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## Legality in EU Common Foreign and Security Policy

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*Published in:*  
Contemporary Challenges to EU Legality

*DOI:*  
[10.1093/oso/9780192898050.003.0004](https://doi.org/10.1093/oso/9780192898050.003.0004)

**IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.**

*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2021

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Wessel, R. A. (2021). Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis. In C. Kilpatrick, & J. Scott (Eds.), *Contemporary Challenges to EU Legality* (pp. 71-99). (Collected Courses of the Academy of European Law). Oxford University Press.  
<https://doi.org/10.1093/oso/9780192898050.003.0004>

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## Legality in EU Common Foreign and Security Policy

### The Choice of the Appropriate Legal Basis

Ramses A. Wessel\*

#### 1. Introduction

To some it may not be self-evident to discuss questions of legality in the context of the EU's Common Foreign and Security Policy (CFSP). In early studies in particular, CFSP was perceived and presented as 'political' rather than 'legal'.<sup>1</sup> Even today, the Treaties indicate that any review of the legality of CFSP decisions is limited to 'certain decisions' (Article 24(1) of the Treaty on European Union (TEU)). Any general review of legality on the basis of Article 263 of the Treaty on the Functioning of the European Union (TFEU) thus seems to have been excluded for CFSP.<sup>2</sup>

Limitations to the enforcement of legality in the area of CFSP, however, do not allow for the conclusion that legality, as such, should be measured or approached differently in CFSP than in other parts of the Union's legal order. The 'normalization' of CFSP has been analysed quite extensively over the past few years,<sup>3</sup> and has pointed to a shift away from intergovernmentalism, even in a sensitive policy domain such as the Common Security and Defence Policy (CSDP).<sup>4</sup> Its further

\* The author is indebted to Dr Graham Butler for his very helpful comments on an earlier draft of this contribution as well as to the Editors of this volume for their guidance. The usual disclaimer applies.

<sup>1</sup> For references, see R. A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (1999).

<sup>2</sup> Yet, see further Section 2.B on the role of the Court of Justice.

<sup>3</sup> See Wessel, 'Integration and Constitutionalisation in EU Foreign and Security Policy', in R. Schütze (ed.), *Governance and Globalization: International and European Perspectives* (2018) 339; 'Editorial Comments', 55 *Common Market Law Review* (2018) 1; Sánchez-Taberno, '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 *Common Market Law Review* (2017) 899; Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency', 47 *Common Market Law Review* (2010) 987; Eckes, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction', 22 *European Law Journal* (2016) 492.

<sup>4</sup> Cf. J. Strikwerda, 'Integration in the European Union's Field of Defence and Security' (2019) (PhD thesis at the University of Oslo), available at <http://urn.nb.no/URN:NBN:no-69552> (accessed 11 November 2020).

integration into the Union's legal order has brought about new questions related to the legality of the acts adopted under CFSP as well as to their legal basis. These analyses highlighted the consolidation of EU foreign policy, its constitutionalization as part of the Union's legal order,<sup>5</sup> as well as institutional adaptations.<sup>6</sup> These changes have put the distinction between CFSP and other external Union policy areas into perspective.<sup>7</sup>

Hence, in the present era, it is more and more accepted that CFSP is 'a policy producing norms just as any other EU public policy does'.<sup>8</sup> As will be shown later, this statement is supported by recent case-law of the Court of Justice of the European Union, revealing a principled effort 'to further embed the CFSP into the EU legal order'.<sup>9</sup> The main consequence of the further 'legalization' of CFSP is that questions of legality have become more prominent in that area, keeping in mind the Court's famous statement in *Les Verts*, that 'the Treat[ies] established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.<sup>10</sup> This has been apparent both before and after the entering into force of the Treaty of Lisbon in 2009. After the

<sup>5</sup> Art. 21(3) TEU; see later. See also G. Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (2019); Lonardo, 'Common Foreign and Security Policy and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union', 14 *European Constitutional Law Review* (2018) 584. As argued by Larik: 'The Lisbon Treaty has both expanded and streamlined the Union's global objectives. [W]e can see that the EU Treaties codify a range of global objectives both in terms of substance but also specifically harnessing law ... Together, these elements coincide with the idea of the Union as a "transformative power", changing not only fundamentally the relations among its members but also of the world around it.' Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality', in B. Van Vooren, S. Blockmans, and J. Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (2013) 7, at 10–11.

<sup>6</sup> Such as the introduction of the European External Action Service and the combination of the High Representative for CFSP and the Commission for external relations. For instance, see M. Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (2017); and De Baere and Wessel, 'EU Law and the EEAS: Of Complex Competences and Constitutional Consequences', in J. Batora and D. Spence (eds), *The European External Action Service: European Diplomacy Post-Westphalia* (2015) 175. On the High Representative, see in the latter volume Helwig, 'The High Representative of the Union: The Quest for Leadership in EU Foreign Policy', 87.

<sup>7</sup> Yet, Cardwell pointed out the difficulty in changing the 'tradition of otherness' in analyses of CFSP, which made it awkward to fully value the (post-Lisbon) changes. Cardwell, 'On "Ring-Fencing" the Common Foreign and Security Policy in the Legal Order of the European Union', 64 *Northern Ireland Legal Quarterly* (2015) 443. See further Broberg, 'EU Development Cooperation and the CFSP: Mutual Encroachment?', in S. Blockmans and P. Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (2018) 254; and in the same volume: Koutrakos, 'The Nexus between CFSP/ CSDP and the Area of Freedom, Security and Justice', 296; Ott and Van der Loo, 'The Nexus between the CCP and the CFSP: Achieving Foreign Policy Goals through Trade Restrictions and Market Access', 230.

<sup>8</sup> Saurugger and Terpan, 'Studying Resistance to EU Norms in Foreign and Security Policy', 2(1) *European Foreign Affairs Review* (2015) 1.

<sup>9</sup> T. Verellen, 'Pirates of the Gulf of Aden: The Sequel, or How the CJEU Further Embeds the CFSP into the EU Legal Order', *European Law Blog*, 23 August 2016, available at <https://europeanlawblog.eu/2016/08/23/pirates-of-the-gulf-of-aden-the-sequel-or-how-the-cjeu-further-embeds-the-cfsp-into-the-eu-legal-order/> (accessed 11 November 2020).

<sup>10</sup> Case C-294/83, *Parti écologiste 'Les Verts' v. European Parliament* (EU:C:1986:166) para. 23. See on the relevance of this notion for CFSP Butler, 'Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law', 24 *Columbia Journal of European Law* (2018) 637.

*Kadi* cases in particular, legality review of CFSP measures has received abundant attention;<sup>11</sup> an attention that has intensified following recent cases in which the Court was confronted with CFSP questions.<sup>12</sup> These cases underline the importance of two elements. First of all, questions of legality make sense only in the context of legal acts. This chapter will therefore briefly revisit the nature of CFSP acts as well as their consequences in the light of the ‘normalization’ of CFSP. Secondly, legal bases matter. Hence, questions of legality will be assessed in relation to the legal basis of CFSP acts and, in particular, the choice of legal basis and the possibility of combining CFSP and other legal bases for acts covering both CFSP and other external policies.

This focus on questions regarding legal basis does not aim to deny the broader scope of the concept of legality. The choice of legal basis is essential for a number of principles that are usually seen as being connected to legality of function, such as the structural principles (including proportionality and conferral), or principles of the rule of law and good administration (including the right to an effective judicial remedy, transparency, and the protection of legitimate expectations).<sup>13</sup> Furthermore, the analysis in this chapter is informed by the emphasis on the principle of consistent interpretation in the current treaty regime, in particular, to establish a legal connection between all external objectives.<sup>14</sup> Thus, Article 21(3) TEU provides:

The Union shall respect the principles and pursue the objectives ... in the development and implementation of the different areas of the Union’s external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Specifically, through the case-law of the Court of Justice, this consistency obligation has become directly connected to the objective of ‘ensur[ing] the coherence

<sup>11</sup> See on the review of the sanctions regimes, for instance C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (2009).

<sup>12</sup> See on the more recent role of the Court in relation to CFSP Hillion and Wessel, ‘The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP’, in S. Blockmans and P. Koutrakos (eds), *Research Handbook on the EU’s Common Foreign and Security Policy* (2018) 65; P. Koutrakos, ‘Judicial Review in the EU’s Common Foreign and Security Policy’, 67 *International and Comparative Law Quarterly* (2018) 1; and Butler (n. 10).

<sup>13</sup> Cf. C. Barnard and S. Peers, *European Union Law* (2014) 203. More generally, see M. Cremona (ed.), *Structural Principles in EU External Relations* (2018).

<sup>14</sup> See further on the many aspects of the consistency requirement and its use by the Treaties R. A. Wessel and J. Larik (eds), *EU External Relations Law: Text, Cases and Materials* (2020) chs 1 and 2.

and consistency of the action and its [the Union's] international representation'.<sup>15</sup> In other words, the principle of consistency underlines the need to assess questions of legality in CFSP in the context of the overall legal order of the EU where legal bases choices have to be made.<sup>16</sup> Whereas 'consistency' calls for the exclusion of discrepancies and the absence of conflicting policies, 'coherence' is a less binary notion, demanding that different Union policies are taken into account.<sup>17</sup>

In addressing questions of legality in relation to CFSP, this chapter will first of all briefly revisit the legal nature of this policy area (Section 2). As well as defining the binding nature of CFSP acts, this section will also examine the Court's approach in assessing the legality of CFSP norms. Section 3 will follow up by investigating the rules guiding the choice of the correct legal basis. As the possibilities for a review of legality largely depend on the legal basis that was used to adopt a certain act, this forms a crucial aspect when establishing the Court's role. The same holds true where a CFSP legal basis is combined with one in the TFEU (Section 4). The unity of the Union's legal order, the integrated external objectives, and the principle of consistency all point to a holistic perspective. Yet the question remains to what extent and in which situations problems related to legality review in CFSP may be solved by combining acts across different policy fields. Finally, Section 5 will draw some conclusions and set out some aims to answer the question to what extent the legal nature of CFSP is reflected in possibilities to review the legality of the Union's acts in that area.

## 2. Does Legality Even Matter? The Legal Nature of CFSP Acts

### A. The Binding Nature of CFSP Acts

Given the traditional image of CFSP as an area that is dominated by politics rather than legal rules, the first question in relation to the legality of CFSP acts is whether these acts are legal at all. This is an old question, which has been addressed many times over the past decades by both legal scholars, and political scientists. The main legal arguments will be summarized here.<sup>18</sup> Given my legal theoretical preference, the question is—admittedly—approached from a formalistic, positivist perspective.<sup>19</sup> The issue originates from Article 24(1) TEU, which provides

<sup>15</sup> Case C-266/03, *Commission v. Luxembourg* (EU:C:2005:341) para. 60, and Case C-476/98, *Commission v. Germany* (EU:C:2002:631) para. 66.

<sup>16</sup> Cf. also Sánchez-Taberno (n. 3).

<sup>17</sup> See quite extensively on consistency and coherence in EU external relations, Gatti (n. 6) ch. 1.

<sup>18</sup> See for a more extensive analysis and further references to earlier literature, Wessel, 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?', 20 *European Foreign Affairs Review* (2015) 123. This section partly draws from that publication.

<sup>19</sup> Cf. the distinction made by Walker between *positivism, idealism, culturalism, and pragmatism* in Chapter 2 of this work.

that CFSP is formed on the basis of ‘specific rules and procedures’ and that the use of ‘legislative acts’ is excluded. The reference to ‘specific rules and procedures’ has largely been interpreted as a reason to set CFSP apart from the ‘general’ rules—what has become known as the ‘Community method’ that would form the basis to enact legal rules in the Union’s other policy areas. The exclusion of ‘legislative acts’ would, however, deny the legal nature of CFSP acts if this were to be taken at mere face value. Both provisions largely relate to decision-making *procedures* and tell us less about the legal *nature* of the acts. The fact that no ‘legislative acts’ can be concluded is mainly intended to exclude the use of the ‘legislative procedure’, which leads to the regular EU types of decisions: Regulations, Directives, and Decisions, and other forms of legal acts emanating from Article 288 TFEU.<sup>20</sup> The exclusion of the legislative procedure (as the regular decision-making procedure for other Union policies), the requirement of unanimity rather than qualified majority voting (QMV) as the default voting rule, the ‘specific role of the European Parliament and of the Commission’, and the fact that ‘the Court of Justice of the European Union shall not have jurisdiction’ with respect to a number of specific CFSP provisions, may leave the reader with an initial view on how the ‘legality’ of CFSP acts is perceived in this chapter—that it may not be so legal at all. At the same time, however, the Treaties are quite clear about the legal (and binding) nature of CFSP treaty provisions and acts.<sup>21</sup> CFSP decisions are to be found under ‘legal acts’ in the EurLex databases and are published in the L-series of the Official Journal. It thus goes without saying that both the procedural norms in the Treaties as well as the decisions taken under CFSP are ‘legal’, in the sense that they form part of the Union’s legal order and ‘must be implemented into the national legal orders when applicable.’<sup>22</sup> They form part of the overall institutional structure of the EU, which will take the specific legal effects of instruments into account in the choice of legal basis. Or, as clearly argued by Butler:

Despite seeming to be the contrary, CFSP matters are a legalised field. For lawyers, everything in EU external relations begins with a discussion on the legal basis for supporting actions. As the Union strives for more coordination, consistency and cooperation, the choice of legal basis is of profound importance. The law is only one element of EU external relations, but it is an integral component that caters for the execution of external action. This is even more so in CFSP matters where strict conditions for the procedural issues are set down in the treaties. This is not only in EU external relations law, but for all EU acts or measures, which must have a legal basis.<sup>23</sup>

<sup>20</sup> See on EU legal acts also an earlier volume in the Academy’s series M. Cremona and C. Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (2018).

<sup>21</sup> Cf. Butler (n. 5) 47.

<sup>22</sup> *Ibid.* 68.

<sup>23</sup> *Ibid.* 5.

Article 26(2) TEU entails a general competence for the Council to ‘frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council’. A combination of this provision and the more specific key legal bases in Articles 28 (actions), 29 (positions), 33 (appointment of special representatives), 37 (international agreements), 42/43 (military and civilian missions), and 46 (permanent structured cooperation) allows for the Council to adopt different CFSP legal and political instruments. Article 25 TEU lists them as follows: *general guidelines* (a specific task for the European Council); *decisions* (entailing both actions and positions as well as arrangements for the implementation of the decisions); and *systematic cooperation* between Member States. This chapter will focus on the ‘decisions’ and leave the more informal instruments (including ‘declarations’ or Council minutes that are the result of the systematic cooperation) aside. In comparison to the many legal acts that are adopted under the TFEU on a daily basis, the adoption of CFSP legal acts is a relatively rare phenomenon. In many instances, the minutes of the Foreign Affairs Council meetings contain the decisions of the Council, without these being adopted as formal CFSP Decisions at a later stage. Most CFSP Decisions are related to restrictive measures or to the CSDP (see further Section 2.B).

It remains noteworthy that the Treaties are quite clear about the binding nature of these CFSP acts. The mandatory force of CFSP Decisions can clearly be derived from Article 28(2) TEU: ‘Decisions referred to in paragraph 1 shall commit the Member States in the positions they adopt and in the conduct of their activity.’ Hence, CFSP Decisions, once adopted, limit the freedom of Member States in their individual policies. Member States are not allowed to adopt positions or otherwise to act contrary to the Decisions. They have committed themselves to adapting their national policies to the agreed Decisions.<sup>24</sup>

Overall, the system is based on a duty of good faith, which is clearly laid down in Article 24 TEU: ‘The member states shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area.’ CFSP acts are concrete norms of conduct, demanding a certain unconditional behaviour from the Member States, which is underlined by the strict limits on the ways in which exceptions are permitted.<sup>25</sup>

The above findings reveal the legal nature of CFSP acts. At the same time, they divulge the challenges in applying the principle of legality to these acts and allowing

<sup>24</sup> It is even tempting to make comparisons with EU Regulations, which also demand the unconditional obedience of Member States once they are adopted. The notion that CFSP acts restrain the EU Member States is, of course, far from new. See already Hillion and Wessel, ‘Restraining External Competences of EU Member States under CFSP’, in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (2008) 79.

<sup>25</sup> See on the exceptions Wessel (n. 18).

the ‘complete system of legal remedies’<sup>26</sup> to function in this area, despite the fact that general principles of EU law are equally valid in a CFSP context. As I have argued elsewhere, this holds true for all key EU principles, including the principle of cooperation; the principles of conferral, subsidiarity, and proportionality; and more substantive principles; as well as some general principles of international law referred to in the Treaties.<sup>27</sup>

## B. The Court’s Approach to the Legality of CFSP Norms

Pre-Lisbon, the Court clearly struggled with its lack of jurisdiction to review the legality of CFSP acts. In the 2006 *OMPI* case it noted its own limitations when confronted with a CFSP decision related to terrorism, while acknowledging the jurisdictional gap:

In the Community legal system founded on the principle of conferred powers, as embodied in Article 5 EC, the absence of an effective legal remedy as claimed by the applicant cannot in itself confer independent Community jurisdiction in relation to an act adopted in a related yet distinct legal system, namely that deriving from Titles V [CFSP] and VI of the EU Treaty.<sup>28</sup>

At the same time, the Court acknowledged the committing nature of CFSP norms and the need to assess them in the context of the overall EU legal order. A statement in that regard was made a year later in the *Segi* case in 2007, when the Court for the first time confirmed the binding nature of Common Positions (currently CFSP Decisions based on Article 29 TEU):

A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law.<sup>29</sup>

<sup>26</sup> Case C-294/83, *Parti écologiste ‘Les Verts’ v. European Parliament*.

<sup>27</sup> See Wessel, ‘General Principles in CFSP Law’, in V. Morena-Lax, P. Neuvonen, and K. Ziegler (eds), *Research Handbook on General Principles of EU Law* (2021).

<sup>28</sup> Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council and UK* (‘*OMPI*’) (EU:T:2006:384) para. 54. See on this case Eckes, ‘Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council and UK* (OMPI)’, 44 *Common Market Law Review* (2007) 1117.

<sup>29</sup> Case C-355/04 P, *Segi and Others v. Council* (EU:C:2007:116) para. 52. While the case primarily concerned the (former) area of police and judicial cooperation in criminal matters (PJCCM), a transposition to CFSP seems legitimate as the Common Position in question could also be regarded a CFSP decision since it was equally based on both PJCCM and CFSP.



The early case-law already made clear that in certain constitutional areas the Court opted for a Union-wide application of certain fundamental rules and principles. Thus, the Court made clear that wherever access to information is concerned, no distinction is made on the basis of the content of the requested document.<sup>30</sup> Similarly, the Court argued that judicial protection was to be applied Union-wide. It referred to Article 6 TEU and concluded:

the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles ... It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.<sup>31</sup>

On the basis of Article 275 TFEU the Court now furthermore enjoys the competence to rule on proceedings brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons. This provision, which gives the Court the possibility to *directly* scrutinize a CFSP measure, is the result of the proliferation of sanctions targeted at individuals in the (global) fight against terrorism. The implication is that, even in a case where restrictive measures are only laid down in CFSP measures (and not followed up through a Regulation), the Court has jurisdiction once the plaintiff is directly and individually concerned.

More recent case-law confirms the notion that the exclusion of the Court's jurisdiction in relation to CFSP which could be derived from Articles 24(1) TEU and 275 TFEU<sup>32</sup> is not absolute.<sup>33</sup> The case-law that has developed since the entry into force of these provisions displays the Court's broader conception of its CFSP-related jurisdiction. Thus, in the fundamental *Mauritius* judgment, the Court held:

the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a *derogation* from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the

<sup>30</sup> Case T-174/95, *Svenska Journalistförbundet v. Council* (EU:T:1998:127). More implicitly this was already accepted by the Court in Case T-194/94, *Carvel and Guardian Newspapers v. Council* (EU:C:1996:172). See further Butler (n. 5) 237 and 249.

<sup>31</sup> Case C-355/04 P, *Segi and Others v. Council* (EU:C:2007:116) para. 51.

<sup>32</sup> Art. 24(1) TEU provides: '... The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union. ...' Article 275 TFEU adds: 'The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.'

<sup>33</sup> Hillion and Wessel (n. 12). Parts of this section draw from that publication.

interpretation and application of the Treaties the law is observed, and they must, therefore, be interpreted narrowly.<sup>34</sup>

Thus, legality control over CFSP restrictive measures is not limited to the annulment proceedings envisaged in Article 263(4) TFEU, but includes the possibility for the Court to give a preliminary ruling on their validity. In *Rosneft*, the Court considered CFSP acts to be fit to be the subject of a preliminary question, albeit in relation to restrictive measures only where the Court also enjoys the competence to review sanctions in direct actions:

Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made by Article 24(1) TEU ...

In those circumstances, provided that the Court has, under Article 24(1) TEU and the second paragraph of Article 275 TFEU, jurisdiction *ex ratione materiae* to rule on the validity of European Union acts, that is, in particular, where such acts relate to restrictive measures against natural or legal persons, it would be inconsistent with the system of effective judicial protection established by the Treaties to interpret the latter provision as excluding the possibility that the courts and tribunals of Member States may refer questions to the Court on the validity of Council decisions prescribing the adoption of such measures.<sup>35</sup>

Recent case-law thus points to a notable development, keeping in mind the distinctive nature of CFSP: the Court's legality control over *certain* CFSP acts is the same as the control it exercises over other EU acts. It is an expression of its general mandate as established in Article 19 TEU; it is governed by the same principles—in particular, the principle of effective judicial remedies enshrined in Article 47 of the Charter of Fundamental Rights and, even more generally, the rule of law.<sup>36</sup> This development is further illustrated by a number of cases with a clear CFSP dimension. First—in the *Mauritius* and *Tanzania* judgments<sup>37</sup>—the Court has made clear that international agreements in the area of CFSP are concluded on the basis

<sup>34</sup> Case C-658/11, *European Parliament v. Council* ('*Mauritius*') (EU:C:2014:2025) para. 70 (emphasis added). See also Case C-439/13 P, *Elitaliana* (EU:C:2015:753) para. 41; Case C-455/14 P, *H v. Council* (EU:C:2016:569) para. 40.

<sup>35</sup> Case C-72/15, *Rosneft* (EU:C:2017:236).

<sup>36</sup> Cf. Van Elsuwege, 'Upholding the Rule of Law in the Common Foreign and Security Policy: H v. Council', 54 *Common Market Law Review* (2017) 841.

<sup>37</sup> Case C-658/11, *European Parliament v. Council* ('*Mauritius*') (EU:C:2014:2025); and Case C-263/14, *European Parliament v. Council* ('*Tanzania*') (EU:C:2016:435).

of the general provisions of Article 218 TFEU, albeit subject to some specific arrangements. Thus, the Court would exercise judicial control to ensure compliance with the terms of that procedure. Second, and in the same vein, the Court has considered that it would have jurisdiction to control the legality of a decision which, despite its CFSP context, relates to a more general or different issue, such as awarding a public service contract in the context of an EU CSDP Mission<sup>38</sup> or staff issues.<sup>39</sup> One of the latter situations formed the background of *H. v. Council and Commission*—a case brought by a staff member of the EU Police Mission in Bosnia and Herzegovina (EUPM), established under the CFSP:

the scope of the limitation, by way of derogation, on the Court's jurisdiction ... cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions.<sup>40</sup>

These rulings underline that the Court of Justice considers the CFSP as part-and-parcel of the Union's constitutional set-up, and that it sees CFSP acts as legal acts that can be subject to legal scrutiny.<sup>41</sup> Yet, the Court's legality review remains limited in the sense that it cannot yet provide 'full review',<sup>42</sup> and so a systemic gap in the EU system of legality review remains. While one option would be to simply grant the Court full judicial oversight over the CFSP, and thus suppress the current derogatory provisions of Articles 24(1) TEU and 275 TFEU,<sup>43</sup> this is unlikely to happen soon. We are therefore stuck in a situation where, in the Court's own

<sup>38</sup> Case C-439/13 P, *Elitaliana* (EU:C:2015:753) para. 49.

<sup>39</sup> Case C-455/14 P, *H v. Council* (EU:C:2016:569); Case T-286/15, *KF v. SatCen* (EU:T:2018:718). See Butler (n. 5) 189–90.

<sup>40</sup> Case C-455/14 P, *H v. Council* (EU:C:2016:569). More recently, the Court also confirmed its jurisdiction in relation to the non-contractual liability of the Union in relation to CFSP acts, plugging another gap in the judicial review of these acts (see Case C-134/19 P, *Bank Refah Kargaran* (EU:C:2020:396)).

<sup>41</sup> Hillion and Wessel (n. 12).

<sup>42</sup> As famously phrased in *Kadi I*: 'the Community judicature must ... ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations'. Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council and Commission* ('*Kadi I*') (EU:C:2008:461) para. 327.

<sup>43</sup> In this respect, see the intervention of President of the CJEU Lenaerts at the ICON-S Conference 2016, Day 3, Plenary Session 3: 'Judicial Interview and Dialogue', available at [https://www.youtube.com/watch?v=\\_VrjbtE9Yfg](https://www.youtube.com/watch?v=_VrjbtE9Yfg) (accessed 11 November 2020).

words, ‘certain acts, actions or omissions performed in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice.’<sup>44</sup> While this statement still leaves us in the dark to some extent, this probably concerns acts *within* the CFSP legal order (related to foreign policy obligations laid down in the Treaty or adopted by the Council), and particularly elements in these decisions that do not concern general restrictive measures. The Treaty clearly places the monitoring and enforcement of the compliance with CFSP acts in the hands of the Council and the High Representative (Article 24(3) TEU). With regard to issues related to civilian and military missions launched in the context of the CSDP, the Court’s jurisdiction also seems difficult to establish. Obviously, this has consequences for accountability or responsibility claims arising from military activities abroad. Any legality review of action in the context of CFSP missions legality is not only hampered by the Treaty rules, but also by the quite extensive immunities granted to EU missions abroad.<sup>45</sup> At the same time it remains clear that fundamental values need to be applied Union-wide, even in a CSDP context. In view of the Court’s recent case-law, a review by the Court of certain acts or activities by military or civilian missions in relation to general rules and principles of EU law is not excluded.

### 3. The Choice of Legal Basis

Given the integration of CFSP into the EU’s legal order and the consolidation of external relations objectives, the question is to what extent the choice of legal basis can be helpful in correcting a number of flaws in the legality review of CFSP acts. After all, the choice of legal basis in this area is key, and largely defines the possibilities for the Court to review the legality of adopted acts.<sup>46</sup> Indeed, as held by the Court, ‘the choice of the appropriate legal basis has constitutional significance’.<sup>47</sup> This section addresses this issue from two perspectives: the general rule to choose either a CFSP or a TFEU legal basis; and the more specific rules on how to make that choice.

<sup>44</sup> Opinion 2/13 (‘EU Accession to the ECHR’) (EU:C:2014:2454) para. 252.

<sup>45</sup> See more extensively on these questions (with further references): Sari and Wessel, ‘International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime’, in B. Van Vooren, S. Blockmans, and J. Wouters (eds), *The EU’s Role in Global Governance: The Legal Dimension* (2013) 126; as well as Wessel, ‘Immunities of the European Union’, 11 *International Organizations Law Review* (2014) 395.

<sup>46</sup> Cf. Butler (n. 5) 58: ‘The objective of an action in deciding the legality of the legal basis is a key determinant that is used by the practitioner which, for CFSP matters, is the Council. The importance of the legal basis cannot be understated.’

<sup>47</sup> Opinion 2/00 (‘Cartagena Protocol’) (EU:C:2001:664) para. 5, and recited later in CFSP case-law, including Case C-244/17, *Commission v. Council* (‘PCA Kazakhstan’) (EU:C:2018:662).

### A. Article 40 TEU and its Current Value

Obviously, the choice of legal basis is closely related to the effects of the different legal instruments, the applicable procedures, and the possibilities for a review of legality. As the Court noted in *Tanzania*:

The choice of the appropriate legal basis of a European Union act has constitutional significance, since to proceed on an incorrect legal basis is liable to invalidate such an act, particularly where the appropriate legal basis lays down a procedure for adopting acts that is different from that which has in fact been followed.<sup>48</sup>

In different legal and political contexts, institutions may prefer to influence the procedure and their own involvement as well as the preferred effects of measures by opting for a specific legal basis.<sup>49</sup> The Treaties allow the Court to annul a measure if the choice for a certain legal basis was not made correctly. As discussed earlier, CFSP acts form part of the Union's legal order and they should be assessed and interpreted in the context of the overall EU legal order (see also the rules on consistency referred to earlier, in Section 2). Yet, apart from the example of restrictive measures, which has a CFSP Decision as the foundation for subsequent action in that area (see later), no automatic hierarchy exists. In the pre-Lisbon version of the TEU, choices for the correct legal basis were to be made according to (former) Article 47 TEU. The main purpose of this so-called 'non-affect clause' was to 'protect' the *acquis communautaire* from incursion by the special CFSP method, and provided that 'nothing in [the TEU] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them'. The landmark case at that time was *ECOWAS* (or *Small Arms and Light Weapons*). The result of the *ECOWAS* case was that the Council's CFSP Decision was annulled because it also included aspects of development

<sup>48</sup> Case C-263/14, *European Parliament v. Council ("Tanzania")* (EU:C:2016:435). Dashwood has formulated the legal basis rule ('Rule (i)') as follows: '[T]he choice of the legal basis for a European Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest on objective factors amenable to judicial review, which include the aim and content of that measure.' Dashwood, 'EU Acts and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements', in M. Cremona and C. Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (2018) 189, at 210.

<sup>49</sup> See extensively on these choices, A. Engel, *The Choice of Legal Basis for Acts of the European Union* (2018). Cf. also Kuijper, 'The Case Law of the Court of Justice of the EU and the Allocation of External Relations Powers: Whether the Traditional Role of the Executive in EU Foreign Relations', in M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (2013) 95, at 102 on the somewhat mundane nature of the legal basis quarrels: 'as a consequence of the "multi-power character" of some institutions, litigation on so-called "separation of power issues" often takes the character of ultra vires claims in respect of the powers allocated to individual institutions and seems closer to questions of the constitutional attribution of precise powers to these institutions than to questions related to broad constitutional principles...'

cooperation, an area that was not covered by the CFSP legal basis.<sup>50</sup> Post-Lisbon, the pillars no longer exist, and Article 47 has been replaced by what is now Article 40 TEU. The current provision reflects the current focus on coherent EU external relations, and is therefore more balanced between the TFEU policy fields and CFSP. As also confirmed in a subsequent case—*Philippines Border Management*<sup>51</sup>—in substantive terms, it essentially reflects the method whereby the correct legal basis is found through establishing the ‘centre of gravity’ of the decision at stake (see further later).

Article 40 TEU provides:

The implementation of the common foreign and security policy 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 Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles 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 Union competences under this Chapter.

In other words, in adopting CFSP decisions the Council should be aware of the external policies in the TFEU, *and vice versa*. Despite its ‘balanced’ approach, Article 40 TEU implies that foreign policy measures are excluded once they would affect powers of the Union related to, for instance, the area of Common Commercial Policy. This could thus limit the freedom of the Member States in, for instance, the area of restrictive measures or the export of ‘dual goods’ (commodities which can also have a military application).<sup>52</sup> Yet, Article 40 TEU forces the Court to adopt a holistic view on the relationship between CFSP and other areas of external action. No longer should an automatic preference be given to a non-CFSP legal basis whenever this is possible. It could be argued that Article 40 TEU is a confirmation of the principle of consistency, now that it no longer establishes a hierarchy between

<sup>50</sup> See for details and further references, Hillion and Wessel, ‘Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?’, 46 *Common Market Law Review* (2009) 551.

<sup>51</sup> Case C-403/05, *Parliament v. Commission* (EU:C:2007:624). See also Klamert, ‘Conflicts of Legal Basis: No Legality and No Basis but a Bright Future under the Lisbon Treaty?’, 35 *European Law Review* (2010) 497.

<sup>52</sup> Council Regulation 1334/2000/EC setting up a Community regime for the control of exports of dual-use items and technology, OJ 2000 L 159/1; in the meantime replaced by Council Regulation 428/2009/EC setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ 2009 L 134/1. Exception was only made for certain services considered not to come under the CCP competence. For these services (again) a CFSP measure was adopted: Council Joint Action 2000/401/CFSP concerning the control of technical assistance related to certain military end-uses, OJ 2000 L 159/216.

CFSP and other policies.<sup>53</sup> Be that as it may, Article 40 underlines the competence of the Court to assess the legality of both CFSP and other external relations acts from a perspective of their interconnectedness.

## B. The ‘Centre of Gravity’ and ‘Lex Specialis’ Tests

The next question is which methods the Court has at its disposal to check whether decisions on external action are based on the correct legal basis. While practice continues to pose problems, the rules on the correct choice of legal basis are quite clear and—as argued here—equally apply to instruments partly dealing with CFSP issues.<sup>54</sup> It is well known that in *Titanium Dioxide* the Court started to develop the ‘centre of gravity’ test, which included ‘in particular the aim and content of the measure’ as the decisive criterion.<sup>55</sup> Defining the centre of gravity was necessary in order to avoid having to use incompatible procedures. The test was further developed in subsequent case-law, in which the Court also held that a mere incidental effect was not decisive for the choice of legal basis.<sup>56</sup>

The latter point was confirmed in a CFSP context in the *Kazakhstan* case,<sup>57</sup> where the Court was given a chance to clarify how to deal with the legal basis questions for decisions or agreements that cover both CFSP and other policy areas. The ‘Enhanced Partnership and Cooperation Agreement’ is a bilateral mixed

<sup>53</sup> Pre-Lisbon, Art. 47 TEU contained the clear rule that ‘nothing in the TEU shall affect the EC Treaty’. See also Case C-91/05, *Commission v. Council (Small Arms/ECOWAS)* (EU:C:2008:288). See further Hillion and Wessel (n. 50). At the same time, it has been argued that the fact that Article 40 does not really add anything to the treaty regime may be interpreted as confirming a separate status of CFSP, which again underlines what has been termed the ‘integration-delimitation paradox’ that from the outset has characterized the position of CFSP in the Treaties. See H. Merket, *The European Union and the Security-Development Nexus: Bridging the Legal Divide* (2016).

<sup>54</sup> See also Naert, ‘The Use of the CFSP Legal Basis for EU International Agreements in Combination with Other Legal Bases’, in J. Czuczai and F. Naert (eds), *The EU as a Global Actor—Bridging Legal Theory and Practice: Liber Amicorum in honour of Ricardo Gosalbo Bono* (2017) 394, at 402: ‘[The *Mauritius* and *Tanzania*] cases clarify that the CJEU applies its traditional jurisprudence on the choice of legal bases also where the choice is between a CFSP and a non-CFSP legal basis.’ See, however, some critical remarks by Van Elsuwege, who wonders ‘whether a traditional centre of gravity test is appropriate to distinguish between CFSP and non-CFSP competences’. Van Elsuwege, ‘Old Habits Die Hard: Questions of Facultative Mixity in Relation to the Common Foreign and Security Policy’, in M. Chamon and I. Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (2020) 169, at 173.

<sup>55</sup> Case C-300/89, *Commission v. Council (“Titanium Dioxide”)* (EU:C:1991:244) para. 10. Cf. also ‘Rule (ii)’ formulated by Dashwood (n. 48) 211 on the basis of the case-law: ‘If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component.’

<sup>56</sup> Case C-70/88, *European Parliament v. Council* (EU:C:1991:373) para. 12; Case C-42/97, *European Parliament v. Council* (EU:C:1999:81); Case C-36/98, *Spain v. Council* (EU:C:2001:64); Case C-301/06, *Ireland v. European Parliament and Council* (EU:C:2009:68).

<sup>57</sup> Case C-244/17, *Commission v. Council (“PCA Kazakhstan”)* (EU:C:2018:662).

agreement between the EU and its Member States of the one part and the Republic of Kazakhstan of the other part. It was based on both CFSP (Articles 31(1) and 37 TEU) and TFEU provisions (Articles 91 and 100(2) (transport) and Articles 207 and 209 (trade and development cooperation)). The case was about the correct legal basis for the adoption of an EU position in the Cooperation Council that was established under the Agreement. Article 37 TEU was added as the legal basis for the conclusion of CFSP agreements, but the Council felt that Article 31(1) TEU (on the CFSP voting requirements) should also be included as a legal basis of the decision, as it had also been included in the decision approving the provisional application of the Agreement with Kazakhstan. The Court thus had to apply the ‘centre of gravity test’ to decide whether it was indeed necessary for the Decision to be adopted unanimously, and whether the inclusion of a CFSP legal basis was at all necessary.<sup>58</sup> As the judgment may form the basis for answering similar questions in the future, it is important to quote some paragraphs in full (emphasis added):

42. It is true that, as the Advocate General has noted in points 64 to 68 of her Opinion, the Partnership Agreement *displays certain links with the CFSP*. Thus, Article 6 of that agreement, in Title II headed ‘Political dialogue, cooperation in the field of foreign and security policy’, is specifically devoted to that policy, the first paragraph of Article 6 providing that the parties are to intensify their dialogue and cooperation in the area of foreign and security policy and are to address, in particular, issues of conflict prevention and crisis management, regional stability, non-proliferation, disarmament and arms control, nuclear security and export control of arms and dual-use goods. Furthermore, Articles 9 to 12 of the Partnership Agreement, which define the framework of the cooperation between the parties 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, may also be linked with the CFSP.

43. However, it is clear that, as the Advocate General has observed in essence in point 69 of her Opinion, those links between the Partnership Agreement and the CFSP are not sufficient for it to be held that the legal basis of the decision on the signing of that agreement, on behalf of the European Union, and its provisional application had to include Article 37 TEU.

44. First, *most of the provisions* of the Partnership Agreement, which contains 287 articles, fall within the common commercial policy of the European Union or its development cooperation policy.

<sup>58</sup> See also 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*, 26 November 2018, available at <http://europeanlawblog.eu/2018/11/26/case-c-244-17-commission-v-council-the-centre-of-gravity-test-revisited-in-the-context-of-article-218-9-tfeu/> (accessed 11 November 2020).



45. Second, *the provisions of the Partnership Agreement displaying a link with the CFSP* and cited in paragraph 42 of the present judgment, apart from being few in number in comparison with the agreement's provisions as a whole, are limited 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 of 11 June 2014, *Commission v Council*, C-377/12, EU:C:2014:1903, paragraph 56).

46. *Those provisions*, which fall fully within the objective of the Partnership Agreement, set out in Article 2(2) thereof, of contributing to international and regional peace and stability and to economic development, *are not therefore of a scope enabling them to be regarded as a distinct component* of that agreement. On the contrary, *they are incidental to that agreement's two components* constituted by the common commercial policy and development cooperation.

47. Therefore, in the light of all those considerations, *the Council was wrong to include Article 31(1) TEU in the legal basis of the contested decision* and that decision was wrongly adopted under the voting rule requiring unanimity.

It is striking that the Court's ruling in the *Kazakhstan* case was done without any particular reliance upon Article 40 TEU; Article 40 TEU is only mentioned with respect to the pleadings of the parties, not anywhere in the 'Findings of the Court' part.<sup>59</sup> Also, the judgment did not rule out future situations where a decision or agreement could use both a CFSP and non-CFSP legal basis.<sup>60</sup> The point the Court does make is that, although there is a clear CFSP dimension in the decision and the agreement, it is 'incidental to that agreement's two components constituted by the common commercial policy and development cooperation'. In other words: it is not necessary to include a CFSP basis merely because there are CFSP elements in a certain agreement or decision. This line of reasoning is consistent with views earlier held by the Court in judgments relating to the agreements bringing Somali pirates before courts in *Mauritius* and *Tanzania* (the Pirates cases; see also later, in Section 4.A).<sup>61</sup> And, for the purpose of the present contribution it is important to note that leaving out the CFSP legal basis in acts or agreements that partly cover CFSP issues, implies that any restrictions on the Court's jurisdiction are no longer applicable.

At the same time, earlier case-law has revealed that the 'gravity test' is not the only test used by the Court in deciding on the correct legal basis. The Court has also made clear that a more specific provision will prevail over the use of generic

<sup>59</sup> See also Butler (n. 5) 127.

<sup>60</sup> *Ibid.*

<sup>61</sup> See respectively Case C-658/11, *European Parliament v. Council* ('*Mauritius*') (EU:C:2014:2025); and Case C-263/14, *European Parliament v. Council* ('*Tanzania*') (EU:C:2016:435).

legal bases.<sup>62</sup> Engel has summarized the distinction between the two tests as follows:

while under the ‘centre of gravity’ theory two different provisions with two different aims are at stake; the *lex specialis derogat legi generali* principle concerns two different provisions, both of which have the same aim, but one being more specific than the other.<sup>63</sup>

The rules on the correct choice of legal basis have particularly proven their value in internal market cases,<sup>64</sup> but there are no reasons not to apply them in CFSP-related cases as well. This has to be done on a case-by-case basis. Thus, the ‘centre of gravity’ test would define whether an instrument falls more in the area of CFSP than, for instance, development cooperation or the Area of Freedom, Security and Justice (AFSJ). The *lex specialis* test could favour a CFSP legal basis in for instance decisions on security and defence policy (CSDP), but it could also lead to a TFEU legal basis when for instance specific financial individual sanctions are issued for which a *lex specialis* exists (Article 75 TFEU). Yet practice reveals that outcomes are difficult to predict. In *European Parliament v. Council (Smart Sanctions)*, the Court was given a first chance to develop an approach towards the function of Article 40.<sup>65</sup> Being confronted with the question of the appropriate legal basis for ‘restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban’,<sup>66</sup> the Court held that Article 215 TFEU (following a previous CFSP decision) rather than Article 75 TFEU (in the AFSJ) was the correct choice. As in the later *Mauritius* case, the *context* of peace and security proved to be decisive for the Court’s conclusion rather than the specific *content* of the decision.<sup>67</sup> These cases also revealed that the limited role of the European Parliament in the CFSP procedures was not decisive.<sup>68</sup>

In general, it has been argued that, while a ‘CFSP context’ may be relatively easy to establish in view of its broad scope (CFSP ‘shall cover *all areas* of foreign policy and *all questions* relating to the Union’s security’),<sup>69</sup> the same would not hold for

<sup>62</sup> The *lex specialis derogat legi generali* principle; Case C-48/14, *European Parliament v. Council (Euratom)* (EU:C:2015:91).

<sup>63</sup> Engel (n. 49) 19.

<sup>64</sup> *Ibid.* 20–27.

<sup>65</sup> Case C-130/10, *Parliament v. Council* (EU:C:2012:472).

<sup>66</sup> Council Regulation (EU) 1286/2009 of 22 December 2009 amending Regulation (EC) 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, OJ 2010 L 346/42.

<sup>67</sup> See Matera and Wessel, ‘Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements—Case C-658/11, *European Parliament v Council (Mauritius Agreement)*’, 18 *Revista de Derecho Comunitario Europeo* (2014) 1047.

<sup>68</sup> Despite the fact that this element was part of the Court’s reasoning in Case C-300/89, *Commission v. Council (‘Titanium Dioxide’)* (EU:C:1991:244).

<sup>69</sup> Cf. also the Court’s remark that there is ‘broad scope of the aims and objectives of ... CFSP [matters], as expressed in Articles 3(5) TEU and 21 TEU’; C-220/14 P, *Ahmed Abdelaziz Ezz and Others v. Council* (EU:C:2015:147) para. 46.

the *lex specialis* nature of a CFSP provision, due to that same broad general description.<sup>70</sup> At the same time, this argument could be used the other way around as this provision seems to point to a CFSP legal basis as the default starting point whenever issues of foreign policy or security are at stake. Overall, any choice between either a CFSP or a non-CFSP legal basis will be subject to the legal limitations imposed by the Treaties and the jurisprudence of the Court as this choice has a clear impact on the role of the Institutions during the decision-making process and, in particular, on the possibility for the Court to engage in any review of legality after the decision has been adopted.

#### 4. Combinations of CFSP and other Legal Bases

Given the requirement of consistency in EU external relations, a final question is to what extent gaps in the legality review by the Court of CFSP acts can be plugged by combining legal bases in acts containing both CFSP and other external relations elements. The argument for these combinations would be that it would allow for a more comprehensive review of the acts. The binary question (CFSP or not CFSP) does not seem to do justice to the full and complete review that can be seen as the ambition of both the Treaties and the Court, nor to the post-Lisbon consolidation of EU external relations objectives. The present section approaches the possibility of combinations of legal bases from a problematic (procedural) perspective and a pragmatic (international agreements) perspective. While combining different legal bases seems difficult in the EU's internal relations, it does seem to work much better in its external relations.

##### A. Problematic Procedural Combinations

As indicated previously, it has become increasingly difficult to clearly separate CFSP from other external action or to link external objectives to certain specific EU competences.<sup>71</sup> The need to combine CFSP and other issues in single decisions or international agreements has become more apparent.<sup>72</sup> The earlier analysis on the 'normalization' of CFSP implies that the general rules, largely based on the

<sup>70</sup> Engel (n. 49) 122; referring to Art. 24(1) TEU.

<sup>71</sup> As argued by Merket on the basis of a study on the relationship between development (TFEU) and security policy (TEU): 'Objectives of conflict prevention, crisis management, reconciliation and post-conflict reconstruction cannot be assigned to one or the other EU competence, forging an indissoluble link between development cooperation and the CFSP' Merket (n. 53) ch. 3.

<sup>72</sup> Cf. 'Rule (iii)' formulated by Dashwood (n. 48) 211 on the basis of the relevant case-law: 'By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary or indirect in relation to the other, the measure must be founded on the various corresponding legal bases.'

*Titanium Dioxide* case-law, continue to apply in this area. Yet, the different procedures to adopt CFSP and other EU acts make it difficult to combine legal bases.<sup>73</sup> Combinations are, however, certainly not impossible, and, as already discussed, they were not ruled out by the Court in the *Kazakhstan* case. In relation to the conclusion of international agreements, Advocate Kokott in her Opinion in the *Tanzania* case argued that ‘the Court has certainly not thus far rejected the possibility of such a dual legal basis in a case like the present one’ (on CFSP and AFSJ). She concluded:

It is by no means impossible to rely on legal bases other than the CFSP for the Union’s external action as the Parliament and the Commission argue. For example, it is expressly recognised in Article 21(3) TEU that, in addition to the CFSP, the Union’s other policies can include ‘external aspects’. *It is therefore perfectly conceivable*, in principle, to have recourse, for the approval of an international agreement for the European Union, to competences in the area of freedom, security and justice or *to have a dual substantive legal basis* by exercising additional competences.<sup>74</sup>

It still remains clear that combinations may be difficult or impossible in practice due to diverging procedural requirements. In Case C-130/10, the European Parliament challenged the legality of a Council Regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden. The Court confirmed the following:

44. With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one’s being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases (see, in particular, *Parliament v Council*, paragraph 36 and case-law cited).

45. None the less, the Court has held also, in particular in paragraphs 17 to 21 of Case C-300/89 *Commission v Council* [1991] ECR I-2867 (‘*Titanium dioxide*’), *that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other* (see, in particular, *Parliament v Council*, paragraph 37 and case-law cited). (emphasis added)

<sup>73</sup> See already for instance Joined Cases C-164/97 and C-165/97, *Parliament v. Council* (EU:C:1999:99) para. 14, in which the Court confirmed that no combination of legal bases is possible ‘where the procedures laid down for each legal basis are incompatible with each other’. Cf. Dashwood’s ‘Rule (iv)’: ‘However, no dual legal basis is possible where the procedures required by each legal basis are incompatible with each other.’ Dashwood (n. 48) 218. Rule (iv) is formulated as an exception to Rule (iii) referred to earlier.

<sup>74</sup> Opinion of Advocate General Kokott delivered in Case-263/14, *European Parliament v. Council of the European Union* (EU:C:2015:729) paras 53 and 57 (emphasis added).

This is a clear example of a situation where different decision-making procedures and legal instruments render combinations of CFSP and other legal bases difficult.<sup>75</sup> With all this in mind, it is interesting to see that combinations do occur and have in the past been accepted by the Court in case of diverging procedures;<sup>76</sup> even when voting requirements were not compatible.<sup>77</sup>

These latter situations come close to a first example of a (necessary) combination of CFSP and other EU rules formed by the regulation of restrictive measures. In fact, legislative decisions taken by the Union in this area depend on a prior CFSP decision. Article 215(1) TFEU provides:

Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union [the provisions on CFSP], provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

Paragraph 2 adds that this procedure is also to be followed whenever a CFSP decision provides for restrictive measures against natural or legal persons and groups or non-State entities. It is important to note, however, that, despite the ‘twin’ relationship between these decisions, they are adopted separately.<sup>78</sup>

In particular in relation to the conclusion of international agreements, it has not been unusual to use a dual legal basis. Even pre-Lisbon many examples of international agreements that were adopted both on the basis of what was then Article 24 TEU (CFSP) and Article 38 TEU (Police and Judicial Cooperation in Criminal Matters (PJCCM)) could be found. However, this ‘cross-pillar mixity’ was easier

<sup>75</sup> Previously also presented in Case C-155/07, *Parliament v. Council* (‘EIB Guarantees’) (EU:C:2008:605).

<sup>76</sup> Cf. Cases C-94/03, *Commission v. Council* (EU:C:2006:2) and C-178/03, *Commission v. European Parliament and Council* (EU:C:2006:4), in which the Court approved the combination of the CCP legal basis (then Art. 133 EC), which gave the European Parliament no formal role, with the legal basis for action on the environment (then Art. 175(1) EC), under which co-decision was the prescribed procedure. In these cases, however, QMV applied for both policy fields and the prerogatives of the European Parliament would not be encroached upon. Cf. also Dashwood (n. 48) 219.

<sup>77</sup> An example is given by Case C-166/07, *Parliament v. Council* (EU:C:2009:499) para. 69, where the Court saw no objection to complying with both the co-decision procedure and the requirement that the Council act by unanimity. But combinations of Art. 352 TFEU (previously Art. 308 EC), requiring unanimity, with provisions using the co-decision have occasionally also been acceptable. Cf. Joined Cases C-402/05 P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* (‘Kadi I’) (EU:C:2008:461) paras 235–236.

<sup>78</sup> The CFSP decision is based on Art. 29 TEU. See for instance Council Decision (CFSP) 2019/25 of 8 January 2019 amending and updating the list of persons, groups and entities subject to Arts 2, 3, and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2018/1084, OJ 2019 L 6/6. See more generally on these issues, C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights—The Case of Individual Sanctions* (2009).

as the procedures as well as the effects were similar in both policy areas.<sup>79</sup> It could even be argued that those combinations were necessary as the procedure for both policy areas was laid down in Article 24 TEU and not in Article 38. CFSP and Community combinations were difficult, not only because of the diverging decision-making procedures, but also because of the unwillingness of Member States at that time to mix the Community method with the perceived ‘intergovernmental’ CFSP procedures. The solution was found in the conclusion of such agreements through the adoption by two distinct, although related, decisions: one ‘on behalf of the European Union’ (with a reference to the CFSP and/or PJCCM legal bases) and one ‘on behalf of the European Community’ (on the basis of EC legal bases).<sup>80</sup>

Post-Lisbon, a combination of TEU and TFEU legal bases has proven to be easier. In the *Mauritius* and *Tanzania* cases, the Council Decision challenged by the European Parliament was based on Articles 37 TEU (CFSP) and Article 218(5) and (6) TFEU.<sup>81</sup> It could be argued that this was an obvious combination as Article 218 TFEU also provides the procedure to conclude CFSP international agreements (and the combination is in fact used quite frequently: see Section 4.B). Hence, in this case the problem was not so much the incompatibility of procedures, but rather the main aim and content of the decision. As discussed previously, in those cases the Court decided in favour of ‘CFSP-only’ because of the foreign policy context, whereas in *Kazakhstan* adding a CFSP legal basis was not deemed necessary because of the ‘incidental’ nature of that policy in the agreement. Indeed, a proliferation of legal bases is not to be preferred. As the Court stated in *Philippines PCA*, only if ‘several objectives which are inseparably linked without one being secondary and indirect in relation to the other, [then] the measure must be founded on the various corresponding legal bases.’<sup>82</sup> That said, it may be preferable from the point of view of the Union as a whole (as opposed to individual institutions) in

<sup>79</sup> Wessel, ‘Cross-Pillar Mixity: Combining Competences in the Conclusion of EU International Agreements’, in C. Hillion and P. Koutrakos (eds), *Mixed Agreements in EU Law Revisited* (2010) 30; as well as Wessel and Fernandez Arribas, ‘EU Agreements with Third Countries: Constitutional Reservations by Member States’, in S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (2008) 291.

<sup>80</sup> See the Agreement between the EU, the EC and Switzerland, OJ 2004 L 370/78 and the Agreement between the EU, the EC and Liechtenstein, Council Decisions 2008/262/EC, OJ 2008 L 83/5 and 2008/261/EC, OJ 2008 L 83/3.

<sup>81</sup> Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, OJ 2011 L 254/1; Council Decision 2014/198/CFSP of 10 March 2014 on the signing and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania, OJ 2014 L 108/1.

<sup>82</sup> Case C-377/12, *Commission v. Council* (EU:C:2014:1903) para. 34.

that having a multitude of legal bases may actually be beneficial to ensure ‘full legal coverage’, and therefore enhance the EU’s external relations possibilities.

The reluctance to opt for a dual legal basis can mainly be found in the Council. As Naert discovered: ‘at the stages of signature and conclusion, the Council has generally opted for not accepting that the CFSP competence should be exercised by the Union, leaving it to be exercised by the Member States as part of national competences in mixed agreements.’<sup>83</sup> This points to a preference for mixity rather than for a dual legal basis solution and is a somewhat peculiar reasoning. It could be argued that this is contrary both to the fact that CFSP is mentioned as a *Union* competence in the Treaties and that the same Union is to reach its external objectives in an integrated manner. By opting for mixity rather than for an EU-only agreement with a dual legal basis, the Council stands in the way of a further consolidation of the Union’s external action and a possible violation of the loyalty principles (Articles 4(3) and 24(3) TEU) comes to mind.<sup>84</sup>

Similar confusion also arises in relation to some of the so-called ‘horizontal’ agreements. The CFSP parts of these agreements were (at least pre-Lisbon) often seen not as Union but as Member State competences, which would be covered by the mixed nature of the agreement. So-called horizontal agreements cover a wide range of issues; they may be ‘deep and comprehensive’ and usually take the shape of an Association Agreement or a Partnership and Cooperation Agreement. Although it is clear that these agreements do not ‘exclusively or principally relate to CFSP’ (Article 218(3) TFEU), the High Representative may in practice be appointed to negotiate CFSP matters.<sup>85</sup> Despite the CFSP being a *Union* competence, and Article 218 dealing with the conclusion of *all* international agreements,<sup>86</sup> it proves difficult in practice simply to take CFSP parts of agreements along during the negotiation, signing, and conclusion phase.

<sup>83</sup> Naert (n. 54) 412; as well as—for the contrary view—Passos, ‘The External Powers of the European Parliament’, in P. Eeckhout and M. López-Escudero (eds), *The European Union’s External Action in Times of Crisis* (2016).

<sup>84</sup> Art. 24(3) TEU: ‘The Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. . . . They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.’ See also on the choice for mixity, Chamon, ‘Constitutional Limits to the Political Choice for Mixity’, in E. Neframi and M. Gatti (eds), *Constitutional Issues of EU External Relations Law* (2018) 163; as well as M. Chamon and I. Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (2020), and the contribution by Van Elsuwe in that volume (n. 54).

<sup>85</sup> See for instance Council Decision authorising the opening of negotiations with the Republic of Kazakhstan for an enhanced Partnership and Cooperation Agreements between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (Council doc. 8282/11 of 13 April 2011, Art. 2(2)).

<sup>86</sup> Cf. Dashwood (n. 48) 190: ‘Article 218 TFEU contains the most complete procedural code governing the negotiation and conclusion of international agreements on behalf of the EU, as well as certain related matters, that have existed to date. . . . As such, it tends to reinforce the view that the Treaty of Lisbon has created an integral Union structure. . . .’ This contribution also provides a good overview of the many aspects of the Art. 218 procedure.

## B. The Practice of Combining Legal Bases for the Conclusion of International Agreements

In 2018, Alan Dashwood wrote:

An important issue is whether the Court will prove willing to countenance the combination of legal bases for the exercise of EU competence in the field of the common foreign and security policy (CFSP) with legal bases figuring in the Treaty on the Functioning of the European Union (TFEU).<sup>87</sup>

In the context of the present contribution, the argument in favour of combinations would be that these would allow—if necessary—for a more comprehensive review of questions of legality, by plugging gaps that still exist in the system of legal review in the area of CFSP.

Since a combination of CFSP and other legal bases is not excluded in practice, the question is what obstacles hinder a further development of this notion, not only allowing the Court to exercise its ‘full review’, but also allowing for a more comprehensive assessment of legality questions. Examples from practice include the Agreement continuing the International Science and Technology Center and the Agreement establishing the EU-LAC International Foundation.<sup>88</sup> Other cases in point include the Partnership Agreement with New Zealand<sup>89</sup> and the accession of the EU to the Treaty of Amity and Cooperation in Southeast Asia.<sup>90</sup> In the latter case, the Decision’s legal basis is defined as follows:

Having regard to the Treaty on European Union, and in particular Article 37 in conjunction with Article 31(1) thereof,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 209 and 212 in conjunction with Article 218(6)(a) and Article 218(8), second subparagraph, thereof ...<sup>91</sup>

<sup>87</sup> *Ibid.* 189–190.

<sup>88</sup> See Council Decision (EU) 2015/1989 of 26 October 2015 on the signing, on behalf of the European Union, of the Agreement continuing the International Science and Technology Centre, OJ 2015 L 290/7; Council Decision (EU) 2016/1873 of 10 October 2016 on the signing, on behalf of the European Union, of the Agreement establishing the EU-LAC International Foundation; OJ 2016 L 288/1.

<sup>89</sup> Council Decision (EU) 2016/2079 of 29 September 2016 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, OJ 2016 L 321/1.

<sup>90</sup> Many thanks to Dr Frederik Naert (Council Legal Service) for guiding me to these examples.

<sup>91</sup> Council Decision 2012/308/CFSP of 26 April 2012 on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia, OJ 2012 L 154/1.



The Decision thus combines Articles 37 TEU (CFSP), Article 31(1) TEU (laying down the voting requirements), and Articles 208 and 212 TFEU (development cooperation and economic, financial, and technical cooperation) and Article 218 TFEU (the procedure to conclude international agreements). The preamble explains this combination as follows (emphasis added):

- (2) The Treaty aims to promote peace, stability and cooperation in the region. To this end, it calls for the settlement of disputes by peaceful means, the preservation of peace, the prevention of conflicts and the strengthening of security in Southeast Asia. Hence, *the rules and principles set out in the Treaty correspond to the objectives of the Union's common foreign and security policy.*
- (3) Furthermore, the Treaty provides for enhancing cooperation in economic, trade, social, technical and scientific fields as well as for the acceleration of economic growth in the region by promoting a greater utilisation of the agriculture and industries of the nations in Southeast Asia, the expansion of their trade and the improvement of their economic infrastructure. Therefore, the Treaty promotes cooperation with the developing countries of that region as well as economic, financial and technical cooperation with countries other than developing countries.<sup>92</sup>

Naert pointed to the fact that in this case not only the Council, but also the Commission, the High Representative, and the European Parliament were of the opinion that dual legal bases were possible.<sup>93</sup> It could be argued that this should not come as a surprise. Article 218(3) TFEU mentions agreements that relate 'principally' (but not 'exclusively') to the CFSP and this may hint at the possibility of a dual legal basis.<sup>94</sup>

Because of their more 'comprehensive' scope, multiple legal bases are often used for the conclusion of 'horizontal' agreements, as the (mixed) Association Agreements with Ukraine, Georgia, and Moldova, or the Enhanced Partnership and Cooperation with Kazakhstan reveal. The respective Council Decisions<sup>95</sup> use Article 37 TEU as a substantive legal basis alongside legal bases in the TFEU.<sup>96</sup> Similarly, the negotiation, signing, as well as the conclusion of the (EU-only)

<sup>92</sup> A similar reason could already be found in the proposal that was jointly submitted by the High Representative and the Commission. Joint Proposal for a Council Decision on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia, Brussels, 16.2.2012. JOIN(2012) 1 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012JC0001&rid=2> (accessed 11 November 2020).

<sup>93</sup> Naert (n. 54) 405.

<sup>94</sup> Wessel (n. 79).

<sup>95</sup> Council Decision 2014/295/EU of 17 March 2014; Council Decision 2014/494/EU of 16 June 2014; and Council Decision 2014/492/EU of 16 June 2014; Council Decision (EU) 2016/123 of 26 October 2015, OJ 2016 L 29/1.

<sup>96</sup> Naert found that in these cases the reason for the dual legal basis was to be found in the need for a swift provisional application which would include CFSP parts. Naert (n. 54) 412.

Stabilisation and Association Agreement with Kosovo was also done on the basis of Council Decisions using a CFSP legal basis.<sup>97</sup> The same goes for the Council Decision on the signing, provisional application, and/or conclusion of the agreements with Japan,<sup>98</sup> Armenia,<sup>99</sup> and Canada,<sup>100</sup> to mention some recent examples. While these decisions are not listed as ‘CFSP Decisions’ (using ‘CFSP’ in the numbering), but as ‘EU’ decisions, a dual legal basis may sometimes be found even in decisions that are categorized as a ‘CFSP Decision.’<sup>101</sup> Whereas Article 37 TEU forms the key CFSP legal basis for CFSP agreements, the Ukraine, Kosovo, and Southeast Asia agreements are examples of the fact that occasional reference is also—or perhaps *even*—made to Article 31(1) TEU on the CFSP voting requirements (see on this also the *Kazakhstan* case in Section 3.B). This is interesting since here the incompatibility of different voting rules is even made explicit in the combination of legal bases used to adopt the decision. In that respect it is important to keep in mind that the TEU (Article 31(3)) foresees a ‘passerelle clause’ which allows changes in decision-making procedures without resort to treaty amendment. In the words of Butler, ‘This passerelle clause provides elasticity away from unanimity, allowing for the adoption of certain CFSP Decisions by QMV in set areas as defined by the European Council.’<sup>102</sup> With the further consolidation of the various dimensions of the EU external action, there may come a moment when the

<sup>97</sup> Council Decision (EU) 2016/342 of 12 February 2016 on the conclusion, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ 2016 L 71/1 (referring to Art. 37 in conjunction with Art. 31(1) TEU, and Art. 217, in conjunction with Arts 218(7), 218(6)(a)(i), and the second subparagraph of Art. 218(8) TFEU). See on this agreement and the political reasons for the EU-only nature, Van Elsuwege, ‘Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo’, 22 *European Foreign Affairs Review* (2017) 393.

<sup>98</sup> 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 part, OJ 2018 L 216/1 (referring to Art. 37 TEU as well as Art. 212(1) TFEU, in conjunction with Art. 218(5) and the second subparagraph of Art. 218(8) thereof).

<sup>99</sup> Council Decision (EU) 2018/104 of 20 November 2017 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, OJ 2018 L 23/1 (referring to Art. 37 TEU, and Arts 91, 100(2), 207, and 209, in conjunction with Art. 218(5) and (7) and the second paragraph of Art. 218(8) TFEU).

<sup>100</sup> Council Decision (CFSP) 2017/2322 of 29 May 2017 concerning the signing and conclusion of the Agreement between Canada and the European Union on security procedures for exchanging and protecting classified information, OJ 2017 L 333/1 (Art. 37 TEU, in conjunction with Art. 218(5) and the first subparagraph of Art. 218(6) TFEU).

<sup>101</sup> See for instance Council Decision (CFSP) 2017/718 of 27 March 2017 concerning the signing and conclusion of the Agreement between the European Union and the Republic of Moldova on security procedures for exchanging and protecting classified information, OJ 2017 L 106/1 (referring to Art. 37 TEU and Art. 218(6) TFEU); or Council Decision (CFSP) 2016/2360 of 28 November 2016 on the signing and conclusion of the Acquisition and Cross-Servicing Agreement between the European Union and the United States of America, OJ L 350/1 (Art. 37 TEU and Art. 218(5) and (6) TFEU). One may argue, however, that in these cases the reference to Art. 218 TFEU is merely of a procedural nature.

<sup>102</sup> Butler (n. 5) 265.

European Council allows QMV for certain CFSP acts, thus streamlining the different procedures.<sup>103</sup>

Association Agreements form a specific category. While some horizontal agreements are in need of various substantive legal bases as Article 218 TFEU merely provides the procedure, it could be argued that this is not the case for Association Agreements, for which Article 217 TFEU provides a full and complete legal basis.<sup>104</sup> In that respect, it is surprising (at least from a legal perspective) that in these cases a CFSP legal basis is added.<sup>105</sup> After all, by concluding an Association Agreement, the Union does not seem to be limited to certain policy areas and is in principle allowed also to use its CFSP competence.<sup>106</sup>

Apart from combined legal bases in decisions dealing with international agreements, practice also reveals the possibility of using both CFSP and other legal bases in other types of Council decisions. Thus, a combination can be found in decisions on the position of the Union in other international organizations or in the framework of a Cooperation Council based on an international agreement.<sup>107</sup>

<sup>103</sup> Proposals in this direction were also made by the Commission in *State of the Union 2018: Making the EU a stronger global actor*, 12 September 2018.

<sup>104</sup> Art. 217 TFEU: 'The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'. CFSP is not in any way excluded from this provision. At the same time, the Court has sometimes asked for an additional legal basis. See for instance Case C-81/13, *United Kingdom v. Council* (EU:C:2014:2449), where next to Art. 217 an additional legal basis had to be found in relation to the free movement of workers (Art. 48 TFEU). Cf. Smyth, 'Variable Geometry, Justice and Home Affairs and the Conduct of EU External Relations', in J. Czuczai and F. Naert (eds), *The EU as a Global Actor—Bridging Legal Theory and Practice: Liber Amicorum in honour of Ricardo Gosalbo Bono* (2017) 337.

<sup>105</sup> The EU-Kosovo agreement gives the following (unconvincing) reason: 'The Agreement provides for the establishment of an association between the Union and Kosovo involving reciprocal rights and obligations, common actions and special procedure. It also contains provisions falling within the scope of Chapter 2 of Title V of the [TEU] concerning the Common Foreign and Security Policy of the Union. The decision to sign the Agreement should therefore be based on the legal basis providing for the establishment of an association allowing the Union to enter into commitments *in all areas covered by the Treaties* and on the legal basis for agreements in areas covered by Chapter 2 Title V of the TEU.' (emphasis added)

<sup>106</sup> Art. 217 TFEU simply provides: 'The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.'

<sup>107</sup> Recent examples include: Council Decision (EU) 2018/1552 of 28 September 2018 on the position to be taken, on behalf of the European Union, within the Cooperation Council established by the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, with regard to the adoption of the EU-Azerbaijan Partnership Priorities, OJ 2018 L 260/20 (referring to Art. 37 TEU, and Arts 207, 209, 218(9) TFEU); Decision (EU) 2018/253 of 15 February 2018 on the position to be taken on behalf of the European Union within the Joint Committee established by 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, as regards the adoption of decisions on the rules of procedure of the Joint Committee and the adoption of the terms of reference of the subcommittees and working groups, OJ 2018 L 46/9 (Art. 37 TEU and Arts 207 and 212(1), in conjunction with Art. 218(9) TFEU); Council Decision (EU) 2017/2434 of 18 December 2017 on the position to be adopted on behalf of the European Union within the Joint Council established by 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, as regards the adoption of a decision of the Joint Council on the rules of procedure of the

Combinations of CFSP and other legal bases are thus possible and applied in certain specific situations in relation to the conclusion of international agreements. It is interesting that different voting requirements do not seem to stand in the way of this combination; something that, as observed previously, was occasionally accepted by the Court in ‘intra-TFEU’ cases.<sup>108</sup> At the same time, it still seems to be impossible to combine the legislative procedure with CFSP decision-making, which explains why it is much harder for internal decisions to have a dual legal basis. In fact, EurLex currently lists 67 Council Decisions in which CFSP and TFEU legal bases are combined, and all of them relate to international agreements. The combination has often already started in the preparatory phase. Despite the rule in Article 218(3) TFEU that the initiative is *either* done by the Commission or by the High Representative, joint proposals occur.<sup>109</sup> Similar developments have been witnessed in relation to the composition and functioning of the ‘negotiating team’. According to Article 218(3) TFEU, ‘the Union negotiator or the head of the Union’s negotiating team’ are nominated with a view to the subject of the agreement envisaged.<sup>110</sup> In cases involving CFSP, the Council would usually nominate either the Commission representative or the High Representative as head of the negotiating team. In practice, when the Commission representative is nominated, the Commission representative may allow the EEAS representative to take the lead.<sup>111</sup> Naert has explained this by pointing to the fact that the establishment of

Joint Council and those of the Joint Committee, OJ 2017 L 344/26 (Art. 37 TEU and Arts 207 and 209 in conjunction with Art. 218(9) TFEU); Council Decision (EU) 2017/2431 of 11 December 2017 on the position to be taken, on behalf of the European Union, within the Joint Committee established by 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, as regards the adoption of the Rules of Procedure of the Joint Committee and the setting-up of two special working groups, OJ 2017 L 344/11 (Art. 37 TEU and Arts 207 and 209 in conjunction with Art. 218(9) TFEU).

<sup>108</sup> Dashwood (n. 48); and Naert (n. 54) 407; as well as Cremona, ‘EU Treaty-Making after the Lisbon Treaty—A Test Case for Mutual Sincere Cooperation?’, in J. Czuczai and F. Naert (eds), *The EU as a Global Actor—Bridging Legal Theory and Practice: Liber Amicorum in honour of Ricardo Gosalbo Bono* (2017) 424–439, at 431. These authors point to accepted combinations of QMV and unanimity in Case C-166/06, *Parliament v. Council* (‘International Fund for Ireland’) (EU:C:2009:499) paras 66–69 and in Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* (‘Kadi I’) (EU:C:2008:461) paras 212 and 235–236.

<sup>109</sup> Cf. Marquart, ‘Still New Kids on the EU’s Institutional Block? The High Representative and the European External Action Service Seven Years after the Entry into Force of the Treaty of Lisbon’, in J. Czuczai and F. Naert (eds), *The EU as a Global Actor—Bridging Legal Theory and Practice: Liber Amicorum in honour of Ricardo Gosalbo Bono* (2017) 1. See for an example the Joint Recommendation for a Council Decision authorizing the opening of negotiations for a Framework Agreement between the European Union and Japan referred to earlier. In these cases, the Council Decision would state: ‘Having regard to the joint proposal by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy’.

<sup>110</sup> Cf. Marquart (n. 109); as well as Gatti and Manzini, ‘External Representation of the European Union in the Conclusion of International Agreements’, 49 *Common Market Law Review* (2012) 1703.

<sup>111</sup> See for instance the Council Decision on the opening of negotiations of the Kazakhstan Agreement (Section 3.B). Cf. also Dashwood (n. 48) 202 in support of this development: ‘There would clearly be a strong case for the High Representative to be formally associated with the Commission in negotiating such an agreement.’

the EEAS also implied the moving of geographical desks from the Commission to that Service.<sup>112</sup>

The conclusion is that combinations of legal bases only partly solve the problem of the restricted legality assessment in CFSP. While adding TFEU legal bases certainly allows for a more comprehensive approach in international agreements dealing with a variety of external relations themes, in many other instances all that is seen are references to the procedure to conclude the international agreements. In a more substantive sense, and leaving out the example of international agreements, combinations of CFSP and other EU policy areas remain difficult as the latter almost always involve decisions adopted on the basis of the legislative procedure. While challenges to CFSP legality thus remain, practice also shows that legality issues mainly concern institutional questions of competence. Where individual rights are at stake (such as in the case of restrictive measures, staff issues, procurement decisions, or access to documents), the Court interprets its competence to include a review of legality on the basis of Union-wide values and principles.

## 5. Conclusion: An Incomplete Review of Legality

Some 20 years ago, questions of legality would have raised eyebrows when brought up in a CFSP context. The aim of this chapter was to reveal that these days the principle of legality is to be applied across the board and is to guide all Union competences, including its competence ‘to define and implement a common foreign and security policy, including the progressive framing of a common defence policy’ (Article 2(4) TFEU). Review of legality by the Court is somewhat hampered by the restrictions on the Court’s jurisdiction in relation to CFSP acts. At the same time, recent case-law has underlined the intention of the treaty drafters to see the limitations as exceptions to the more general idea that, in principle, all Union acts should be subject to a ‘full review’.

The possibility for the Court to engage in this review largely depends on the choice of legal basis. This choice itself is now clearly subject to the rule in Article 40 TEU, and the claim has been made that the criteria on the basis of which the Institutions make a choice for the appropriate legal basis should be the same in TEU–TFEU situations as in TFEU–TFEU cases. At the same time, choosing a certain legal basis may affect the extent to which the legality of decisions can be assessed. This implies that key EU principles, including the principle of conferral, run the risk of becoming useless where there is a CFSP legal basis. This would run directly against the Court’s view:

<sup>112</sup> Naert (n. 54) 419.

the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles ... It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.<sup>113</sup>

This chapter thus pointed to a clear challenge: how to square some of the specific rules and procedures of CFSP with the fact that it is at the same time part and parcel of the Union's legal order. As the latter indicates the need not only to apply key EU principles to the CFSP area but also to allow for a review of these principles, this chapter investigated the possibility of combining legal bases for CFSP and other EU policies. Despite the abundant references to the principle of consistency in the Treaties, combining legal bases remains difficult. While practice has revealed a number of procedural combinations in relation to the conclusion of international agreements, extending any review of legality through adding a substantive TFEU legal basis typically runs up against either incompatible procedural requirements or the political wish of the Council to keep CFSP separate. The result is an incomplete system of legality review.

<sup>113</sup> Case C-355/04 P, *Segi and Others v. Council* (EU:C:2007:116) para. 51.