, discussed above, the conclusion would arguably be that these CFSP references are not the centre of gravity of these agreements. Moreover, these CFSP components are not “inseparably linked” with the other, non-CFSP parts of the agreement and are essentially incidental to the latter, thus precluding the addition of a CFSP legal basis next to other TFEU legal bases.⁶⁴ This is precisely the conclusion which has been drawn by the European Commission with respect to its proposal for a Council decision on the position to be adopted on behalf of the EU in the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement (CEPA) with Armenia. Initially, the High Representative and the Commission had adopted a joint proposal based on Article 37 TEU and Articles 91, 100(2), 207 and 209 TFEU in conjunction with Article 218(9) TFEU. Based on the ECJ’s judgment in the *Kazakhstan* case, the Commission decided to drop Article 37 TEU as a legal basis in the amended proposal. In the Commission’s view, the limited number of CFSP provisions in the CEPA do not require a separate legal basis taking into account that they are only incidental to the predominant components of the Agreement.⁶⁵ This reasoning would equally apply to all the other broad framework agreements signed after the Treaty of Lisbon, even if such CFSP provisions are more ambitious and numerous in several agreements than in others.⁶⁶ This also indicates that the Council made an error in the choice of legal basis when including Article 37 TEU in Decision (EU) 2016/123 on the signing and provisional application of the

64. Opinion 2/00, *Cartagena Protocol*, para 23; Case C-377/12 *Commission v. Council*, Framework Agreement with the Philippines, EU:C:2014:1903, para 34 and Case C-263/14, *Parliament v. Council*, para 44.

65. European Commission, Amended Proposal for a Council Decision on the position to be adopted on behalf of the European Union in the Partnership Council established by the Comprehensive and Enhanced Partnership 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 part, as regards the adoption of decisions on the rules of procedure of the Partnership Council, the Partnership Committee and those of specialized subcommittees or any other body, COM(2019)345 final, p. 3.

66. See e.g. the more ambitious provisions on CFSP and CSDP in the Association Agreements with Ukraine, Moldova and Georgia, which all refer to these countries’ *alignment* with the EU. For analysis, see Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration without membership* (Brill/Nijhoff, 2016), pp. 191–200.

EPCA.⁶⁷ The Court actually explicitly confirmed this error in its present judgment.⁶⁸

Indeed, the practice of the choice of legal bases of framework agreements including CFSP provisions after the Treaty of Lisbon reveals that the centre of gravity test has not been applied correctly or consistently. Several framework agreements have a CFSP legal basis in addition to TFEU provisions such as Article 207 (Common Commercial Policy) and/or 209 (development cooperation) TFEU. For example, the different framework agreements with Australia,⁶⁹ New Zealand,⁷⁰ Afghanistan,⁷¹ Armenia,⁷² and Japan⁷³ include Article 37 TEU as a substantive legal basis in addition to TFEU legal bases, but without however adding Article 31(1) TEU as a procedural legal basis. These agreements use instead the second subparagraph of Article 218(8)

67. It is noteworthy that the Joint Proposal of the European Commission and the High Representative already included a reference to Art. 37 TEU, in addition to Arts. 207 and 209 TFEU (see: JOIN (2015) 24 final, p. 4).

68. Judgment, para 43. A.G. Kokott noted in this context that the legal basis of Council Decision 2016/123 on the signing and provisional application is irrelevant for the discussion with regard to the legal basis of the contested decision in this case as “a mere practice on the part of the Council cannot derogate from the rules of the Treaties and cannot therefore create a precedent that is binding on the EU institutions” (Opinion, para 53).

69. The substantive legal bases of this agreement are Art. 37 TEU and Arts. 207 and 212(1) TFEU and the procedural legal bases are Art. 218(5) and the second subparagraph of Art. 218(8) TFEU (Council Decision (EU) 2017/1546 on the signing, on behalf of the European Union, and provisional application of the Framework Agreement between the European Union and its Member States, of the one part, and Australia, of the other part, O.J. 2017, L 237/5).

70. The legal bases for this agreement are Art. 37 TEU and Arts. 207 and Art. 212(1) TFEU as substantive legal bases. The procedural legal bases are Art. 218(5) and the second subparagraph of Art. 218(8) TFEU (Council Decision 2016/2079 on the signing, on behalf of the European Union, and provisional application of the Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part, O.J. 2016, L321/1).

71. The substantive legal bases of this agreement are Art. 37 TEU and Arts. 207 and 209 TFEU. The procedural legal bases are Art. 218(5) and the second subparagraph of Art. 218(8) TFEU (Council Decision 2017/434 the signing, on behalf of the Union, and provisional application of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, O.J. 2017, L 67/1).

72. The substantive legal bases of this agreement are Art. 37 TEU and Arts. 91, 100(2), 207 and 209 TFEU. The procedural legal bases are Art. 218(5) and (7) and the second subparagraph of Art. 218(8) TFEU (Council Decision (EU) 2018/104 on the signing, on behalf of the Union, and provisional 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 part, O.J. 2018, L23/1).

73. The substantive legal bases of this agreement are Art. 37 TEU and Art. 212(1) TFEU. The procedural legal bases are Art. 218(5) and the second subparagraph of Art. 218(8) TFEU (Council Decision 2018/1197 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 part, O.J. 2018, L 216/1).

TFEU as a procedural legal basis, indirectly referring to the unanimity requirement in the area of CFSP as “a field for which unanimity is required for the adoption of a Union act”.⁷⁴ Other framework agreements with a CFSP legal basis, such as those signed with Cuba,⁷⁵ and Canada,⁷⁶ include Article 37 TEU as a substantive legal basis and Article 31(1) TEU as the procedural legal basis, leading to the same result of unanimous decision-making in the Council. However, other framework agreements with a similar CFSP dimension remarkably do not have an additional CFSP legal basis, such as recent agreements with Korea⁷⁷, Iraq,⁷⁸ Vietnam,⁷⁹ the Philippines,⁸⁰ and Mongolia.⁸¹ It is unlikely that this is the result of a different outcome of the centre of gravity test, considering that the qualitative and quantitative importance of the CFSP references in these agreements is rather similar to the

74. It has to be noted that whereas the Court argues in the present case that Art. 37 is a procedural legal basis (para 5), A.G. Kokott takes the view that Art. 37 is a substantive legal basis and that Art. 31(1) TEU is a procedural legal basis (Opinion, para 18).

75. The legal bases of this agreement are Art. 31(1) and 37 TEU and Arts. 207, 209, 218(5) and the second subparagraph of Art. 218(8) TFEU (Council Decision 2016/2232 on the signing, on behalf of the Union, and provisional 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, O.J. 2016, L 337/1).

76. The legal bases of this agreement are Art. 31(1) and Art. 37 TEU and Arts. 212(1), 218(5) and second paragraph of Art. 218(8) TFEU (Council Decision 2016/2118 on the signing, on behalf of the 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, O.J. 2016, L 329/43).

77. The substantive legal bases of this agreement are Arts. 207 and 212 TFEU (Council Decision 2013/40 on the signing, on behalf of the European Union, and provisional application of the Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part, O.J. 2013, L 20/1).

78. The substantive legal bases of this agreement are Arts. 79(3), 91, 100, 192(1), 194, 207 and 209 TFEU (Council Decision 2012/418 on the signing, on behalf of the European Union, and provisional application of certain provisions of the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, O.J. 2012, L 204/18).

79. The substantive legal bases of this agreement are Arts. 79(3), 91, 100, 207 and 209 TFEU (Council Decision 2012/279/EU on the signing, on behalf of the Union, of the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part, O.J. 2012, L 137/1).

80. The substantive legal bases of this agreement are Arts. 79(3), 91, 100, 191(4), 207 and 209 TFEU (Council Decision 2012/272 on the signing, on behalf of the Union, of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part, O.J. 2012, L 134/3).

81. The substantive legal bases of this agreement Arts. 79(3), 207 and 209 TFEU (Council Decision 2012/273/EU on the signing, on behalf of the Union, of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part, O.J. 2012, L134/4).

aforementioned agreements including a CFSP legal basis. Significantly, also the Council decisions on the signature and provisional application of the Association Agreements with Ukraine,⁸² Moldova⁸³ and Georgia⁸⁴ have a CFSP legal basis (i.e. both Art. 37 and Art. 31(1) TEU) in combination with Article 217 TFEU. This is remarkable as Article 217 TFEU on association is traditionally considered as a “catch-all” provision, which does not require the adoption of separate additional legal bases for specific provisions of such an agreement.⁸⁵ Another important association agreement signed after the Treaty of Lisbon, i.e. the EU-Central America Association Agreement, does not include a CFSP legal basis.⁸⁶ A possible explanation seems to be that the addition of a CFSP legal basis in the association agreements with the Eastern neighbours was introduced to allow for a broad provisional application.⁸⁷ The latter only concerns the exercise of EU competences, and the addition of a CFSP legal basis indicates that the Member States in the Council acted within the framework of the EU’s CFSP competence and not as part of their national competences in relation to foreign and security issues.⁸⁸

Hence, the addition of a CFSP legal basis seemed to be a potential instrument to avoid the conclusion of mixed agreements. A clear example is

82. Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Art. 1, and Title I, II and VII thereof, O.J. 2014, L 161/1. It should be noted that the Ukraine Association Agreement had a two-phase and “split” signature, with several different legal bases. For analysis see Van der Loo, *op. cit. supra* note 66.

83. Council Decision 2014/492 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, O.J. 2014, L260/1.

84. Council Decision 2014/494 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, O.J. 2014, L 261/1.

85. Van der Loo, *op. cit. supra* note 66. See also Van Elswege and Chamon, “The meaning of ‘association’ under EU law: a study on the law and practice of EU association agreements”, Study for the AFCO committee of the European Parliament”, Feb. 2019, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU\(2019\)608861_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU(2019)608861_EN.pdf).

86. Council Decision 2012/734 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters, O.J. 2012, L346/1.

87. Naert, *op. cit. supra* note 8, pp. 412–413.

88. In this respect, it is also noteworthy that the Council Decisions on the conclusion of the Association Agreements remained exclusively based on Art. 217 TFEU and only the Decisions regarding signature and provisional application contained an additional reference to a CFSP legal basis.

the specific case of the EU-Kosovo Stabilisation and Association Agreement (SAA) which was negotiated, signed and concluded with a CFSP legal basis (Art. 37 TEU) in addition to Article 217 TFEU.⁸⁹ Along the same lines, the Commission and the High Representative jointly proposed the combination of Article 37 TEU (CFSP) and 207 (CCP) and 209 TFEU (development cooperation) legal bases for the signature of an “EU only” Cooperation Agreement on Partnership and Development (CAPD) with Afghanistan.⁹⁰ While agreeing with the substance of the agreement, the Member States in the Council nevertheless expressed their preference for a “mixed” agreement with provisional application. The joint proposal was amended accordingly without changing the legal basis of the agreement.⁹¹

As argued above, it appears that the Court’s judgment in the *Kazakhstan* case will bring an end to this – sometimes inconsistent – practice of adding a CFSP legal basis to broad framework agreements. This shift will also have procedural consequences as the decision-making procedure in the Council for these agreements will now be QMV – and not unanimity – with the notable exception of association agreements, for which unanimity will still be required pursuant to Article 218(8) TFEU. Moreover, it implies that the Commission is supposed to act alone without involvement of the High Representative. The latter is a consequence of Article 218(3) TFEU which provides that the Commission *or* the High Representative shall submit recommendations to the Council before the opening of negotiations. Whereas a textual interpretation of this provision seems to suggest that only a single actor can take the initiative, joint recommendations by the Commission and the High Representative were frequently used in practice in order to reflect the dual nature of the external action.⁹² The omission of a specific CFSP legal basis somehow undermines this logic, implying that the initiative to submit recommendations to the Council depends upon the centre of gravity of the agreement.

Hence, the consequence of this *Kazakhstan* case is that, in the event that the Council were to decide, after applying the centre of gravity test, that a substantive CFSP legal basis (i.e. Art. 37 TEU) needed to be added to a

89. See Van Elsuwege, “Legal creativity in EU external relations: The Stabilization and Association Agreement between the EU and Kosovo”, 22 *EFA Rev.* (2017), 393–410.

90. JOIN(2015)35 final. However, in the joint proposal for the decision on the signing and provisional application of the EPCA, the Commission and the High Representative did include Art. 218(8) TFEU as a procedural legal basis (JOIN(2015)24 final).

91. JOIN(2016)45 final. It is noteworthy that the provisional application of the agreement includes some CFSP related aspects, such as the clauses on political dialogue and human rights, but not all of them. For instance, the provisions on conflict prevention and resolution, peace-building, small arms and light weapons, non-proliferation of weapons of mass destruction and counter terrorism fall outside this scope.

92. Marquardt, in Czuczai and Naert, *op. cit. supra* note 8, pp. 31–32.

decision regarding the adoption of EU positions under Article 218(9), unanimity in the Council would always be required for the adoption of this decision and the High Representative must be involved in the negotiating procedure. Moreover, this should be clearly reflected in the procedural legal basis by reference to Article 31(1) TEU or to the second subparagraph of Article 218(8) TFEU in the procedural legal basis. The possibility to include Article 37 TEU as a substantive legal basis without adding one of these corresponding procedural legal bases (which both lead to the same result), as in the case of the joint proposal from the Commission and the High Representative on the position to be adopted on behalf of the Union in the Cooperation Council of the Kazakhstan EPCA, seems from now on to be excluded by the Court.

6. Concluding remarks

The implications of the inter-institutional dispute between the Commission and the Council in this case go far beyond the adoption of the rules of procedure in the Cooperation Council with Kazakhstan. This case is to be considered in the context of a broader controversy regarding the position of the CFSP in the EU legal order and the choice of legal basis in relation to international agreements including CFSP and TFEU provisions.

The Court's judgment confirms what has been called the "normalization",⁹³ "mainstreaming"⁹⁴ or "assimilation"⁹⁵ of the CFSP into the Union legal order. The ECJ horizontally applies general constitutional principles (the EU's institutional balance) and mechanisms (the centre of gravity test) instead of granting a special treatment to the CFSP. This is fully consistent with the Court's post-Lisbon case law, but nevertheless raises the question whether this fully respects the intention of the drafters of the Treaties to retain a distinctive position for the CFSP. Moreover, applying a centre of gravity test with respect to horizontal agreements remains a difficult exercise. The introduction of quantitative and qualitative criteria forms a new addition to the existing case law, which implies that more general competences, such as the CFSP, no longer need to be included in a separate legal basis for the

93. See e.g. Wessel, "Integration and constitutionalisation of EU foreign and security policy" in Schütze (Ed.), *Governance and Globalization: International and Constitutional Perspectives* (Cambridge University Press, 2018), p. 339.

94. Hillion, "Norway and the changing Common Foreign and Security Policy of the European Union", Norwegian Institute of International Affairs (2019), p. 17.

95. Cremona, "The position of CFSP/CSDP in the EU's constitutional architecture" in Blockmans and Koutrakos (Eds.), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar, 2018), p. 13.

adoption of Council decisions concerning the signature or conclusion of framework agreements.

Accordingly, the *Kazakhstan* case seems to put an end to the – sometimes inconsistent – practice of adding a CFSP legal basis to broad framework agreements which include CFSP provisions. From the perspective of the Council, such an addition appeared necessary in light of the particular nature of the CFSP and in order to clarify the exercise of Union rather than national competences in relation to foreign and security issues. The Court's judgment clarified that this assumption is not correct. The CFSP is to be treated just like any other policy area implying that it should not be added as a separate legal basis unless it forms the centre of gravity of a particular decision. This clarification also has procedural consequences as the decision-making procedure in the Council for comprehensive framework agreements will be QMV – and not unanimity – with the notable exception of association agreements. Moreover, the Commission will be able to act alone, i.e. without the High Representative, when submitting recommendations to the Council under Article 218(3) TFEU. The same logic applies with respect to the adoption of EU positions under Article 218 (9) TFEU insofar as the positions cover the entire scope of the framework agreements.

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