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**EU Law in Foreign Security and Defense Policy:  
Administration and Leadership from the High  
Representative's Perspective**

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Master's Degree in Law,  
in the specialty of  
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## **Anti-Plagiarism Statement**

I hereby declare that the work I present is my own work and that all my citations are correctly acknowledged.

I am aware that the use of unacknowledged extraneous materials and sources, constitutes a serious ethical and disciplinary offense.

Ivo Vaz

## Front Matter

### Acknowledgements

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### **List of Abbreviations**

- **AT** – Amsterdam Treaty
- **BiH** – Bosnia and Herzegovina
- **BT** – Brussels Treaty [WEU]
- **CAR** – Central African Republic
- **CARD** – Coordinated Annual Review on Defence
- **CBRN** – Chemical, Biological, Radiological and Nuclear Weapons
- **CCM** – Civilian Crisis Management
- **CCP** – Common Commercial Policy
- **CDU/CSU** – German Christian Democratic Union/Christian Social Union parliamentary group
- **CPCC** – Civilian Planning and Conduct Capability
- **CESRP** – Civilian European Security Research Program
- **CEU** – Council of the European Union [Council of Ministers]
- **CEURP** – [Council] Rotating Presidency
- **CFE** – The Convention on the Future of Europe [2002-03]
- **CFSP** – Common Foreign and Security Policy
- **CISNET** – The EC’s Intranet
- **Civ-Mil** – Civilian [&] Military
- **CJEU** – Court of Justice of the European Union
- **CLRTAP** – The Convention on Long Range Transboundary Air Pollution
- **CMPD** – Crisis Management and Planning Directorate [EEAS]
- **COREPER** – Committee of Permanent Representatives
- **COREU** – Correspondance Européenne
- **COTER** – Council Working Group on the International Aspects of Terrorism
- **CP** – Crisis Platform [EEAS]
- **CPDA** – [Instrument for] Communication and Public Diplomacy Actions
- **CRS** – Crisis Response System
- **CSDP** – Common Security and Defense Policy
- **CTC** – EU Office of Counter-Terrorism Coordination
- **CTP** – Common Trade Policy
- **D** – Decision [when citing a CEU, EUCO, or HR decision]
- **DCFTA** – Deep Comprehensive Free Trade Area
- **DCI** – The Development Co-operation Instrument
- **DDR** – Disarmament, Demobilization and Reintegration

- **DDSC** – Declaration on Defense and Security Cooperation
- **DEVCO** – DG International Cooperation and Development
- **DG** - Directorates-General
- **DG AIDCO** – DG Europe Aid (later merged with DG DEV into DEVCO)
- **DG DEFIS** – DG for Defence Industry and Space
- **DG DEV** – DG Development (later merged with DG AIDCO into DEVCO)
- **DG ELARG** – DG NEAR [precursor]
- **DG MARE** – DG Maritime Affairs and Fisheries
- **DG NEAR** – DG European Neighborhood and Enlargement Negotiations
- **DG RELEX** – [former] DG for the External Relations
- **DG Trade** – the DG for EU CTP
- **DHoD** – Deputy Head(s) of Delegation [EEAS]
- **DR** – Directive [when citing a directive]
- **DRC** – Democratic Republic of Congo
- **DSG** – Deputy Secretary-General
- **DTF** – Defense Task Force
- **EA** – External Action
- **EASRA** – European Armaments and Strategic Research Agency
- **EATC** – European Air Transport Command
- **EC** – European Commission
- **ECAP** – European Capabilities and Armaments Policy
- **ECHO** – DG for European Civil Protection & Humanitarian Aid Operations
- **ECJ** – European Court of Justice
- **ECSC** – European Coal and Steel Community
- **EDA** – European Defense Agency
- **EDC** – European Defense Community
- **EDEM** – European Defense Equipment Market
- **EDTIB** – European Defense Technological and Industrial Base
- **EEAS** – European External Action Service
- **EIDHR** – The European Instrument for Democracy and Human Rights
- **ELARG** – DG Enlargement
- **EMU** – European Economic and Monetary Union
- **ENER** – DG for Energy
- **ENP** – European Neighborhood Policy
- **ENPI** – The European Neighbourhood and Partnership Instrument
- **EOM** – Election Observation Mission(s)
- **EP** – European Parliament
- **EPC** - European Political Cooperation
- **EPRS** – European Parliamentary Research Service
- **ERCC** – Emergency Response Coordination Centre
- **ESG** – Executive Secretary General [EEAS]
- **EU** – European Union

- **EUAM Ukraine** – EU Advisory Mission to Ukraine
- **EUCO** – European Council
- **EUDF** – The EU Development Fund
- **EUGS** – EU Global Strategy
- **EU INTCEN** – EU Intelligence and Situation Centre
- **EUISS** – EU Institute for Security Studies
- **EUMC** – EU Military Committee
- **EUMS** – EU Military Staff
- **EUMSS** – EU Maritime Security Strategy
- **EUPM** – EU Police Mission [BiH]
- **EUSG** – EU Global Strategy
- **EUSR** – EU Special Representatives
- **EULEX** – EU Rule of Law Mission in Kosovo
- **EUSR** – EU Special Representative(s)
- **ESDP** – European Security and Defense Policy
- **ESA** – European Single Act
- **ESS** – European Security Strategy
- **FA** – Foreign Affairs
- **FAC** – Foreign Affairs Council
- **FDI** – Foreign Direct Investment
- **FHQ** – Force Headquarters [Theatre-Level]
- **FO** – Field Office(s)
- **FP** – Foreign Policy
- **FPI** – [Service for] Foreign Policy Instruments [EC]
- **FPIS** – Foreign Policy Instruments Service
- **FRG** – Federal Republic of Germany [West Germany]
- **FSJ** – Freedom, Security and Justice
- **GAC** – General Affairs Council
- **GDR** – German Democratic Republic [East Germany]
- **GNI** – Gross National Income
- **GS** – General Secretariat
- **GSC** – General Secretariat of the Council
- **HA** – High Authority [ECSC] (precursor to the EC)
- **HHG** – Helsinki Headline Goals
- **HoA** – Horn of Africa
- **HoD** – Head(s) of Delegation [EEAS]
- **HQ** – Headquarters
- **HR** – High Representative
- **IAEA** – International Atomic Energy Agency
- **IBM** – Integrated Border Management Agreement [Serbia & Kosovo]
- **ICIC** – Instrument for Cooperation with Industrialised Countries
- **IcSP** – The Instrument contributing to Stability and Peace

- **IFS** – Instrument for Stability
- **IGC** – Intergovernmental Conference
- **IMF** – International Monetary Fund
- **INSC** – The Instrument for Nuclear Safety Co-operation
- **IntCen** – EU Intelligence Centre
- **IPA** – The Instrument for Pre-accession Assistance
- **IPTF** – UN International Police Task Force [BiH]
- **IR** – International Relations
- **ISA** – EU-NATO Information Security Agreement [2003]
- **ISC** – Inter-Service Consultation
- **ISF** – Internal Security Fund
- **ISG** – Inter-Service Group(s)
- **JFC** – Joint Force Command
- **JHA** – Justice and Home Affairs Council
- **KFOR** – NATO Kosovo Force
- **LOI** – Letter of Intent
- **LT** – Lisbon Treaty
- **MA** – Mixed Agreement(s)
- **MBT** – Modified Brussels Treaty [WEU]
- **MERCOSUR** – Southern Common Market [South America]
- **MFA** – Ministry(ies) of Foreign Affairs
- **MFAP** – Macro-Financial Aid Package
- **MFF** – Multiannual Financial Framework
- **MMA** – Monitoring, Mentoring and Advising
- **MONUC** – UN Mission in the DRC
- **MPCC** – Military Planning and Conduct Capability
- **MS** – Member State(s)
- **MT** – Maastricht Treaty
- **NATO** – North Atlantic Treaty Organization
- **NAC** – North Atlantic Council
- **NAHEMA** – NATO Design and Development, Production and Logistics Management Agency
- **NCS** – NATO Command Structure
- **NETMA** – NATO Eurofighter and Tornado Management Agency
- **NH90** – NATO Helicopter for the 1990s
- **NIMS** – NATO’s International Military Staff
- **NMC** – NATO Military Committee
- **NSC** – New Strategic Concept [NATO]
- **NSPA** – NATO Support Agency
- **NSS** – US National Security Strategy
- **NT** – Nice Treaty
- **IO(s)** – International Organization(s)

- **OCCAR** – Organization for Joint Armaments Procurement
- **OHQ** – Operation Headquarters
- **OLP** – Ordinary Legislative Procedure
- **OPCEN** – EU Operations Center
- **OPI** – Open-Source Information
- **OSCE** – Organization for Security and Cooperation in Europe
- **PCC** – Prague Capabilities Commitment
- **PESCO** – Permanent Structured Cooperation
- **PFCA** – Political Framework for a Crisis Approach
- **PFOS** – Perfluorooctane Sulfonates
- **PI** – The Partnership Instrument
- **PMG** – Political and Military Group
- **POP** – Persistent Organic Pollutants
- **PRISM** – Integrated Approach Stabilization and Mediation
- **PSC** – Political and Security Committee
- **QMV** – Qualified Majority Vote(ing)
- **R** – Regulation [when citing EU Regulations]
- **R&D** – Research and Development
- **RDI** – Research, Development, and Innovation
- **REFIT** – Regulatory Fitness and Performance Programme
- **RELEX** – Foreign Relations Counsellors Working Party
- **ROL** – Rule of Law
- **RoP** – Rules of Procedure
- **RRF** – Rapid Response Force(s)
- **SACEUR** – Supreme Allied Commander Europe
- **SatCen** – EU Satellite Centre
- **SECPOL** – Security and Conflict Prevention Directorate
- **SFOR** – NATO Stabilization Force [BiH]
- **SG** – Secretary-General
- **SG/HR** – Secretary General/High Representative [Original HR]
- **SHAPE** – Supreme Headquarters Allied Powers Europe [NATO]
- **SITCEN** – EU intelligence and Situation Centre
- **SITROOM** – The EU Situation Room
- **SME** – Small and Medium Sized Enterprises
- **SNE** – Seconded National Experts
- **SOTEU** – State of the Union EU
- **SSR** – Security Sector Reform
- **TCE** – Treaty establishing a Constitution for Europe
- **TEC** – [former] Treaty of the European Community (now TFEU)
- **TEU** – Treaty of the European Union
- **TFEU** – Treaty on the Functioning of the European Union
- **UFM** – Union for the Mediterranean



- **UK** – United Kingdom
- **UN** – United Nations
- **UNGA** – United Nations General Assembly
- **UNHRC** – United Nations Human Rights Council
- **UNSC** – United Nations Security Council
- **US** – United States (of America)
- **USSR** – Union of Soviet Socialist Republics
- **WB** – World Bank
- **WEU** – Western European Union
- **WMD** – Weapons of Mass Destruction
- **WT** – Washington Treaty [NATO Treaty]
- **WTO** – World Trade Organization
- **WW2** – World War Two

## **Abstract**

This thesis analyzes the Common Foreign and Security Policy's legal architecture, administrative regime, and financial aspects, addressing the European Union's Treaty evolution concerning foreign, security and defense. It aims at questioning the validity of canonically held views continuously reproduced throughout academia, namely the weight that Intergovernmentalism and the Unanimity Requirement have on limiting the Common Foreign and Security Policy. While most studies exaggerate the role Sovereignty plays, they do so starting from the assumption that Nation-States are inherently uncooperative, *ergo*, naturally EU foreign policy either doesn't exist, or has a self-imposed ceiling. Those studies that do approach other aspects contributing to the Common Foreign and Security Policy's shortcomings are mostly either single-issue focused, or purely within the realm of Political Science, rather than Law. This thesis highlights the common patterns found in the former, exposing common trends and how they relate and influence each other, whilst also acknowledging the value in the latter's insights. This thesis adopts a holistic analysis, contributing to the academic field in comparing and articulating often disconnected and overlooked points.

### **Key Words:**

EU Law; CFSP; High Representative; Duplication; Overlapping Competences.

## **Abstrato**

Esta tese analisa a arquitetura legal da Política Externa e de Segurança Comum, o regime administrativo, e aspetos financeiros, abordando a evolução dos Tratados da União Europeia no que concerne a política externa, segurança e defesa. Procura questionar a validade de visões canónicas continuamente reproduzidas academicamente, nomeadamente o peso que o Intergovernamentalismo e o Requerimento de Unanimidade têm em limitar a Política Externa e de Segurança Comum. Enquanto que a maioria dos estudos exagera o papel desempenhado pela Soberania, estes fazem-no partindo do pressuposto que Estados-Nação são inerentemente aversos à cooperação, logo, naturalmente ou política externa da UE não existe, ou tem um teto autoimposto. Os estudos que chegam a abordar outros aspetos contribuintes para falhas de desempenho da Política Externa e de Segurança Comum são maioritariamente ou mono temáticos, ou de raiz puramente ancorada à Ciência Política, ao invés do Direito. Esta tese realça padrões comuns encontrados no anterior, expondo tendências comuns e como se relacionam e influenciam mutuamente, enquanto reconhece também o valor do posterior. Esta tese adota uma análise holística, contribuindo para o mundo académico ao comparar e articular pontos frequentemente desconexos e negligenciados.

### **Palavras-chave:**

Direito da UE; PESC; Alto Representante; Redundâncias; Conflito de Competência.

## Introduction

Throughout Academia, Think Tanks, and the *Brussels Bubble*, we are led to understand that measuring the success of EU Foreign Policy is ultimately determined by Intergovernmentalism and the Unanimity Principle. It is argued that introducing QMV to CFSP will not only accelerate Foreign Policy, but also make it more coherent and consistent, the majority opinion will prevail over radical minority opinion, and by organic assimilation Foreign Policy will gain homogeneity over time<sup>1</sup>.

This seems too simple an answer to justify EU shortcomings. Offering a more nuanced approach, KU Leuven held a webinar on the matter with a panel moderated by KU Leuven's Wouters, J., consisting of Vimont, the first EEAS Executive Secretary General; Marquardt, Head of the EEAS Legal Department; Leiden University's Pomorska, K.; and Groningen University's Wessel, R.

While Vimont welcomed QMV, he stressed that it does not address shortcomings' core issues. Even when QMV is applied *e.g.*, when agreeing the Commission's migration relocation scheme, Member States use political tools to circumvent points they had disagreed on. He added that near 90% of CFSP issues are agreed consensually, yet this is unseen since the media only highlights contentious issues. The unanimity case is overrated. Today, CFSP is as much High Politics as it is Commerce, Energy, Tech, Competition, or Transport – competences under the Commission.

Pomorska was reticent on introducing QMV, elucidated several points to why QMV may be detrimental to CFSP. First, smaller Member States, specially newly integrated, may feel sidelined and resist further integration, this has negative spillover in those who often feel ignored using veto not to protect their own interests, but chaotically for opposition's sake, using what power they have, further dividing the Union.

We see this with Hungarian representatives in the CEU. One of the core informal rules is that, while lobbying opposition is allowed, it must be voiced, reasoned and expressed. Hungarian officials resorted to entrenched discursive disengagement and isolation. The EEAS are a case in point where smaller/medium Member States are frustrated regarding

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<sup>1</sup> An extremely impactful tangent – yet ultimately beyond the scope of this thesis - advanced by Schutze (2012), regards a more metaphysical legal debate on this matter. Schutze uses a comparative approach to the EU's constitutional regime vis-à-vis the US, making use of both CJEU and USSC case law *e.g.*, C-266/03, Opinion 1/94, Opinions 1/76 and 2/92, Case 22/70, *etc.* Similarly, Abel (2020) compares Case 11/70 to C.74 US 700. Moreover, Wallner (2020); Crikemans, (2010); Frazee (2017); Segura & Etherington (2017); Fontes (2020); and particularly Mulligan (2022) analyzing the *Holmes v. Jennison* case, all make very insightful contributions to the debate surrounding EU constitutionalism and the legitimacy of the EU FP Regime.

access and representation within its ranks, resulting in attrition, complicating EEAS role of Foreign Policy facilitators.

Crucially, one must ask who is using veto. Often overlooked is that some Member States have very refined administrative and diplomatic skills, so they don't even resort to veto - by the time a text comes up for debilitation it has already been tailored at lower levels. The veto is often a sign of failure, since a MS was not able to effectively negotiate at lower levels. Taking on Poland, when governments change, often seasoned diplomats are lost resulting in experience drain. Introducing QMV would only inflame the already lit issue of Brussels-concentrated power. Thus, majority rule in Foreign Policy might inflame domestic authoritarian discourse.

It seems imprudent from a more primordial aspect. How can we imagine FP towards Russia without Baltic consent? Mediterranean FP without Cyprus? Latin American FP without Portugal? CFSP loses effectiveness if MS don't feel ownership of investment (Cohn, 2016).

Wessel, more favorable to QMV, added quantitatively. Exposing 47% of CFSP decisions are based on Art. 29 TEU and 30% on Art. 31.2 TEU; and 50% of CSDP decisions are based on Art. 43.2 TEU, and 45% on Art. 42.4 TEU. Moreover, in *EC v. CEU (C-244/17)*, on Kazakhstan's Enhanced Partnership and Cooperation Agreement, the CJEU ruled in the EC's favor regarding admissibility of QMV and OLP in international agreements with CFSP elements. Ultimately, with the normalization of CFSP both in its institutions and the CJEU's role, there are signs of interest in broadening QMV scope – CCM and Human Rights being low hanging fruit. In fact, in the Juncker EC, most CFSP documents regarded Civilian Crisis Management, and in the Von der Leyen EC most were Human Rights and Sanctions related.

Provisions for QMV exist *e.g.*, Arts 31 TEU or 215 TFEU, yet the CEU often deprives itself from using QMV signaling mutual respect. Marquardt, recalling his time in the CEU, failed recalling a time where QMV options were used, mostly because most of the work is done at the Working Party level, which operate by consensus. Consensus is the general rule.

Aiming to enrich the demystifying efforts of this webinar, this thesis shall analyze the evolution of EU Foreign Policy, particularly highlighting the introduction of the High Representative within the EU machinery and hierarchy, since its role bridges the Intergovernmental vs Supranational dichotomy.

Introduced by the Amsterdam Treaty, the post was reinforced by the Lisbon Treaty, meaning it was a significantly impactful improvement to merit an increased role within the system. The position has existed since 1997, which allows for a sober analysis of its

return on investment. Conversely, the investment put into said position and the environment in which it operates shall also be analyzed.

Thus, in questioning the extent to which Intergovernmentalism holds back EU Foreign Policy, this thesis first analyzes the Common Foreign and Security Policy; followed by the Common Security and Defense Policy; and finally, considers the impact that the EU's top-ranking officials, in particular the High Representatives, have had throughout their tenure.

## Title I

### On CFSP

#### Introduction

MS have increasingly invested in CFSP, aiming for absolute gains, rather than relative gains in FP. The HR epitomizes MS' gradual EU FP investments, given its hybrid nature tying the intergovernmental and supranational spheres of the EU.

Maastricht allowed action in FA and Justice without applying the Community Method (Christiansen, *et al*, 2012). Yet, CFSP was not so different from ESA's EPC, inheriting its structure, bodies and most procedures (Hurd, 1994). The Amsterdam Treaty advanced Maastricht's second pillar, introducing the SG/HR; advancing the CEU's role on defense matters (Art. 13 TUE); including a solidarity clause (Art. 11.2 TEU) by which CSFP would be based on MS' mutual solidarity (Art. 12 TUE); and establishing QMV in cases where common actions or positions were adopted (Art. 23 TEU) (Coutinho & Camisã, 2016:22).

This Title sets to analyze the CFSP, first briefly highlighting Amsterdam and Lisbon, which materialized *acquis communautaire* on investing in CFSP provisions; then considering the HR *vis-à-vis* these investments; and finally analyzing how CFSP bodies are articulated within the CFSP Regime.

## **Chapter I**

### **Treaty Evolution**

#### **Section I**

##### **Amsterdam**

The AT advanced the MT's second pillar, and despite unanimity on defense, CFSP was framed as involving all security matters and a gradual common defense policy (Coutinho & Camisã, 2016:22). This is significant, not only since the SG/HR also presided over the WEU, but also because the personality chosen to inaugurate the role was Solana, the last NATO SG.

Back then the WEU was still relevant, AT Art. J.7 fully backed the WEU as integral to EU security. Yet, due to criticism directed at the EU's performance in the Balkan wars, the HR was originally triple hatted as: CEU SG, HR for CFSP and head of the WEU. Its aim was to enhance coordination of all policies with external dimension and provide continuity and consistency in a time when the CEURP had greater impact (Barros, 2008:10).

Despite the ambition, the job description was vague and ill-equipped to perform. The CFSP's framework hadn't yet matured, built just 5 years prior and shaken by the IR paradigm shift that led to the AT in the first place. Moreover, the HR had to contend with stronger institutional rivals. Small MS resisted the idea, because since it would hold advantage of continuity and they lacked political weight, they would lose FP influence, proposing a 6-month mandate for the HR. The EC also resisted, as it would rival DG RELEX. Ultimately, the HR lacked strong formal power or material resources. Formally modest, the HR's power was limited to assisting the CEURP and upon request representing the CEU in third party political dialogue (Art. J.16). Being unanimously appointed by the CEU, lacking right of initiative, with meager budget, and overlapping



competences with DG RELEX culminated in a very thin legal status. Furthermore, having to perform CEU SG duties meant the HR had to play a huge administrative role, being the backbone of the CEU and its Working Groups, especially because at the time the SG did not have much institutional leeway, in fact, only recently the CEU SG, probably due to the LT's HR, gained greater political weight (*ibid*:11).

Though MS reluctance and limited financial resources were widely acknowledged regarding the EU's IR underperformance, a lot can be said about the CFSP's institutional setup. The EU lacked both vertical and horizontal coherence. Vertical coherence implies MS adhere to act in line with EU policies. However, more telling was horizontal coherence, which implies coordination between the first and second MT pillars. External policies were too divided between the CEU and EC's spheres, and as policies developed, they spurred confusion with the HR and DG RELEX's overlapping competences. Though there was a noticeable improvement in the AT through the HR, the EU's image as a global actor remained confusing both internally and externally, not least given the CEURP's biannual change of leadership in CFSP (Rüger, 2012:144).

## Section II

### Lisbon

A critical legal weakness in the EU's quest to be a global actor was the ambiguity of its own legal personality. The complications derived from having a separate legal personality for the European Community and the pillar system was confusing both internally and externally concerning CFSP (Craig & Burca, 2021:550). The LT took a lot from the failed TCE. One of the takeaways was the establishment of a *single* legal framework (Trybus & White, 2007:44). Thus, many scholars argue the grandest change is the end of Maastricht's pillar system. Through Art. 1.3 TEU the EC became EU and gained legal personality (Coutinho & Camisão, 2016:10). However, the second pillar was fossilized in being CEU dominated, excluded from judicial review, and EC-avoidant in CSDP (Trybus & White, 2007:45). Placed in Title V, the LT didn't create a unified CFSP/CSDP. Explicitly, Declarations 13 & 14 state that provisions governing CFSP/CSDP affect neither the specific character nor powers of each MS to conduct their own foreign/defense policies (Coutinho & Camisão, 2016:11). Significantly, Art. 40 TEU surgically amends ex Art. 47, in doing so, the specific procedures applied to CFSP do not question the EU's single legal system (Craig & Burca, 2021:551).

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In clearly defining the Petersburg Tasks (Art. 43.1 TEU) (Biscop & Coelmont, 2010), under the LT, the EU's competence covers all areas of FP including security (Art. 24.1 TEU). Despite non-application of the Preemption Principle, as per Declaration 14, it is a shared competence (Arts. 2.4 & 4.1 TFEU) (Coutinho & Camisã, 2016:30). Still, despite Art. 31.2 TEU allowing QMV, the fact that a EUCO decision (taken unanimously) is a prerequisite, the innovation is neutralized (Rüger, 2012:152). Additionally, though the LT includes assistance and solidarity clauses (Arts. 42 TEU & 222 TFEU), with Declaration 37, MS retained ample discretion in deciding its manner of solidarity (Radtke, 2012:52).

LT Art. 24.3 refines Amsterdam's J.1.2 adding that MS *shall comply* with CFSP, entrusting the HR to ensure compliance to vertical coherence, a task afore CEU-exclusive. Yet, there is no punitive mechanism for accountability (Rüger, 2012:150). Attesting impunity, Greece, recipient of huge Chinese FDI, blocked an EU statement at the UN criticizing China's human rights record, in clear derogation from Art. 25.b.ii. TEU. EU diplomats said this undermined efforts to confront China's abuse, and was the first time the EU failed to make this statement at the UNHRC (Reuters, 2016).

There is innovation in avoiding outright unanimity. Art. 31.1 TEU offers constructive abstention. If 1/3 of MS representing 1/3 of the population don't abstain, the deliberation stands. Additionally, EUCO may, with the *Passerelle* Clause in Art. 31.3, unanimously agree to extend matters (beside military & defence) on which the CEU may decide through QMV. Moreover, even when there is a blocking minority, the LT allows for permanent structured cooperation to avoid MS outright ignoring institutional avenues for volunteer collective cooperation (Coutinho & Camisã, 2016:35).

LT reforms aimed at reenforcing, expanding, and consolidating FP, particularly on security/defense, adopting many TCE ideas and stipulating a united foreign mission in Art. 2 TEU with principles pegged to the UN Charter (*ibid*:8). This is groundbreaking, as most of Union/Community history did not lack attempts at reaching coordination in FP. The EDC, the Fouchet Plan, 1969 Hague Summit, the Davignon, Copenhagen, and London Reports, the EPC and the WEU all shared the idea of Europe speaking in a single voice at the world stage (*ibid*). However, these were mostly coordination mechanisms, *i.e.*, what was lacking was coherence in the form of a strategic framework. Lisbon codified an external mission statement through Arts. 3 & 21 TEU, enumerating a set of common values and principles (Craig & Burca, 2021:559).

## Chapter II

### *HR & Status Quo*

EU FP is multifaceted, comprised by the CFSP, CSDP, EEAS, internal policies' external dimension, and MS FP interactions; multi-method, organized by both the TEU and TFEU; and multilevel, given the many actors at play with different frameworks, competences, legitimacy, obligations and resources, combining both formal norms and informal practices (Keukeleire & Delreux, 2014:11).

At the CFE, Working Group VII acknowledged the HR greatly helped consolidate the EU's IR profile, keeping contact with international partners and fostering consensus within the CEU. Thus, they worked to strengthen the HR's role in decision making and increasing the resources at its disposal. Indeed, while the AT merely referenced the HR 3 times, Lisbon references it 72 times. The HR was thus pivotal in CFSP reform (Rüger, 2012:145).

The AT launched the SG/HR to increase effectiveness and visibility of EU FP. Yet, the innovation failed to address the MT's cross-pillar incoherence. Lisbon addressed the issue fusing the HR and RELEX Commissioner with FAC chairmanship. Assuming the jobs of three different individuals clearly led to a tight agenda. While the HR/SG was also WEU SG, in comparison, the HR/VP's tasks considerably increased both in CFSP and CSDP. Like the HR/SG, the HR/VP conducts ministerial political dialogue with third parties (Art. 27.2 TEU), however now the HR may interact with third parties for CFSP as well as other EC EA dossiers, in addition to presiding over EUSR (Art. 33 TEU), EDA and the EEAS, assisting the incumbent both as HR and VP (Art. 2 CEU 2010/427); working with EUCO (Art. 15 TEU); and representing the EU in IO including the UNSC (Art. 34 TEU), yet only on ministerial level, as it is the EUCO President who represents the EU in CSFP at head of state level (Art. 15 TEU) (Schmid, 2012:9).

The HR is entrusted with ensuring coherence, consistency, visibility and continuity of EU FP. *Inprimis*, coherence of legal orders is linked to systemic consistency. Whenever an actor is bound to two or more orders, the level to which their coexistence affects cohesiveness impacts consistency. When MS set a principle of EA *consistency* in the

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Treaties, they may have intended to express the principle of legal order consistency, rather than the gray area of *systemic coherence*. The Davignon Report kickstarted the Principle of Coherence in EU Law on EA, setting up consultation on major international issues, acknowledging the need to sync High and Low Politics. Since echoed across the Treaties, the LT mentions *consistency* repeatedly, particularly Art. 21.3 TEU and Art. 7 TFEU. While the former broadens MT Art. C, applying coherence to both external/internal policy, the latter links it to conferral of power. Among the many references to consistency, Art. 18.4 TEU endows the responsibility of its assurance to the HR (CEU and EC in Art. 21 TEU) (Gatti, 2016:20).

Equally, Duty of Cooperation is a core EU Law principle. Absent cooperation, coherence alone is useless or inconsequential. Whereas Vertical cooperation (EU-MS) is corollary and complimentary to conferral pursuant Art. 4.3 TEU, Horizontal cooperation (EU-EU) descends from conferral set by Art. 13.2 TEU (*ibid*:63). Consequently, given both the issue of external representation, and void power of enforcement, predictable risks to coherence extend beyond the HR's reach. MA (wherein both the EU and MS are separate parties) offer an example of Vertical risks to cooperation. For instance, in 2005 Sweden proposed, under the Stockholm POP Convention's framework, to add PFOS to the convention. Neither in the CEU, EC or Working Parties on Environmental Issues had PFOS been settled for inclusion in the lists to be supported at EU level for both the POP Convention and the Aarhus CLRTAP Protocol. Understanding this as a breach of Duty of Loyal Cooperation (now Art. 4.3 TEU), the EC initiated proceedings at the CJEU, which ruled in the EC's favor (Cremona, 2010).

Concerning accountability of enforcement, the CJEU's monopoly on interpretation of some MA and the Principle of Sincere Cooperation, one may be solaced it fosters EA coherence and cohesiveness. However, near all EA exceeds CJEU jurisdiction, *i.e.*, the principle can rarely be judicially assured. The external dimension of Energy policy is a case in point. Long has the EU striven for an Energy Union to cut Russian dependence. The CEU even adjured the EC negotiate with Baku and Ashgabat on a Trans-Caspian Pipeline (CEU 2011). Here, absent precise position, non-cooperation cannot be dealt judicially since it remains under MS jurisdiction under the Principle of Subsidiarity and Conferral (Gatti, 2016:65).

The 3 fundamental tensions of EU FP offer an example of Vertical risks to cooperation within HR reach but beyond CJEU reach, namely: Strategic Autonomy v Atlantic Solidarity; Civilian v Military Power; Inter v Supranationalism. Strategic Autonomy v Atlantic Solidarity is likely the cornerstone of all defense related tensions. The US' role in post-WW2 Europe marked EU integration in such a way that EU dependence on the US and NATO enforces itself at every sign of weakness or threat. Civilian v Military Power is at the root of how the EU self conceptualizes. Doubling down on its defensive reliance on the US, the Normative power thesis pushes for an EU labeled as non-

threatening, but rather an influential force in shaping international regimes. Inter v Supranationalism is the major quagmire in the CFSP's structure. The LT attempted to amend these tensions by way of the HR, being double-hatted and challenged with balancing out CFSP forces (Keukeleire & Delreux, 2014:19).

Since cooperation is not a given, coordination becomes instrumental to ensure consistency. The obstacle then becomes enforcement of cross-body competency delimitation in absence of centralization. The attempt at mitigation came in the Treaties' pragmatically vague use of *coordination*. Indeed, *coordination/coordinate* appear more often than *power/confer*. One may assume *coordination* is conceptually linked to both centralization and cooperation, yet the term is obscurely defined in EU Law. Though politically held as a decentralized coordination process, as a legal concept, mere *cooperation* is too decentralized to constitute *coordination*. The Treaties use *coordination* in a way seemingly equal to the Duty of Cooperation. To illustrate, it would appear indifferent whether Art. 168 TFEU stated MS must cooperate rather than *coordinate* on their Health policies (Gatti, 2016:66). Even the CJEU uses *cooperation/coordination* synonymously, for instance the FAO judgement regarding another MA, wherein it mentions a *coordination* procedure and judges based on the Duty of *Cooperation* (Case C-25/94).

Even gray terminology implies some level of centralization, presupposing a *coordinator*. This would also imply hierarchy and conferral of exclusive competencies and thus, authority. Coordinators may be collective or autonomous authorities. While the former may be more accountable, when voting by majority, the latter are more refined and effective, holding a weighed perspective on balance of interests/stakes as anti-deadlock honest brokers. Where the latter become risks to effectiveness regards either personal traits or if their mandates impinge other coordinating authorities' power (*ibid*:70).

*Autonomy* may be defined as minimized external constraint, administratively or operationally. For an EA coordinator, one may infer the need of both to act both as a credible mediator and guide between decision-makers and bodies. The HR emerges as better suited than collective organs (EUCO or CEU) given their natural pursuit of MS interests, as well as the more autonomous EC President, exactly due to its autonomy. However, the HR lacks well defined autonomy (*ibid*:80).

Regarding consistency, vagueness ensues. Hierarchically, under Art. 21.3 TEU the HR shall assist the CEU and the EC, to ensure consistency. The HR is also EC VP, its appointment mirrors this duality. The nomination is made by EUCO acting by QMV in agreement with the EC President (Art. 18.1 TEU). Yet, serving two often opposing masters cannot ease in fomenting consistency. Further, under Art. 18.4 TEU the HR shall only be bound by EC procedures to an extent that is consistent with its CEU role, *i.e.*, Lisbon seems to allow the HR to serve either master at its descension (Rüger, 2012:151).

Moreover, while many scholars point to the HR's role as a consensus-builder, the only reference that comes close to this notion is Art. 21.3 TEU, under which the HR, the EC and the CEU shall cooperate in ensuring FP consistency, thus being a collective effort more than ordaining an arbiter mandate to the HR. In fact, the only explicit mention of a consensus building position is the EUCO President, pointing to hierarchical consistency confusion (Art. 15.6 TEU) (Keukeleire & Delreux, 2014:20). Thus, though the HR is expected to fulfil an institutional bridge building function in all aspects of EA, the LT does not equip it with procedural prerogatives (hierarchically) to facilitate this. In fact, EC VPs seem to hold only symbolic meaning, especially considering decisions are taken on the principle of collegiality (Schmid, 2012:10).

Regarding visibility, the HR was to be the EU's single voice in IR, holding the right of representation at IOs and conferences, including the UNSC, when the EU has a defined position (Art. 34 TEU) (Coutinho & Camisã, 2016:13). Yet, though the LT capped the CEURP's role in FP in favor of the HR (Art. 18.2 TEU), it created a new troika of representation. The HR must now compete with both a newly created EUCO President, charged with the EU's representation on CFSP (Art. 15.6 TEU), and EC President, representing the EU on other EA issues, wielding considerable authority over important EU FP areas (Art. 17 TEU). Moreover, both the EUCO and EC Presidents hold higher diplomatic status *vis-à-vis* the HR, being full-on EUCO members (the EU's highest authority), able to easily override the HR's authority in day-to-day decision making. Arguably, the HR held more influence over EU FP in the pre-LT architecture, since its main competition was the CEURP, and to a lesser extent the RELEX Commissioner (Smith, 2017:250).

There is similar confusion regarding hierarchy in crisis procedures: the EUCO President, not the HR/VP, may convene extraordinary EUCO meetings, if international developments require, to define strategic lines of EU FP (Art. 26.1 TEU), yet the HR/VP can also request an extraordinary FAC meeting within hours (or less) in cases requiring a rapid decision (Art. 30.2 TEU). Given these overlapping responsibilities, there are only three uniquely HR-owned powers: FAC chairmanship (Arts. 18 & 27 TEU); appointment of EUSRs (Art. 33 TEU); and authority over the EEAS (Art. 27.3 TEU). In short, the LT increased confusion regarding visibility (Smith, 2017:251).

Despite the ambiguity, the most impactful upgrade to the HR's power affords the right of initiative (Art. 30 TEU). Now, besides being an institutional counterweight and a consensus builder, the HR is also a policy entrepreneur (Rüger, 2012:154). Impactfully, if a development requires fast reaction, the HR may circulate a CFSP proposal via COREU, setting a deadline (as short as 2h) for MS objections. Given its imminence, MS self-restrain minor objections, thus being useful for first stage consensus building. A powerful use of HR power of initiative. Here the EEAS hold some advantage in building vertical coherence. Equally however, its range is limited, as CEU-intended texts must be

Working Party-prepared (Ch. 2.c.16 Decision 10898/08), meaning it's limited legally to CFSP and tacitly to non-sensitive issues (Gatti, 2016:243).

As impressive as LT reforms may be, HR task overload is a *de facto* obstacle. Delegation may be a solution, yet neither is there legal basis in Primary or Secondary Law, nor in Doctrine. The LT is unclear both on establishment and empowerment of Agencies. Scholars cite both the Meroni and Romano judgements when debating the issue. The Meroni Doctrine is pertinent regarding HR Delegation, as it was claimed the ECSC's HA had no right to delegate powers. Though the ruling was in Maroni's favor, it stated that such possibility shan't be excluded, framing the permission. Its interpretation thus rises acute discord (Kozina, 2017:3). Considering the idea's legality, we must use ECJ interpretation methods: grammatical, historical, systemic and teleologic. Historical interpretation aims at the authors' contextual intention. Thus, we should focus attention on the CFE and prep work of Working Group VII (EA) and VIII (Defense). Working Group VII pondered human and financial upgrades to reflect the size of the HR's responsibility. Deputies were discussed when ex RELEX Commissioner Patten addressed the feasibility of the LT's HR. However, only 1 out of 4 options supported the idea of deputies. Supporters advocated for either one deputy per hat, or no deputy for the EC VP hat, but as many CFSP deputies as the HR deemed necessary, subject to CEU nomination. Working Group VIII pondered HR empowerment regarding crisis management. Ex French Defense Minister Richard, argued for a Defense deputy, however the overwhelming opinion was of fear of multiplication of defense related posts. Ultimately, deputization in defense was shelved (Schmid, 2012:14). This is however awkwardly inconsistent, as Nice provided for deputization of the former SG/HR, despite its deputy being chosen by Council QMV, not by the HR/SG (Art. 207.2 Nice).

There is an equally awkward a reason commonly given for the evaporation of discussions on deputization: time management. There was apparently not enough time to address all relevant issues, and debates on deputization specifically were agreed to be postponed after the LT's entry into force. However, during the Slovenian Presidency, the issue was seen as resolved. Yet, regarding EUCO, despite existing provisions on EUCO members' deputization *e.g.*, Art. 235.1 TFEU, neither the LT nor EUCO's RoP address how to deal with the HR's absence. In this context the issue is less grave, as the HR merely *takes part* in EUCO's work and only represents the EU on a ministerial level. Regarding the CEU, ministers are allowed deputization, and indeed transfer of voting rights (Art. 4 CEU RoP). Regarding the FAC specifically, the CEU's RoP allows the HR to request the holder of the CEURP to replace them if unable to attend (Art. 2.5 CEU RoP), however this is not deputization, rather exceptional replacement, which is problematic due to first opening an opportunity to pursue their national interests, and second risking inconsistency due to rotation. Regarding the EC, not only is the EC President allowed to deputize its VPs (Art. 25 EC RoP), but the EC SG is also allowed deputization (Art. 24 EC RoP). Yet there is no equivalent for the HR. Even if all commissioners are allowed to be replaced by their

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heads of cabinet if they cannot attend an EC meeting (Art. 10 EC RoP), this is not deputization, as there is no transfer of voting rights, and in the HR's case, it is doubtful that an HR's head of cabinet could effectively defend their position and coordinate all commissioners' FP dossiers. Moreover, they do not sit around the College table but at the back and do not take part in debates. Even more frustrating, HR absence in EC meetings is very frequent. Since EUCO holds meetings quarterly and the FAC monthly, the HR tends to give them priority. However, EC meetings are weekly. Given the HR must attend EUCO, FAC and other CEU meetings, EP sessions and international representation duties, this highly constrains their agenda. This practical hindrance is further problematic for third party dialogues, not only because *ad hoc* representation leads to turf wars, but also because diplomatic relations tend to best thrive when the highest possible ranking official is present (*ibid*:30).



## Chapter III

### Framing CFSP

Though the value of international entities such as the EU is widely studied, the specific contribution made to their policy outputs by administrative as opposed to political actors is often overlooked. Little value is given to intrainstitutional dynamics and administrations' impact on the wider collective's yield. The impact of cabinets and departments' bargaining and rivalry is generally overlooked (Kassim, 2017). Applied to the EU, not only individual Commissioners, but the administrative machinery, such as the GSC and the EC GS are very impactful. Single in name, dual in method, while the Community Method covers EA portfolios *e.g.*, Trade, Development, Aid; the Intergovernmental Method covers CFSP/CSDP (Keukeleire & Delreux, 2014). Applied to the HR, the weight of departments falling outside the HR's direct authority merits highlight, given the prospect of a purposeful design to limit it.

The LT set a new trifecta in external representation: The EUCO and EC Presidents, and the HR (Radtke, 2012:53). However, due to vaguely defined competences, overlaps and rivalry, one should question the extent to which this formula benefits EU FP. Thus, the following section closely examines FP bodies, starting with the closest to the HR: the EEAS. In so doing, throughout the following sections it is beneficial to bear in mind a threefold categorical distinction of power: hierarchical, political, and judicial control. Applied to the EEAS, it's hierarchically subject to the HR and EC, politically to the CEU, and though the CJEU is marginal to CFSP, both the EC and CEU may use judicial review to secure their control over the EEAS (Gatti, 2016:155).

## Section I

### EEAS

The HR's activity and institutional relations are nebulously defined. To be both authoritative and subordinate seems oxymoronic. Given the ambiguity, the ability to *de facto* effect coherence depends more on the HR's personal traits than the post's prerogatives. Precariously, beyond lack of any accountability regarding standard of expertise, competent or not, its impact is likely ephemeral. Given the post's unpredictable stability, EA requires greater institutional solidity *i.e.*, an administration with precisely defined status/mandate, ensuring (lasting) consistency no matter the HR. Enter EEAS (*ibid*:90).

By extension of properties, if the HR is a coordinator, the EEAS should perform said coordination. Yet, if the EU is *sui generis*, the EEAS are *sui generis*<sup>2</sup>, its status is incomparable to any EU institution, body or agency. Primary law lacks precision on its status, administratively or operationally. Though administratively, Art. 3 D2010/427 states the EEAS are to ensure consistency throughout the GSC, EC and MS diplomatic corps; and operationally, Art. 9 2010/427 explicitly allows intervention in some areas, its scope is gray. Indeed, the EEAS both adopts other bodies into itself *e.g.*, EU Delegations, and are adopted into other bodies *e.g.*, DG DEVCO (*ibid*:96).

Art. 1 D2010/427 sets the EEAS as functionally autonomous. Etymologically, *autonomy* from the Greek *Auto-Nomos* (self-law) implies self-organization. Whereas legally, *autonomy* has an administrative and an operative sphere, *functional autonomy* has no clear EU Law definition (*ibid*:104). The CJEU approach in competition law may merit attention. Case law suggests that distinct legal identity is insufficient to prove formal separation of two companies, provided the subsidiary does not independently decide its conduct (Akzo Nobel v Commission) (*ibid*:149).

*Prima facie*, as a service, autonomy *per se* seems inexistent. Entering in support of the HR and multiple other institutions, they are functionally dependent on the entities they support, like an extension of themselves (*ibid*:103). If a coordinating body, meant to steer, is actually steered, then the substantive conduct of a coordinator lacks efficacy. Operational autonomy thus merits emphasis. R473/2013 frames this autonomy hierarchically *i.e.*, entities are operationally autonomous from entities they don't take instructions from (*ibid*:141).

Under Art. 13.2 TEU, EU institutions must act within Treaty lines, and institutional balance regards exercise of powers *vis-à-vis* others' prerogatives. Autonomy is thus intimately linked to Conferral and separation of powers. However, under Art. 27.3 TEU and D2010/427, the EEAS lacks explicitly conferred autonomy, subject to other authorities' respective exercise of power. Moreover, since EEAS organization and functioning is defined by CEU Decision (Art. 27.3 TEU), and unlike EU Agencies/Institutions, the EEAS are unable to adopt its own RoP, this refutes self-organizing (*ibid*:145). To better comprehend this predicament, we must travel back in time.

The LT sharply amended Rome and the MT. Art. 27.3 states the EEAS shall assist the HR, double hatted to represent both inter and supranational bodies - the EEAS autonomously in between (Smith, 2017:246). The EEAS, through D2010/427, fused the EA responsibilities of both the CEU and EC, aggregating officials of both bodies and MS' diplomatic corps (Art. 27.3 TEU). Under Art. 1 D2010/427, the EEAS are a separate and autonomous EU institution with its own legal personality, under HR authority, entrusted to implement EU FP (Art. 2 & 3 D2010/427); assisting both the EUCO and EC Presidents (Art. 2.2 D2010/427); cooperating with MS' diplomatic corps as well as the GSC and EC to ensure consistency between EU EA and other policies (Art. 3.1 D2010/427); and contribute to programming and management of financial instruments related to EU EA (Art. 9 D2010/427). The EEAS are organized by DGs, responsible for thematic and geographic desks; the management of a variety of tasks, from the security of communication and information systems, budgetary matters, and human resources; crisis management, the EUMS and EU INTCEN, all under direct HR authority (Art. 4 D2010/427) (Coutinho & Camisã, 2016:15). Nevertheless, the EEAS provoked a high degree of confusion and conflict within EU bodies and among MS MFA (Smith, 2017:248).

The idea drew wide consensus at the CFE's Working Group VII (Laursen, 2012). The CFE set the stage for the current EU FP institutional structure. Early on, Working Group VII widely recognized that MS were collectively greater than the sum of their parts, an underlying logic since the EPC. Agreeing the need for greater coherence and efficiency between institutions and actors, the issue was how to achieve it. Given Solana and Patten's good working dynamic, the HR and RELEX Commissioner were merged. EUCO asked Solana and Patten to draw a report on the future EEAS (Balfour, 2015:33). Further, to enable the HR's CSDP duties, the CMDP, EUMS, CPSS and SITCEN, would also integrate the EEAS, and idea of EU delegations replacing the EC delegations with the EEAS also came up (*id.*, 2012).

However, the TCE's defeat froze deeper EEAS discussions. Only after the LT came into force did debates on practicalities begin (Balfour, 2015). From then until the LT much occurred, from the Iraq war to the economic crisis, cutting wedges in EU unity. Yet, the

context in which policymakers implemented the LT was arguably more hostile due to the economic crisis (*ibid*:31). Moreover, setup being left for the next HR, negotiations included not only 27 MS, but also the CEU, EC, and EP. The turf wars spawned by the negotiations ultimately crippled the EEAS' power to meet expectations (Laursen, 2012:171).

Likely the hottest EEAS setup issue: Budget. The EP pushed integration within the EC's structure; the CEU pressed budget autonomy to avoid EC pull over the operative sphere *i.e.*, CSDP structures; the EC counter pressed with Art. 317 TFEU, reserving its power over implementation of operational expenditure. The financial compromise was operational EC-dependence and administrative autonomy reliant on Art. 27.3 TEU (Gatti, 2016:114). Additionally, the EP leveraged their budgetary power to influence budget, monitoring and staff regulations. The initial debate regarded if the HR should be part of the EC (backed by the EP), or closer to the MS in the CEU (backed by MS) (Lequesne, 2015:45). Ultimately, the EEAS were not listed in the EU's institutions despite being an autonomous body because MS feared CFSP communitization. However, since the EP wanted to communitize the EEAS, its budget became dependent on the EC, the EC accepted this, as it would give them leverage in CFSP, despite being against the EEAS in the first place (Laursen, 2012:177). Indeed, though the HR is responsible for preparing the EEAS budget, negotiation compromises made this difficult, the EEAS merely contributing to the programming and management cycle (CEU, 2010, Art.3). Furthermore, being opposed to the very idea of the EEAS, the EC also exerted its influence. Not only controlling most management and financial tools, but also keeping expert staff and competences over several EA policies. This staff brain drain meant lack of expert staff on crucial FP areas *e.g.*, trade, ENP, humanitarian aid, climate, and external dimension of internal policies like energy and counterterrorism. This doomed the EEAS from inception (Balfour, 2015:35).

While the innovation seems quite groundbreaking, the LT lacked a blueprint for the EEAS. Instead of an approach based on pragmatic operational experience, their setup was politicized by all actors with a stake in the system (Smith, 2017:246). While EEAS were meant to assist in EU FP consistency and coordination, its provisions are only found in the sections regarding the CFSP, not the EA sections, reflecting the EC's effort to influence FP and contain the HR (Laursen, 2012). Critically, Art. 27 TEU is both too specific and too vague. Specific in exclusive focus on staff composition (1/3 by EC officials, 1/3 by CEU officials from the GSC, 1/3 by MS diplomats). Vague in lacking information on structure, roles, or procedures (Balfour, 2015:37).

The LT failed to adequately accommodate the EEAS within its framework, in practice leading to an EC 2.0 for foreign/security policy. This maintained, if not reinforced, the structural problems that had initially led the idea of an EEAS (Smith, 2017:249). Under an obscure mandate, the EEAS are to support all top decision-making bodies (EUCO,

2010). Linked to previous EC (DGs DEV, ECHO, AIDCO, RELEX, ELARG & Trade) and CEU (the Policy Unit & DG E) structures, yet most of these remained (Gatti, 2016:92). Structurally, the EEAS has a central directorate around and under which thematic and geographic directorates orbit, mirroring former DG RELEX; the PSC lost prestige under the EEAS chairmanship; the EUMS, CMPD, CPCC, and IntCen all directly report to the HR; and the former EC Representations became EU Delegations, coordinating MS embassies. Yet, despite the EEAS responsibility covering both civ-mil crisis management, the CMPD, CPCC, EUMS and IntCen all remain somewhat disconnected to the EEAS architecture, working in parallel rather than in coordination with the EEAS (Lequesne, 2015:47).

The EEAS mix EC, GSC and MS MFA personnel, in theory easing vertical coordination. Their 2013 Review concluded many obstacles this posed yet failed amending them. One obstacle regarded different perceptions of what is best for EU FP *e.g.*, MS diplomats were criticized for renationalizing EU FP and not being familiar with EU procedures. Another obstacle was representation. On one hand, some third states find MS ambassadors more influential than EU representatives *e.g.*, Lebanon would not deal with the EU without consulting the French or UK embassies. On the other, vertical coordination became more complex (*ibid*:50). Pre-LT, with EC Delegations, MS were unlikely to cooperate in diplomatic coordination. The EEAS attempted at mitigating this, with Art. 221 TFEU requesting MS diplomatic/consular missions cooperate, furthering Art. 27.3 TEU. Yet, neither primary nor secondary law endows the HR/EEAS chairmanship of diplomatic coordination meetings. Art. 34 TEU merely states the HR coordinates EA in international fora, not defining HR status or EEAS role (Gatti, 2016:252). The EU lacks a standard for representation at IOs, varying in status. At the WTO, EU and MS status is equal, yet at the UN the EU has only UNGA observer status, and no representation at all at the UNSC, though Art. 34 TEU allows the HR represent a common EU position. This is a massive task as EU delegations in New York, Geneva and Vienna organize 1300 annual meetings to coordinate MS positions (Lequesne, 2015:52).

One may assume, given the wide mandate, they lessen the HR's task burden. Yet the EEAS are undercut by a cost-efficiency requirement under the principle of budget neutrality (CEU, 2015, recital 15), *i.e.*, expenses should resemble those incurred by pre-LT institutions. While understandable given 2010's economic context, it's simply unreasonable. Both the EEAS and their tasks are larger than the sum of pre-LT administrations (Gatti, 2016:95). Furthermore, while the LT replaced EC Delegations with EU Delegations, Art. 221 TFEU places them under direct HR authority, hierarchically disconnected from the EEAS (Vanhoonacker, 2011:159). One thus wonders how autonomous this autonomous body is.

Despite constant restructuring, ultimately the incomplete merger of EC and CFSP tools hinder significant evolution. In its spring there were no relevant changes in the EEAS

structure. With ongoing disputes over its role, there is often progress on paper and new structural organigrammes, but no real progress (Smith, 2017:255). Thus, with a complex and often changing structure, the normal state within the EEAS became unclear lines of command (Morillas, 2015:57). Since its birth, the EEAS had a complex structure of DGs and lines of command. The EC-EEAS working relationship is complex not only due to on field Delegations reporting back to separate headquarters (EC and EEAS), but also given the EC maintains key FP competences and instruments, leading to suspicion and rivalry vexing progress in CFSP horizontal consistency (Balfour, 2015:44).

Integrating MS diplomatic staff into the EU FP system was another attempt at generating synergies whilst rationalizing costs, in a sort of diplomatic economy of scale during a financial crisis. However, trust-building proved difficult as MS not only saw the EEAS as potential competition, but also a vector increasing competition with other MS, in turn complicating the EEAS coordination of MS on field positions. The EEAS were supposed to hold a supporting policy entrepreneur role. Yet, while the first post-LT HR was charged with important dossiers, such as Serbia-Kosovo and Iran E3+3, the EEAS were under-resourced and limited by MS diplomatic protectionism. Moreover, the EEAS are highly constrained by the requirement to operate without prejudice to EC and GSC work. Even where the EEAS are granted relative autonomy *e.g.*, administrating its budget, Preamble 15 (CEU, 2010) set a guiding principle of cost-efficiency and budget neutrality. Further, they inherited the budget previously assigned to the staff that was transferred from the EC and GSC. Thus, while MS judge the EEAS for lack of initiative, the EEAS judge MS for little maneuverability (*ibid*:45).

Though excessive formality in analyzing operational autonomy may neglect evidence of bureaucrats' influence in policy implementation and revision (a 4<sup>th</sup> government branch), political bodies often seek to limit administrative autonomy. This control is specially problematic when multiple bodies exert authority over the same bureaucracy. This is the case regarding the EEAS particularly regarding EC leverage and GSC quasi-executive power (Gatti, 2016:153).

Subject to multiple masters, the EEAS are legally designed as non-autonomous. Most concerning, its most important master is limited in its control, despite the EEAS being legally prevented from taking instructions from governments, authority, organization, or person other than the HR (Art. 6.4 Decision 2010/427). The first constraints are limitations in resources and time, given the HR supervises triple the amount of EEAS directorates as Commissioners' DGs, plus EUSR and the EC's FP service (*ibid*:161). An obvious solution would be a Secretariat General overseeing the wider administration, which the EEAS lack. In fact, most EEAS preparatory drafts are not filtered *e.g.* PFCA Libya presented to the CEU (EEAS, 2014) was only approved by the EEAS, with no mention to the HR. While one may argue the EEAS has an ESG, entrusted to manage the EEAS administration and budget (Art. 4 CEU 2010/427). One may expect the HR freely

nominate a trusted person. Yet, no post-LT HR has independently appointed the EEAS SG. The first two (Vimont & le Roy) were French diplomats, and the current (Sannino) is an Italian diplomat, their appointments are product of MS post bargaining. Thus, one cannot assume the HR can solidly rely on their ESG (*ibid*:162).

The EEAS' greatest challenge has been the development of an *esprit de corps*, with officials from different institutional backgrounds and the need to balance geographic and gender criteria (Laursen, 2012:195). Functional leadership depends on good inter and intrainstitutional coordination. However, the ability to overcome institutional barriers mostly relied on the goodwill of the EC, EEAS and MS to cooperate by informal networking at all hierarchical levels. When the EEAS have been asked to be an institutional bridge, internal problems surfaced regarding work cultures, role definition and a heterogenous staff; while external problems concerned cross-institutional and MS coordination, and resource allocation. When asked to be a cross-border service, internal problems related to ill-defined status or authority, financial strain, and unclear goals; and external problems stemmed from overlapping competences, competition with the EC, and MS contention. Finally, when asked to be security focused, internal problems related to being under resourced and unempowered, while external issues regarded MS contestation. Institutionally, the autonomous gray area between CEU and EC created a plurality of hierarchies, overlapping competences, and bureaucratic territoriality, which when compounded by the EEAS resource dependency among contiguous bodies, made not only cooperation but any attempt at reform harder (Carta & Duke, 2015:55).

## Section II

### EUCO

The EU institutional system is described as a fourfold: Executive power shared by EUCO and the EC; and Legislative power by the EP and CEU. Colloquially nicknamed the *extra CEU configuration*, EUCO was originally omitted in Treaties, its first summit held in 1961 outside Community framework. While the idea of institutionalization of these summits began in 1974, it was only formalized in the ESA, and only legally recognized by the LT, becoming a supranational body with a permanent president representing the EU's most authoritative body (Costa & Brack, 2014:59).

In his 2010 College of Europe keynote speech, ex-EUCO President Van Rompuy classified EUCO as a collective head of state in FA. Verily, the EUCO President's cabinet reflects the importance of FP, 1/3 of its staff focusing on FP (Vanhoonacker, 2011:156). EUCO is instrumental in EU FP, proposing the EC President, influencing the HR's appointment, and providing strategic guide and objectives (Art. 28 TEU). Exercising the impetus function originally EC-assigned, EUCO is composed of its permanent president, MS Heads of State and Government, and the EC President, with the HR holding role by which EUCO is linked to both the CEU and EC (Costa & Brack, 2014:62). Despite lacking voting power (Art. 235 TEU), EUCO's President is perceived as superior to both the EC President and HR. While this does depend on the third party, it is more widely held, since EUCO's President represents the EU in summits at the head of state level (Ondejcikova, 2013).

Institutions are designed in response to problems or new necessities. Institutionally, EUCO is given a central role: its strategy defining role is broadly set in Art. 15 TEU, in the general provisions on EA in Art. 22 TEU, regarding CFSP in Art. 26 TEU. The LT thus provides EUCO with a range of tools and competences in FP to define the international identity it wishes to project (Craig & Burca, 2021:560). Despite EUCO being the EU's agenda setter and highest decision-making body, discussions on a permanent EUCO Presidency were not as attritious as other top-ranking posts. Lisbon drew fairly modest competencies, the EUCO President being virtually indistinguishable from a chairperson. In fact, its selection procedure is akin to that of a chairperson, and accountability is exclusively toward EUCO itself (Closa, 2011:121).



While lacking voting or legislative rights (Art. 235 TFEU), EUCO's President is an *organe d'impulsion* providing visibility, legitimacy, and bargains on sensitive issues. Yet, precisely due to concentrating the top figures of all MS, EUCO's agenda is primarily filled with internal matters, and while its President is permanent, EUCO's leadership impact is rarely permanent, due to rarely convening and not being conferred larger powers by the LT (Keukeleire & Delreux, 2014:63).

Subtle but noteworthy changes concern COREPER and the GAC preparing conclusions prior to EUCO meetings, and the size reduction of delegations and agenda points. Yet, this only eliminates inefficiencies in EUCO's work, it doesn't add to its powers. It would seem as though its main goal is to be an institutional arbiter. However, given EUCO's impetus role, the institutional design is prone to hierarchical conflicts among all the top posts (Closa, 2011:122). Thus, there has been a historic trend of limiting the number of people attending EUCO meetings to facilitate negotiations and settle package deals, releasing several dossiers at once, mitigating divisive topics *i.e.*, those prepared by COREPER 2 and PSC (Costa & Brack, 2014:62).

Furthermore, the selection criteria of EUCO's President tends toward a lower profile consensus building leadership (Keukeleire & Delreux, 2014:63). Selection of EUCO's President, contrary to that of the EC President and HR does not need EP approval, and reflecting the intent of Art. 244 TFEU, attention is paid to geographic, demographic, gender and political balance. Yet, neither the Treaties nor EUCO's RoP specify who is officially tasked with the nomination of EUCO's president. For Van Rompuy it was executed by the CEURP; when considering his successor, Van Rompuy proposed Tusk, upon his reelection, again the CEURP took the lead; when considering his successor, Tusk himself conducted the process. Unlike in previous cases, the 2019 election of the EUCO, EC, ECB presidents and the HR was agreed in a package deal in a special EUCO meeting. Curiously, while Art. 15.6 TEU prohibits EUCO's President from holding national office, nothing forbids them from holding another EU office. In fact, seeing as neither hold voting rights in EUCO, Juncker proposed the merger of both the EUCO and EC Presidencies into a double-hatted presidency facilitating representation (EPRS, 2022).

### Section III

#### CEU

There is a gap between setting strategic impetus and execution, for the latter the CEU and EC take center stage. Rome originally tasked the CEU with assuring the objectives set out in the Treaty were achieved (Art. 145 EEC). This evolved with the emergence of two rival powers: the EP, constraining its legislative power; and EUCO, constraining its executive power (Schutze, 2015:20). Consequently, the GSC maintained its centrality, but under the LT the masters it serves multiplied: EUCO, the CEURP, and HR, increasing its coordination challenge (Vanhoonacker, 2011:153).

Intergovernmental *per se*, the CEU is composed of MS ministerial representatives (Art. 16.2 TEU). Thus, CEU configuration depends on subject matter. However, the LT only specifically cited two configurations (Art. 16.6 TEU). The GAC is tasked with ensuring consistency of all other configurations, and the FAC is tasked with elaborating the EU's EA according to EUCO guidelines and ensuring its consistency (Schutze, 2015:22).

The CEURP was envisioned for a Common Market of 6, not for a Union of 27 and counting. The LT attempted to deal with the gap in leadership and continuity through the HR, entrusting the post with FP implementation. The LT thus elevates the HR entrusting it with FAC chairmanship, further strengthening consistency with the trio system of the three CEURP. In theory, this system would allow and respect the CEURP's priorities whilst mitigating abrupt shifts and promoting the use of the HR as a vector in their pursuits (Vanhoonacker, 2011:140).

The CEU being the CFSP's main decision-making body, FAC covers all stages of policymaking, and with EUCO ensures MS control over CFSP/CSDP. However, most decisions are not taken by FA ministers, but the many CEU substructures that prepare their meetings. Indeed, FAC only discusses A-points, issues already agreed on at lower levels *e.g.*, COREPER or PSC. In fact, between the congested agenda and the many actors at play (ministers, senior diplomats and advisors, Commissioners and EEAS officials), debates are very limited, genuinely occurring informally (Keukeleire & Delreux, 2014:66).

Due to the CEURP's broad range of tasks, they are assisted by the GSC which has long term organizational experience and manages the more than 150 committees and Working

Parties that compose the preparatory bodies (also assisting EUCO) (CEU, 2022). Thus developed a web of comitology. From Rome's onset COREPER is composed of permanent MS ambassadors supporting the CEU's work. Divided in COREPER 1 and COREPER 2, COREPER is the CEU's most senior preparatory body. While COREPER 2 covers the FAC, GAC, ECOFIN, HJA and all work done by lower committees, COREPER 1 covers less sensitive dossiers (*ibid*:68). COREPER is vaguely defined in Arts. 16.7 TEU, 240 TFEU, and 19 CEU RoP. All items of a CEU meeting are examined by COREPER in advance with the aim of reaching an agreement to be submitted for CEU adoption. When COREPER reaches agreement, these become A points, otherwise becoming B points requiring further discussion (Schutze, 2015:23). To deal with this workload of prep and implementation work, COREPER is in turn assisted by other substructures composed of MS representatives (Gatti, 2016:244).

Despite D2010/427 not explicitly mentioning CEU-EEAS relations, the CEU may hierarchically exceed the EC *vis-à-vis* the EEAS. While the EEAS is independent from the CEU (Art. 1 D2010/427), the HR conducts CFSP under the CEU (Art. 18.2 TEU), implying the CEU and its prep bodies may instruct the EEAS. While especially apparent given the PSC (a CEU body), controls crisis missions' strategy; broadly, the EEAS cannot ignore CEU/prep bodies' indications both in non- and CFSP areas. While the EEAS may set an issue on its agenda, there is no surety the CEU will be swayed. The CEU may impose amendments or block EEAS' decision-making process at any stage (*ibid*:170).

CEU comitology is also a control mechanism by which MS representatives know about decisions *ab initio* and block implementation *ad fontem* pre-FAC level. While EUCO D2009/908 set CEU prep body chairmanship (the EEAS chairing almost half), given unclear prep body chairmanship regulation in D2010/427, the CEU weighs heavy over the 100+ lower-level Working Groups. It may also sanction the EEAS, *e.g.*, D2009/908 was legally based on Art. 236 TFEU, meaning a QMV may negatively reset it. Further, CEU budget leverage may surpass the EC's, given their last say along with the EP (*ibid*:171).

The GSC is also organized by DGs, one of which inherited ex-RELEX's acronym playing a role in EA, maintaining regular contact with MS capitals, embassies and permanent representations to IO (Vanhoonaeker, 2011:144). In true maintenance of consistency, there have only been 8 GSC SG, only 3 of which have held their post for less than 7 years. The first holder, Christian Calmes, assumed the post for 20 years, while the current SG, Tranholm-Mikkelsen, has overseen the GSC for 7. The CEU RoP make no mention of the duration of the SG's mandate, simply stating the CEU shall appoint the GSC's SG by QMV (Art. 23 CEU RoP).

Other than dealing with bureaucratic practicalities, the GSC chairs several committees, Working Parties and Working Groups in the substructure comitology, and is responsible

for COREPER's archives and each CEU configuration's meetings (CEU 2022). The EEAS also integrate the CEU, assisting the CEURP and chairing some prep bodies (Gatti, 2016:244). Here things are disorientating. At the Working Group level, a broad rule is that geographic prep bodies, CFSP horizontal bodies and CSDP bodies are chaired by the HR or a representative (*id.*, 2011:150).

However, several are the exceptions where the CEURP continues in charge *e.g.*, the Foreign Relations Counsellors Working Party, Terrorism Working Party, the application of antiterrorism measures Working Party, Consular Affairs Working Party, Public International Law Working Party, Law of the Sea Working Party, as well as COREPER 2. Additionally, the EUMC and EUMC Working Group have an elected chair (CEU 16517/09).

Pre-LT, COREPER, PSC and prep body chairmanship was held by CEURP representatives. Yet, post-LT primary law does not regulate where Art. 16.9 and Art. 18.3 TEU overlap on prep body chairmanship. Art. 4.4 D2010/427 merely states the HR chooses the chairs of prep bodies chaired by an HR representative according to *previous* CEU Decisions. While such Decisions do exist, based on Arts. 16.9 TEU and 236.b TFEU, they raise legal issues of competence since they enable adoption of acts regarding presidency of CEU configurations, *except FAC*. By extension of properties, it would seem at least unreasonable, and at most unlawful, to regulate FA prep bodies based on primary law excluding FA. The reasoning is thus political since these were decided before the EEAS setup to avoid negotiating with the EC (*id.*, 2016:248). This eagerness to avoid the EC is exhibited by the fact that CEU D16517/09 and CEU D2009/908 are mirrored in content and institution of origin yet were passed two days apart.

Crucially, these Decisions raise issues of essence. COREPER is chaired by the CEURP, and PSC by the EEAS. This seems reasonable given COREPER operates beyond CFSP, and PSC only in CFSP. However, after EUCO D2009/881, CEU D2009/908 sets arbitrary allocations: the CEURP retains chairmanship of Trade and Development bodies, while the EEAS chair geographic and CSDP related bodies; horizontal bodies are even more odd, with CEURP chairing those on International Law, Consular Affairs, Terrorism, and one on CFSP institutional issues, with the remaining chaired by EEAS (*id.*, 2016:248). Development points a glaring case. The EC has DG DEVCO, the EEAS has its own Development departments, and the CEU also has Development bodies a clear example of overlapping competences, mandates and duplication of resources and material.

Thus, through a closer reading of secondary law and CEU RoP, HR coordination of FP related portfolios is not as straightforward as the LT makes it seem. There are salient differences between policy areas, notably, the CEURP continues chairing both the Working Group on Trade and Development. In fact, even when these matters come up in FAC meetings, it is the CEURP who chairs. In practice meaning that despite the HR

coordinating the FP dossiers cross-thematically, the GSC SG is the CEURP's main interlocutor. The exception is only when larger MS assume the CEURP, being less reliant on support (Vanhoonacker, 2011:151).

Thus, though the GSC is tasked with an administrative role while the EEAS focus on content and policymaking, *de facto* the lines are blurred. Admittedly, the GSC role in CFSP diminished with the advent of the EEAS, with close to 95% of GSC CFSP staff transferred to the EEAS. Yet, if on one hand this may lessen its burden, given EEAS officials' mandate is much longer than the CEURP's, avoiding having to start from scratch every semester (*ibid*:152); it also allowed for a more intimate GSC-CEURP dynamic vis-à-vis the EEAS-FAC dynamic. In fact, though Art. 2.1 D2010/427 stems from Art. 18.3 & Art. 27.3 TEU, not only did it acknowledge the GSC's privileged relationship with the CEURP without prejudice, but also without clearly distinguished mandates (Gatti, 2016:239). Pointing not only to the GSC's significantly greater influence to affect decisions versus the EEAS, but crucially, more overlapping mandates.

OI Regime Theory exhibits States' active attempts at directing OIs action to their interest. The EEAS are no exception, specially with larger MS' active FP, thus requiring geographic balancing of top bureaucratic posts. Yet, if an official ultimately owes their position to their nationality, questions of allegiance and autonomy rise. MS Diplomats are especially pronounced in EU Delegations' staff (45%) (*ibid*:177).

Most notably in the EEAS, being composed not only by 33% GSC officials and 33% MS diplomats, but also by SNEs (Art. 27.3 TEU). The CEU argued SNEs as indispensable given the EEAS need for officials from MS' Ministries of Defense and Home Affairs in CSDP, with SNEs to CPCC, CMPD and SITCEN having added benefits. MS are actively involved in the EEAS top posts' recruitment and vacancies following the HR's annual EEAS report. Yet, D2010/427 set no limit to the number of SNEs. Though HR D12/8 (amended by HR D14/01) set SNE regulation, no quantitative limit exists (*ibid*:178).

This has qualitative repercussions. The *limited* number of EEAS SNEs (Art. 6.3 D2010/427) now exceeds the number of MS diplomats. This cluster of MS officials led to high expectations *i.e.*, status. MS diplomats occupy a bulk amount of top posts *e.g.*, 40% of HoD. A ridiculous amount of managing positions were created to accommodate the influx of high rank diplomats. The EEAS has twice as many senior management staff as its pre-LT structures. Thus, it's hard to argue against stereotypes of MS staff being a nuisance to EA, or EU bureaucracy being a static monolith, notably when bargaining top positions show signs of national inheritance (*ibid*:180).

## Section IV

### EC

Three core principles guide EU Law: the Principle of Conferral, the EU must only act in the remits of the Treaties; Subsidiarity, in areas not of exclusive competence, the EU may only act when the objectives of a proposed action cannot be properly achieved by MS alone, better achieved at EU level; and Proportionality, EU action cannot exceed what is necessary to achieve the objectives of the Treaties. Underlying these principles is the doctrine of implied powers *i.e.*, Treaty negotiators could not have granted some powers to the EU, without having implicitly accepted to endow it with powers that are intimately linked to them (Costa & Brack, 2014:175).

Though depicted as a bureaucratic monolith, originally the EC was acutely fragmented, power widely dispersed. Its President limited both in resources and political influence, even concerning senior appointments. Commissioners and DGs were sufficiently unrestricted in autonomously pushing their own agenda. Only since the turn of the century has the administrative dynamic turned centripetally toward its President. Despite now the EC SG being accountable to the EC President, its main *raison d'être* was to ensure the Principle of Collegiality. Thus, the EC President had little control in binding the College to a shared vision. Only two legends, Walter Hallstein, founding father and first EC President, and Jacques Delors, were greater than *primus inter pares* (Kassim, 2017:5).

Landmark EC empowerment began with the AT. Not only did it amend Rome Art. 163, cementing the EC under its President's political guidance, but also elevated the EC in CFSP: through Art. J.4.4 ensuring the EC's role in implementation of CFSP Joint Actions; Art. J.10 synchronized MS diplomatic and consular missions with EC delegations; and Art. J.17 fully integrated the EC in CFSP. Meanwhile, Nice's Art. 214.2 empowered the EC President with College nominations, and Art. 217 not only bolstered AT amended Art. 163, but also allowed EC reshuffling at its President's discretion, appointment of VPs, and dismissal power. LT Art. 17.6 then furthers said dismissal power to its own discretion. Thus, the EC President's unequivocal authority over the EC is recent (Kassim, 2017:7).

Though the CFSP is *par excellence* intergovernmental, it is far from being what MS' separate FP boil down to. The ESS and the EUGS reveal Brussels-based actors' centrality

in strategy making (Morillas, 2019). If EUCO is the ignition, the EC is the motor. *Sui generis par excellence*, central to the Community Method, and the main interlocuter of governments and special interest groups. The opportunity to attend EUCO and EU sub-units grants the EC President considerable leverage in framing policy (Pietzko, 2015:77). Under Art. 17.7 TEU, the EC President is proposed by EUCO QMV, accounting for the outcome of the EU elections (Nice dropped EUCO's unanimity requirement to enable selection of a stronger personality to ensure leadership), and then elected by the EP by simple majority (Costa & Brack, 2014:68).

The EC administration is headed by the EC SG, proposed by the EC President and agreed on principle of collegiality, tasked with interdepartmental coordination. The current holder, Ilze Juhansone, appointed by VdL, had previously been EC DSG for Interinstitutional and External Relations. Strikingly neither the TEU nor TFEU reference the EC SG, despite mentioning the GSC SG, only referenced in the EC RoP. In a rare example of continuity and consistency, there have been only five EC SG from 1958 to 2015, having no term limit (Costa & Brack, 2014:72).

Critical for all policy areas, the EC-EEAS dynamic is vital and information exchange is crucial. Broadly, COREU is institutionalized since 1973, facilitating exchange of confidential info among CFSP decision makers. Whilst initially only accessible to MS, the EC and GSC soon became essential inclusions. To ensure consistency of EU EA, the EEAS are bound by a Duty of Mutual Cooperation and Consultation with MS' diplomatic corps, the EC and GSC (Art. 3.1 D2010/427). This Duty is held by two platforms: the ISG & ISC. An ISG is a group of EC services, formally set up for continuity of coordination of an unchanged objective throughout its lifecycle. The ISC is an obligatory inter EC DG procedure on any document pre-College submission. There are more than 250 ISG, where EC officials meet under a configuration-dependent chairmanship – many with external dimension. ISC starts within CISNET, often post-ISG, usually signaling an advanced drafting state. The debates are not binding but are crucial for lower level coordination. EEAS connection to CISNET is obliged by Art. 18.4 TEU, thus aware of all non-CFSP policy with external dimension before reaching College voting phases (Gatti, 2016:209).

Though it is encouraging to see MS' positive acknowledgement of the Duty of Mutual Cooperation and Consultation (Art. 32 TEU) and Principle of Sincere Cooperation (Art. 4.3 TEU) in an area hardly CJEU-enforceable, some legal issues soon arise. While EEAS participation in this prep format as if any other EC department helps its consistency making role, refuting the interpretation that the LT and D2010/427 effectively made an EC 2.0 for FP also becomes harder. The EEAS inclusion as COREU manager was a turning point, seemingly unlocking its full potential with a significant increase in input. In addition, the EEAS set up SITROOM, a division for crisis info exchange, monitoring developments worldwide, acquiring info from MS, Delegations, CSDP missions, EU

bodies, SatCen, and OPI, and distributing info among EEAS departments. However, SITROOM's legal issue concerns the ERCC. The ERCC is a DG ECHO department, which equally monitors crisis worldwide, exhibiting another case of resource and function duplication and overlapping mandates (*ibid*:221).

Moreover, given the HR is bound by EC procedures (Art. 18.4 TEU), and the EC President may structure and reshuffle responsibilities during its term (Art. 248 TFEU). One may argue, the EEAS are subject to this procedure by extension of properties. If practice confirms EEAS departments work at the same level of their EC corollaries, it also confirms this interpretation. This impacts the EEAS to the lowest detail, both justifying and complimenting the reason why the EEAS have seen repeated restructuring (Smith, 2017:255), even if indirectly by needing to adapt to the distribution of EC Departments' responsibilities (Gatti., 2016:257), disrupting both its administrative stability and *esprit de corps*. Indeed, the most consequential EA policies are under EC DGs' responsibility *i.e.*, Trade, DEVCO, ECHO, DEFIS, and NEAR. Moreover, while the EEAS have geographic desks (Art. 4 D2010/427), so too do EC DGs *e.g.*, both EEAS and NEAR have units dealing with Turkey and the Western Balkans. This duplication of work is notable in crisis response and diplomacy as well (*ibid*:258).

Despite the many boundary-related turf wars and duplication, those considered most contentious are EC-related. Despite only having initiative when acting jointly with the HR, the EC controls many CFSP issues. Blurring lines in Arts. 3 & 6 TEU, DGs are often reshuffled in ways that encroach the CFSP, such as DEFIS (the EC President's most recent encroachment), DG Trade, DEVCO, ELARG, ECHO, or even FPIS which was set up in direct response to the EEAS creation, covering crisis response projects, EOM, public diplomacy, CSDP civ missions, CFSP inter-institutional relations, and sanctions. Many, if not all, DGs have a FP dimension *e.g.*, Environment, Competition, RDI, Energy. In theory, the HR shall coordinate cross-thematic FP dimensions to ensure consistency, coherence and continuity (Art. 18.4 TEU). However, despite not having legislative approval powers, the EC's power of initiative and negotiation (Arts. 207 & 218 TFEU) are very powerful in the context of external dimension of internal policy, since external and internal politics mutually influence each other - the ERTA Principle being case in point of *in foro interno, in foro externo* (Case 22/70). This gains more relevance when considering the EU's label as a Normative Power on the world stage (Keukeleire & Delreux, 2014:75).

While Declaration 14 states CFSP provisions do not endow the EC with new powers, on one hand the EC exercises budgetary power (Arts. 314 & 317 TFEU), thus, when a CFSP action requires use of external policy instruments *e.g.*, sanctions or aid, or funding by the CFSP budget, the EC has significant influence over implementation; on the other, the EC need not rely solely on budget leveraging to impact implementation, since its technocratic



## Framing CFSP

expertise is crucial for both CEU and EEAS. Yet, this often sparks turf wars among the EC's technocracy, the EEAS and the GSC (*ibid:77*).

## Conclusion

Having a bipolar legal personality led to inefficiencies spurred by internal and external confusion, thus, Art. 40 TEU surgically amends ex Art. 47. CFSP provisions were enhanced while preserving their substance, separate procedures not questioning the EU's single legal system. Significantly, constructive unanimity, the *Passerelle* Clause, and PESCO mitigated Unanimity requirements and intergovernmentalism.

Despite the consensus on increased investment on CFSP, the EU's security was still pegged to the WEU. Thus, the HR was originally triple hatted: CEU SG, HR for CFSP and head of the WEU. The original HR had a huge administrative burden, not only being under resourced and understaffed, they had to deal with overlapping competences with DG RELEX and the CEURP's inconsistency. Nevertheless, the return on investment was visible. Lisbon thus sought to better accommodate the HR within the CFSP structure. Moreover, the LT consolidated FP by codifying an EU mission (Arts. 3 & 21 TEU).

*Omni* hatted, the HR was now RELEX Commissioner (the EC VP hat), FAC Chairman, and head of the EEAS and EDA, along with several other responsibilities, and called to ensure coherence, consistency, visibility and continuity. This would imply being endowed with powers to live up to the expectation, yet accountability issues emerge, since despite being called to ensure compliance (Art. 24.3 TEU), sanctions are not provided. Indeed, Lisbon mentions *coordination* more regularly than *conferral of power*. Lisbon's provisions are nebulous on the HR's autonomy, role and hierarchy. Regarding visibility, the trident representation dilutes visibility compared to the SG/HR. Though consistency was improved in having right of initiative and presiding several bodies, the task overload is overwhelming, made worse by not being allowed delegation, a downgrade when compared not only to other top jobs, but the SG/HR. It would seem as though now the HR enjoys less autonomy despite having more responsibility.

Equally, the CSFP Regime's complexity exponentiated. The EEAS, meant to be an extension of the HR coordination, are constraint by virtually all other CFSP bodies and top jobs. Mirroring the HR, lacking prerogatives to ensure vertical consistency, the EEAS lack prerogatives to enforce horizontal consistency. Moreover, inefficiency ensues in duplication of mandates, overlapping competencies and competitive bureaucratic rivalry – whereupon the EEAS lack pressure resistance. Where they may hold some advantage comes ironically in a very intergovernmental body – PSC. However, it is the excessive multiplication of bodies and actors involved and diminishing marginal returns that makes output so inefficient and ineffective.

## Title II

### On CSDP

#### Introduction

WW2 sparks the genesis of EU security and defense. The 1948 BT set the WEU, predating NATO, it provided for military cooperation and a mutual defense clause. Under its original Art. IV, if a party is victim to an armed attack, the others will afford *all* military and other aid in their power. Yet, post-EDC failure, defense became taboo and WEU provisions were organized within NATO framework (Keukeleire & Delreux, 2014:172). Indeed, the 1954 MBT Art. IV established close WUE-NATO cooperation, explicitly setting its reliance on NATO (Lindstrom, 2017:16).

While the EDC failed, the EPC, following the Davignon Report, was precursor to the MT CFSP. MT Art. J.4 pioneered in predicting a common defense *might* arise. It would take the end of the CW, the Balkan wars, and a UK U-turn, for an EU defense policy to emerge with crisis management competences (*id.*, 2017).

The AT aimed to fill the CFSP-EPC gap in common actors and instruments pioneering the HR and ESDP. Through access of WEU operational capability to conduct the Petersburg Tasks, St Malo, ESDP's catalyst, led to sundry EUCO meetings to detail the Tasks, and Berlin Plus provided the EU with NATO assets. In just a few years the military sphere was the quintessential CSDP element. For the first time since 1948, MS overcame both Atlantisist vs Europeanist, and Civilian vs Military dichotomies, with Solana at the helm. Yet, these were frail responses, ESDP *ultra*-Treaty development. The HR was most impactful change (Keukeleire & Delreux, 2014:172).

This Title sets to analyze CSDP, briefly highlighting the legal evolution of security/defense provisions, and subsequently analyzing CSDP's bodies, in light of *de facto* practicalities.

## Chapter I

### Legal Evolution

9/11 and terrorism on EU soil lit a new *Zeitgeist*. Yet, together with the Afghan and Iraq wars, the dynamic was both divisive and invigorating (*ibid*:152). While the TCE failed, much permeated Lisbon: making ESDP CSDP, formalizing its setup; a mutual assistance clause (Art. 42.7 TEU); a solidarity clause (Art. 222 TFEU); EDA (Art. 45 TEU); and Art. 43.1 extended the Petersburg Tasks (Lindstrom, 2017). Yet, initial implementation disrupted rather than facilitated or improved CSDP. Paradoxically, while CSDP entered Treaty framework it also lost vital drive, as its main endorser, France, rejoined NATO under Sarkozy (Keukeleire & Delreux, 2014:58).

Still, it would be intellectually dishonest to neglect LT improvements: conflict prevention as a CSDP goal; establishing EU legal personality, allowing the EU negotiate and sign international agreements and join IOs; Title IV's enhanced cooperation; Title V's constructive abstention, allowing for coalitions of the willing to take forward leaps; improved continuity with PSC permanently chaired by an EEAS official rather than CEURP; the HR now serving as formal institutional link (Smith, 2017); MS duties *e.g.*, Art. 24.3 TEU, under which MS must support CSFP unreservedly, and thus CSDP by extension of Art. 42.1 TEU; and Art. 42.3, under which MS shall improve their military capabilities (Duke, 2018:158).

LT Art. 42 makes CSDP integral to CFSP, endowing operationality to EA in, *inter alia*, conflict prevention and counterterrorism; also mentioning gradual definition of a common defense, which *will* lead to a true defense union when EUCO unanimously decides. Further empowering the HR, CSDP decisions are adopted by CEU unanimity, following either HR or MS proposal – despite unlike CFSP, absent the *Passerelle* clause (Art. 42 TEU). Art. 43 clarifies CSDP objectives, endowing the HR competence to coordinate civil and military aspects of Petersberg missions in link with the PSC. Moreover, cooperating with EDA, MS commit to improve their defense capabilities, with EDA

providing info and aid to reinforce tech and industrial capacity. Crucially, Art. 46 TEU allows PESCO in CSDP with CEU QMV (Coutinho & Camis o, 2016).

Moreover, the LT brought some pragmatism to CSDP, namely regarding Differentiation and Capability. Doubtlessly, Lisbon stands out in defense differentiation. Debates on differentiation are not new, captioned as *multi-speed* or *varied geometry*, emerging when some MS wish to deeper integrate in certain areas. Among legal scholars this enhances rather than threatens integration, seen as experimentally valuable and open to MS future participation. Thus, the LT aims to legalize and control fragmentation. In allowing flexibility within EU framework, differentiation *ultra-Treaties* is minimized. The MT made opt outs structurally manageable *e.g.*, UK opt out from the Charter of Fundamental Rights; Denmark opt out from FSJ matters; or even UK opt out from FSJ however opt in in specific cases *e.g.*, Europol. Lisbon further details how enhanced cooperation should carry out, specifically in economic governance and defense. In defense, LT Art. 42.6 & Protocol 10 allow PESCO, remaining intergovernmental as all CSDP (Craig & Burca, 2021:379).

Differentiation is a reverse opt out: few MS advance, whereas enhanced cooperation allow minority disagreement in favor of majority participation, respecting both the Last Resort and the Openness Principles. MS accept these mechanisms, such that all MS participate in at least one enhanced cooperation (*ibid*:378). LT recognition of capability differentiation is positive, foreseeing flexible options. First, when deciding a CSDP mission, the CEU may entrust its implementation on a group of willing and capable MS linked with the HR (Art. 44 TEU); further, PESCO is an option for MS with greater capabilities and more binding commitments (Arts. 42.6 & 46 TEU); moreover, EDA brings MS together in joint capability development (Art. 45.2 TEU). Yet, despite these vectors, there has been voluntary MS cooperation in other configurations *e.g.*, the 2010 DDSC (UK & France), the Weimar Triangle (Poland, Germany & France), Eurocorps (France, Germany, Spain, Belgium & Luxemburg), Admiral Benelux (Belgium and Netherlands), or EATC (France, Germany, Netherlands, Belgium) (Keukeleire & Delreux, 2014:174).

Historically, MS have acted parallel to, or independently from EU initiatives. Defense cooperation tends to be held outside EU framework, the reason, enshrined in the Treaties, is NATO. Yet, MS also prefer bi/multilateral cooperation even when NATO is not involved. Battlegroups are a case in point. After the ambitious but ultimately failed HHG, Battlegroups attempted a more modest vector for CSDP operability. Usable since 2007 yet unused. Nevertheless, their disuse hasn't impeded EU military deployment, either by Europeanization of NATO forces, *Ad-hocism*, or making troops available outside CSDP framework, obeying non-permanence of EU forces and volunteer nature. Europeanization occurred when Concordia replaced Allied Harmony, or EUFOR Althea replaced SFOR; *Ad-hocism* may occur by MS or HR initiative *e.g.*, Artemis, EUFOR DG Congo, EUFOR

Chad/RCA, or EU NAVFOR Somalia; and Libya 2011 illustrates the coalitions of the willing option, outside CSDP framework for the UN or NATO. While flexibility and bottom-up cooperation are advantages, uneven burden-sharing is a major hurdle in force generation, coordination and funding (*ibid*:178).

Commendably, the LT brought flexible CSDP provisions, extending from: multinational forces, *e.g.* Eurocorps (Art. 42.3 TEU); military actions by coalitions of the willing (Art. 44 TEU); PESCO (Art. 46 TFEU); and enhanced cooperation (Art. 20 TEU, Art. 326-44 TFEU). However, Defense greatly relies on practicalities: individual capabilities, willingness, and finances. Post-Brexit, such issues mostly fell on French shoulders, as German military leadership is taboo. Given the old reluctance towards shared defense frameworks, legal fragmentation seems necessary, much like EMU or Schengen. A *Defense Schengen* has been theorized, wherein like-minded MS would *ad hoc* share military capabilities and resources, with the Openness Principle and the possibility of being formalized in Treaty (Craig & Burca, 2021:392).

While not a *Defense Schengen*, anticipating differentiated integration and aiming to avoid *ultra*-Treaty cooperation, the LT opens PESCO to defense, and under Protocol 10, the HR is fully involved, despite not setting rules for its involvement. Notably, conditions are much softer than normal PESCO. PESCO in defense only requires CEU QMV, whereas other PESCO require CEU QMV and EP consent, or even CEU unanimity for CFSP initiatives. Further, LT Art. 46.5 allows for unilateral voluntary withdrawal. There is also accountability since participating MS may vote my QMV to suspend a MS who's failed commitments (46.4 TEU). Comparatively, enhanced cooperation, is based on the Openness Principle (Arts. 328.1 & 330 TFEU) *i.e.*, MS are unable to keep or suspend MS from participating. Moreover, despite being intergovernmental, regulated in a Protocol of its own (10), the EC has aimed at adding some supranationalism to PESCO, particularly by the EDF. Its success is still to be seen, yet while Brexit is negative due to loss of capabilities, it is positive since the UK had been CSDP's main thorn (*ibid*:393).

However, allowing for joint military action is insufficient to achieve CSDP effectiveness, or a common culture in strategic thinking, deployment, and use of force. While overall the EU is greater than the sum of its parts, CSDP-wise it seems as though it is less than the sum of its parts (Morillas, 2015:75). It is thus pertinent to address the capability issue. While *capabilities* is often used regarding CSDP, it has no agreed definition. Duke (2010) proposes viewing it as the capacity to articulate organized resource deployment routines to achieve goals, while resources may be tangible or intangible. This definition is useful in avoiding a quantitative bias of capabilities since intangible elements like training and systems of use can improve quantitative elements. There is also the issue of whether these capabilities are available, which is likely in CSDP. Additionally, despite the operational Principle of Single Set of Forces, there is ample evidence of system duplication across MS, the EDF's impact yet to be seen (Duke, 2018:154).

The MT introduced provisions on defense and security through the CFSP. Born during the fall of Yugoslavia, to deal with the recurring crisis was a herculean ambition. Having no military capabilities, the EU was reliant on the WEU, as per MT Art. 17.3. However, the WEU was a poor capacity provider. The EU & WEU's underwhelming role in the region led to St. Malo. Despite the WEU caving into CSDP, it remained reliant on MS resources. Art. 42.1 TEU states CSDP shall provide the EU with operational capacity. This would raise a question regarding MS obligation under EU Law to place capabilities at the EU's disposal for the execution of Petersburg tasks were it not for the same article stating that said execution is done using MS capabilities. Yet, while LT Art. 42 requires CSDP decisions by CEU unanimity, decisions merely state the mandate, OHQ, commander and mission objectives. Force generation is an entirely separate process dependent on MS command structures *i.e.*, potential MS parliament red lights. Thus, despite unanimity, MS are not obliged to provide the necessary capabilities, and may be impeded from such by their parliaments even if willing, and since the ECJ has no CSDP jurisdiction, commitments are only held to political accountability (*ibid*:159).

Nevertheless, there have been several attempts both pre and post LT at mitigating the capabilities gap. Quite innovatively, PESCO, established by CEU D2017/2315, with compound value of commitment, accountability and permanence, stands out compared to earlier efforts. However, born by LT Art. 42.6, PESCO instantly entered hibernation. Only post-EUGS, opening the floodgates of EU defense initiatives (CARD, MPCC, EDF), did 23 MS in late 2017, join PESCO by a common notification (not.171113), in the backdrop of Crimea, terrorist attacks, migration crisis, Brexit, and US FP shifts. Set as ambitious, binding and inclusive, PESCO is a legal framework aimed at fomenting MS cooperation in defense capability development and operations. Joining PESCO entails various commitments aimed at raising defense spending, joint capability development, and making military assets available for operations. PESCO's framework is twofold. First, the binding commitments: MS cooperation pledges regarding incremental defense spending, availability of deployable units, or development of joint equipment programs within EDA. Second, projects: all commitments being binding, and PESCO actions being either capability or operation driven, PESCO MS must participate in at least one project. The HR, EDA and EEAS are tasked with regular assessments of MS commitments and projects. (Fiott, 2017:7).

CSDP Treaty provisions significantly snowballed from 1997-2007. With the LT, previously restrictive provisions became more enabling, PESCO a case in point. With 6 non-NATO MS, Denmark's opt-out, and frequent blockings, there was a sense of necessity to overcome legal obstacles. The LT allowed for legal amplitude, distinguishing text from context in an area with little *acquis*. In a truly *sui generis* manner, the LT facilitated CFSP action without QMV (*ibid*:11).

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The AT relaxed CFSP unanimity through a constructive abstention clause (now Art. 31 TEU), without contracting associated costs. Yet, only once was it activated, (EULEX Kosovo), meaning MS still prefer acting consensually on CFSP. However, in 1994 the German CDU/CSU had written a paper arguing for *multispeed* integration to cope with a heterogeneous EU, sparking debates on integration based on an *avant garde* core that would test the limits of integration. Indeed, the EMU is a case in point for precedent, with terms of *closer* or *enhanced* cooperation entering Treaty vocabulary (*ibid*:12).

CSDP's launch following St Malo made WEU provisions redundant, this is not irrelevant since MT Art. J7 and Nice Art. 17 transferred relevant defense provisions to it, despite only 10 MS participating in it and lasting until 2011. Moreover, at the time, closer cooperation between  $\geq 2$  MS under WUE framework was not discouraged, putting into perspective PESCO's current minimum requirement of 9 participating MS (Art. 20.2 TEU), and WEU functions ultimately transferred to the EU (*ibid*:16). MS need to feel invested, intergovernmentalism is not the issue.

Regardless, the same issues on defense remain, with NATO MS referring to it for common defense, and asymmetric levels of ambition or military capabilities.

PESCO built upon the TCE's innovation on structured cooperation on defense in its Art. I 40.6 and Art. III 213. Inspired by EMU, it emphasized pre-defined functional criteria for operational participation, subject to which any MS could participate. Envisioning a *defense Eurozone*, the TCE pushed for flexibility in decision making and military action, as well as the EASRA, precursor to EDA (Art. I 40.3), and basis for the LT's solidarity clause (Art. I 40.7 & III 214). Indeed, Lisbon included these almost *verbatim* in Art. 42.6 & 46 (*ibid*:18).

Yet, despite PESCO becoming more flexible regarding capability, performance and funding criteria, neither MS nor institutions pushed for it in the post-LT conjecture. Marred by a financial crisis and the flustered EEAS setup, there was no immanent incentive to prioritize defense. The St Malo push reverted to bilateral cooperation, with the Lancaster House Treaties and the Weimer Triangle initiatives both *ultra*-PESCO. In fact, the last 2013 EUCO meeting, devoted to defense, did not mention PESCO (*ibid*:20).

Moreover, 2014 coincided with a new EC College, Crimea, terrorist attacks, and a migrant crisis revamp, and just around the corner were the shocks of the Brexit referendum and Trump's election. However, while Mogherini successfully pushed the EUGS, only after overcoming refrain between foreign and defense ministers (the latter less inclined than the former due to EDTIB protectionism) did the conclusions of EUCO's last 2016 meeting mention PESCO as means to achieve EUGS ambitions. Mogherini's approach thus focused on inclusion, future commitments, and benchmarks rather than strict criteria (*ibid*:21).



Still, PESCO's Protocol 10, referring to Art. 42.6 TEU, states it shall be open to any MS that intensively develops defense capabilities, towards the supply of combat units for missions structured tactically as a battle group. Nevertheless, MS have diverged strongly over ambition vs inclusivity, fueling debates over how operational a mission should be, and thus how high PESCO should aim, creating an existential question: if minimum standard criteria are too inclusive to the point where missions are inoperable through PESCO, why bother? (*ibid*:29).

Furthermore, while the use of EU Battlegroups was envisioned, they have never been deployed. In practice the preferred vectors for military operations have been EUROCORPS and EUROGENDFOR, which are not a PESCO project. EUROCORPS was born under the WEU, and EUROGENDFOR by the Treaty of Velsen. They are multinational forces under Protocol 10 Art. 1.b, and they have participated in NATO and CSDP missions, however the closest either gets to PESCO is EUROCORPS, thanks a project dedicated to developing next-gen aircraft and tanks (The European, 2021).

PESCO pledges on availability of deployable units is not exactly new. The 2003 HHG aimed for a deployable military corps-size capacity of 50K–60K personnel to respond autonomously to international crises. The intent was to be fully deployable within 60 days, and within this to provide smaller RRF available and deployable at *very high readiness*. However, Battlegroups have remained unused since inception (Reykers, 2017:2).

In 2003, when conflict erupted in the DRC, the UNSC authorized temporary deployment of an Interim Emergency Multinational Force in Bunia linking with MONUC, allowing it to take all necessary measures. In response, the EU rapidly deployed Operation Artemis: 1800 troops provided by 12 MS, with France providing OHQ as framework nation. Seen as a success, Artemis served as template for the projected RRF. In its mold, Battlegroups consist of 1500 troops deployable within 15 days. However, early on gaps emerged between the concept and MS commitment (*ibid*:4).

In tune with the Petersburg Tasks, MS agreed Battlegroups should not be strictly focused on a single duty to be able to reach the full range of tasks under Art. 43.1 TEU. Yet, though this seems to allow flexibility, flexibility is what it lacks most due to only having 1500 troops. In praising Artemis, EUCO failed to recognize the large reliance on French troops who were already there before the mission began. Ultimately, Battlegroups lack the power to impact missions that aim beyond political symbolism (*ibid*:5).

Further, Battlegroup personnel are provided by MS on a 6-month rotation scheme. However, the system is voluntary, leading to difficulties in filling rosters. MS increasingly feel burdened by this troop commitment due to limited defense capabilities.

Moreover, aiming for autonomous action implies that Battlegroups have their necessary military, service and logistic needs met. However, the standby nations have discretion on what forces (land/maritime/air) they provide and how the roster is composed, obviously leading to inconsistency and doubts over Battlegroups' fitness for purpose. Furthermore, roster filling is a mere political commitment *i.e.*, though these troops are available for training, there is no deployment guarantee. Battlegroups' empty track record is not due to lack of opportunity. Among the many examples of failed chances are: the DRC (ironically just 2 years after Artemis in 2006 and then in 2008), Chad (2007), Libya (2011), Mali (2013), and the CAR (2013) (*ibid*:6).

Finally, though much can be said about lengthy decision-making hindering rapid response, Battlegroups ultimately fail due to a mix of political and financial costs. CSDP missions for instance, are funded by the MS who participate on a voluntary basis *i.e.*, MS fund missions in crisis they are interested in. The Battlegroups rotation scheme means that rosters are filled with troops whose MS are disengaged from the crisis they are asked to participate in, and while the Athena mechanism covers costs such as installing the OHQ and medical services, these only count for an estimated 10% of total costs. The Weimar Battlegroup for example, refused to deploy in Mali because Poland and Germany perceived the crisis as a French problem (*ibid*:7).

## Chapter II

### Framing CSDP

#### Section I

##### CEU

Though legislation is out of scope (Art. 24 TEU), this does not keep CEU CFSP Decisions from binding effects (Art. 28.2 TEU), rather it is an exclusionary mean thwarting the EC and EP. There is a vast CEU administrative underbelly behind CFSP/CSDP decisions. The GSC assists the CEU and is headed by the CEU appointed GSC SG (who is also EUCO SG). In addition to human and financial resources and administrative management, the GSC SG supports the CEU, CEURP, and EUCO, taking part in meetings and proceedings. The CEU may launch both civ/mil CSDP missions and implement sanctions. The Gymnich meetings are the CEU's FAC setting, encompassing FP, Defense, Security, Trade, Aid and Development – corresponding to the HR/VP's HR hat. Thus, depending on the agenda, beside FA Ministers, Defense, Development, or Trade Ministers may compose FAC. COREPER prepares the CEU's work and may act under its assignment. Within COREPER, COREPER 2, assisted by the Antici Group, prepares *inter alia*, the FAC agenda. This preparatory stage allows for better understandings of MS' positioning (Iklody, 2017:51).

The EUMC is the highest CEU military body (CEU D2001/79). Composed by MS' heads of Defense, represented by military representatives and permanently chaired by the HR's top military advisor, who is EUMC-selected and CEU-appointed. It plans and executes all EU military actions, advising the PSC and providing risk assessment. The EUMCWG, whose permanent chair is EUMC-selected and COREPER-appointed, acts under the EUMC and elaborates its PSC recommendations and strategic concepts. Further, the EUMCWG/HTF focuses on military capability development. Additionally, the PMG carries the PSC's CSDP advisory and preparatory work, including EU-NATO relations, civ-mil policy, capability, mission concept and operations, and implementation

supervision. CIVCOM provides an additional advisory role for civilian crisis management. Furthermore, RELEX, chaired by the CEURP, is tasked with the CFSP's legal, financial and institutional aspects, covering crisis management, EUSR, cross-sectional CFSP-CSDP issues, non-proliferation, EA financing, and sanctions – however, since 2004 a further Working Group was created to focus on sanctions management and implementation (*ibid*:54). There are many other committees, below which operate well over a hundred Working Groups. Since these structures are mainly staffed by MS officials, CSFP/CSDP policy is very much about balancing competing MS interests (Keukeleire & Delreux, 2014:68).

Among all the CEU underbelly however, the PSC is cardinal. Chaired by the EEAS, it is key in CSDP, composed by representatives of the MS, EUMC and CIVCOM. It implements and monitors CSDP policies and holds political and strategic control over mil/civ missions under HR and CEU authority (*ibid*:67). The PSC's work is prepared by the Nicolaidis group and is framed under Art. 38 TEU. Thus, without prejudice to COREPER, it monitors IR developments and defines policy and opinions for the CEU. Nevertheless, beyond COREPER, PSC, and some 35 thematic and geographic CEU desks, more than 150 different prep bodies, the Working Parties, support FAC's work (Iklody, 2017:52).

Though MS centrality hardly changed since the MT set up the CFSP, the framework for MS FP coordination has evolved, notably, the system of permanent chairs in the FAC and PSC. EUCO and FAC have hence contributed to Brusselization of EU FP, yet dependent on MS ownership. The PSC connects the CFSP's inter/supra dimensions as well as the Brussels-based bodies, particularly regarding crisis management. (So arguably the EEAS were also a PSC 2.0, in addition to being an EC 2.0). Despite driving this Brusselization, the LT hardly references it. The PSC changed significantly post-LT with a reinforced HR, EEAS, and EUCO. MS hadn't intended on losing FP centrality, but rather on an institutional upgrade. While the LT made no legal changes to the PSC's role, it had unintended consequences. Legally, the PCS is mostly unchanged since 2001. It monitors IR, adds to CFSP policy making, and monitors CFSP implementation (Art. 38 TEU), particularly CSDP (Maurer & Wright, 2021:6).

The PSC emerged with St Malo, to ensure MS control over CFSP (specially CSDP missions) (CEU D2001/78). Like the EEAS, its role and mission wasn't included in the Treaty preceding it, rather through a CEU Decision in an opaque policy area. While post-AT the PSC became an institutional linchpin for the HR and a core agenda-setter, with the post-LT HR and EEAS, the new architecture became *more* ambiguous, *de facto* endangering its role (*ibid*:9). If the PSC is a thorn in the EEAS CSDP-wise, the inverse thorn is existential, in one of the clearest shows of duplication and overlapping competences.

Though COREPER 2 formally prepares FAC agendas, the PSC appears better at fomenting solid informal relations among MS actors. While retaining intangible value, few PSC officials consider Lisbon made things less complicated *e.g.*, FAC being chaired by the HR allowed for *trampolining*: the HR circumventing the PSC, engaging directly with MS Capitals. Mogherini, known for being very proactive, was known at the PSC for overruling them with the FAC after the PSC reached consensus. Similarly, Ashton is known to have omitted PSC conclusions. When intending to limit MS influence, the PSC is the HR's first target (*ibid*:13).

Regardless, EEAS-PSC relations represent the bulk of day-to-day CFSP negotiations. Pre-LT, the PSC didn't have an obvious partner, struggling between the EC and GSC. Today, the EEAS-PSC relationship is symbiotic, cooperating on an hourly basis. Yet, the EEAS enjoy institutional advantages *vis-à-vis* the PSC. Chairing the PSC and CFSP Working Groups allows great agenda-setting and continuity, reinforced during Mogherini's tenure post-EUSG (endorsed by all MS). Moreover, the EEAS have access to a global network of on field EU Delegations, an information advantage since few MS enjoy such diplomatic reach, and significant power balance shift within CFSP architecture, since the pre-LT CEURP system lacked such oversight capabilities, making the EEAS the driving force in PSC meetings. Thus, the tension remains with PSC vying for MS preferences and the EEAS only seeking PSC approval if necessary, often contacting MS capitals to reverse positions taken at PSC meetings; in turn regarding PESCO PSC remained the preferred honest broker, the exception dependent on smaller MS' heavy discontent (*ibid*:15).

In sum, the EEAS, PSC and COREPER 2 embody overlapping competency and duplication. Formalizing EUCO atop the CFSP hierarchy had a ripple effect on all CEU structures: FAC lost its *in situ* advantage and FA ministers became disengaged; COREPER 2 appreciated *vis-à-vis* PSC, EUCO meetings' agenda-setters, increasingly attentive on cross-sectional CFSP issues; and PSC depreciated given the HR's double-hat and greater use of EEAS or EC. Ultimately exhibiting the LT's lack of foresight on CFSP architecture (*ibid*:21).

## Section II

### EEAS

Ch. 2 tl. V TEU applies specifically to CFSP and is divided into a section on common provisions and a section on CSDP. This structure reveals both the CFSP/non-CFSP duality as well as an effort to introduce consistency and coherence in EU EA (Kellerbauer, *et al*, 2019:197).

Given its mandate to support other bodies, the EEAS integrate many administrations. Equally, the EEAS may absorb into its structure other bodies' administrations. The issue is how, legally, such integration occurs whilst conducting coordination and holding an apparent subordinate status. Indeed, primary law barely references the EEAS, and secondary law poorly defines its CSDP role. The same cannot be said of the HR, who coordinates both civ-mil missions (Art. 43.2 TEU); manages CSDP tasks (Art. 44 TEU); and is involved in PESCO (Art. 46 TEU) (*ibid*:215).

Whereas EA is generally under EC control *i.e.*, Cooperation, Aid, and contact with local crisis management authorities; CSDP missions, are implemented by the CEU, EEAS and MS, and upon a mission's launch, the HR and PSC ensure political control. Pre-LT, these were CEU structures. Yet, intending the HR conduct CSDP (Art. 18.2), the EEAS setup led to Crisis Response restructuring (Gatti, 2016:271).

Delays in negotiating/ratifying the LT and the EEAS' vagueness opened a window for disputes, hindering CSDP's evolution. The first red flag was Ashton's appointment. Both Ashton and her cabinet had little EU or FP experience, much less Solana's clout. Ashton was charged with structuring and staffing the new EEAS, one of the most wide-ranging institutional changes ever attempted (7,000 staff and over €500B annual budget). The lack of preparation was clear with several senior EC officials admitting underestimating the task (Smith, 2017:252).

MS agreed the EEAS should chair the PSC and absorb CSDP bodies. Yet, the reset was flawed. MS accepted the transfer of crisis management structures to the EEAS under the condition they be under direct HR authority and responsibility, unsubjected to any EEAS official's authority. While the HR was supposed to bridge the inter/supranational gap, its own service barely makes a rappel rope. In fact, D2010/427, is silent on EEAS role in

non-CFSP aspects of crisis response, though Ashton tried to fill this gap by setting up the EEAS CP (Gatti, 2016:274).

Consequently, the Duty of Cooperation applied to the EEAS *vis-à-vis* other bodies is problematic in nature and substance. An extensive interpretation of its substantive scope implies applicability of both supra and intergovernmental issues *i.e.*, CSDP. Under Art. 3.2 D2010/427 the EEAS and EC shall *consult* each other on all areas except CSDP. *Consultation* however, is not *cooperation*, hence, the limitation on the former doesn't necessarily apply to the latter. Had the legislature wanted to restrain cooperation in general, such distinction wouldn't have been made. Practice confirms such interpretation *e.g.*, in a CSDP mission in CAR the EC's Aid department kept systemic contact with the EEAS to ensure humanitarian consistency in military action. If EEAS' Duty of Cooperation is broad, its legal framing is nebulous. Primary and secondary law use *cooperation* pleonastically, suggesting different meanings *e.g.*, Art. 32 TEU states Delegations must *cooperate* with MS embassies; Art. 222 TFEU uses *close cooperation*; and Art. 8.6 D2010/427 states the EEAS must *fully cooperate* in budgetary procedures. Other provisions use *support/assist* with *cooperation*. In any given provision, one may ponder if *cooperation* is to be more or less *full* (*ibid*:202).

Whereas Art. 3.2 D2010/427 allows EEAS-EC *consultation* on all areas except CSDP, under Art. 3.1 the EEAS shall *cooperate* with MS diplomatic corps, the GSC, and EC across all areas of EA and other policies. *Consultation's* slimer scope may indicate CEU intention to allow EEAS preparation and management of CSDP acts free from EC meddling. Crucially, while *consultation* is limited, it lacks express definition or procedures. The Isoglucose case clarified that in areas requiring EP consultation by the CEU, the latter could not simply adopt legal acts absent an EP opinion (Teasdale & Bainbridge, 2012). In *Roquette Frères v CEU*, the Court established that Duty of Consultation requires both a request and an opinion. Regardless, consultation remains procedurally nebulous in the EEAS-EC case (Gatti, 2016:207).

Art. 3.2 D2010/427 states the EEAS shall take part in prep work and procedures regarding EC-prepared acts in EA, suggesting participation rights. Yet, the EEAS lack any such right *stricto sensu* in any EC activity, save some EC Development programs (Art. 9 D2010/427). Indeed, not even Joint Communications emerge by Art. 3.2, but as corollary of Treaty Distribution of Powers, since *joint* implies both non and CFSP elements, thus requiring both the EC and HR (not with its VP hat). *De facto*, there is no literal consultation, rather, the EEAS contribute to EC activity as if it were an EC department. Analyzing Art. 18.4 TEU, if the HR acting as VP is bound to EC procedures, by extension the EEAS should also, thus taking part on equal footing with EC departments (*ibid*:208).

Crucially, specially in CSDP, the orders in which the EEAS operate are particularly fragmented. A plurality of subsystems follow different procedures in different policy

areas creating duplication and competency conflict. Fragmentation is particularly acute in Diplomacy and Crisis Response, where the EEAS integrate other bodies' administrations. Whereas the LT aimed to standardize EU diplomacy through the EEAS, various EU institutions have organs with overlapping competencies, undermining EA coherence. To illustrate, relations between EUSR and the EEAS, to which EU delegations belong, are a poorly defined source of friction and EA cacophony. While under HR authority (Art. 33 TEU), MS rejected integrating EUSR within the EEAS. Given the division between non- & CFSP policy, EU delegations receive CFSP instructions from the HR and non-CFSP instructions from the EC (Art. 5 D2010/427). This however contradicts not only the legal basis of D2010/427 (Art. 27.3 TEU), reenforced by Art. 6.4 D2010/427 wherein the EEAS mustn't take instructions from any entity other than the HR; and the EEAS' consistency assurance role across EU FP and internal policies (Art. 3 D2010/427); but also EUSR's mandate, which cannot extend over non-CFSP policies, as it is the EC that represents the EU in these policies (Art. 17 TEU), being limited to external representation in specific policy issues within CFSP (Art. 33 TEU) (Kellerbauer, 2019:230).

Further, under Art. 1.4 D2010/427 EU Delegations are part of the EEAS' hierarchical structure. Delegations are under the authority of a HoD accountable to the HR. However, when acting outside CFSP *e.g.*, when executing EU budget, the HoD receives instructions from the EC (Art. 5.4 D2010/427); and shall also respond to the EP (Art. 5.7 D2010/427) (*ibid*:1688).

ECHO in particular is historically the most aloof, enjoying significant EC autonomy, since R1257/96 states Humanitarian Relief must not be politically guided (CEU, 1996). ECHO has nearly 50 FO entirely distinct from EU Delegations hierarchically and functionally. While under ECHO, not the HR, these FO conduct operational implementation of Humanitarian Aid. ECHO FO and EEAS DG often functionally overlap. Beyond overlapping, they often *de facto* compete when implementing security projects. Ultimately, ECHO FO, EEAS Delegations, and EUSR are all EU diplomatic actors acting on CFSP issues, specially CSDP. Thus, even if there was perfect EEAS-EUSR-ECHO FO coordination, it would not exhibit a view of EA uniformity (Gatti, 2016:297).

Other EC EA DGs such as Trade, NEAR, Development or Aid did not integrate the EEAS given their supranationality. CSDP crisis management bodies are also distinct within EEAS hierarchy, particularly in development and security, where MS, the EC and EEAS have competency. In areas of shared competence, turf wars between MS, EC and EEAS represent a further challenge to horizontal and institutional coherence (Morillas, 2015:57).



## On CSDP

If the CSDP provides the EU with operational capacity to conduct missions outside the EU (Art. 42.1 TEU), Crisis Response is severely fragmented. While crisis require holistic approaches, the amount of disarticulated tools and actors at play in Crisis Response actively jeopardize coherence, continuity and effectiveness (Gatti, 2016:270).

Among the sundry security policies involved, beyond CSDP are non CFSP policies e.g., Aid, Development, Civil Protection, or Police Cooperation. Yet, all are functionally entwined, as acknowledged by Art. 21 TEU citing transversal objectives in strengthening security. Solana highlighted the challenge of synchronizing all instruments and capabilities (GSC, 2003:21), complex given the scattered managing responsibilities. CSDP itself is divided in civ-mil spheres, not only financially but hierarchically, breeding duplication and inefficiency (*ibid*:272).

The EC leads the non-CSDP side while the operational side is mostly led by PSC. Under the PSC are bodies previously under the CEU *i.e.*, CPCC and EUCM for civ & mil missions respectively. Yet, framing the HR/EEAS role in this structure has been flawed. Incorporating the CPCC within the EEAS but not the EUMC disrupted CSDP coherence, specially accounting for EC non-CSDP policy impacting the CSDP. In fact, even departments technically within the EEAS are not entirely integrated. MS agreed some transfers to the EEAS under the condition these were placed under direct HR authority *e.g.*, EUMS, to avoid transferring authority to the EEAS, paradoxical given the EEAS chair the PSC. The gaps this created led Ashton to create the EEAS CP, and Mogherini to setup the CMPD, these however only added another layer of complexity and duplication (*ibid*:272).

Concerning the CMPD, Ashton appointed Miozzo, from the Italian Civil Protection, as first HoD. While Mogherini kept Miozzo's system, the platform was hierarchically shuffled. Miozzo's appointment was adequate given Italy's crisis response system is also split by separate executive organs. While it lacks decision making power, the CMPD is chaired by the HR or the EEAS SG and configuration is issue related, able to call on the EEAS, EC DGs, and CEU departments. Yet, given MS tend to use the CMPD to co-opt EC instruments, the EC is less inclined to facilitate its work, specially given the EEAS play a leading role which competes with DEVCO and ECHO (*ibid*:276). Still, when planning CSDP missions, the EEAS rely on several EC mechanisms *e.g.*, the PFCA, crucial to the CP (Ojeda, 2017:56).

Moreover, depending on the source of funding, different actors and EU institutions have differing levels of influence on a CFSP operation and ultimately its outcome. The EP has thus a budgetary role in CSDP missions (Ramopoulos, 2019:270). The EP must be consulted in procedures for rapid EU budget access for CSDP (41.3 TEU) (Kellerbauer, 2019:215). Beyond Art. 36 TEU, its biannual debates on CSDP, and budget power (Art. 41 TEU), the EP's comitology has the AFET and SEDE drafting opinions on FP and

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Defense respectively. Indeed, the JCM also serve as platforms for the EEAS, EC, and EP to negotiate missions' budget (Legard, 2017:60). This is not something the EP takes lightly. In fact, EP committees are key in its para-diplomacy which offset its relative weakness in CFSP and tip the scales of decision makers. Through a system of interparliamentary delegations, the EP is connected not only to MS parliaments, but also parliaments outside the EU, and at IO *e.g.*, OSCE, NATO and MERCOSUR (Costa & Brack, 2014:122).

Operating expenditure for *military or defense implications* cannot be EU budget financed (Art. 41 TEU) *i.e.*, only civ missions' expenditure, and mil missions' administrative expenditure may be charged to the EU budget. Clear as this may seem, it is not always easy to tell apart the different types of expenditure, specially since these are not Treaty-defined; or to determine whether a CSDP mission has military or defense implications, they may have both (Kellerbauer, 2019:270).

### Section III

#### EC

Old habits die hard. The pre-LT EC had far-reaching diplomatic status: the EC had 130+ Delegations, DG RELEX employed several hundred officials, holding political and strategic control over a large Development budget, not insignificant since collectively the EU has been the world's undisputed top aid provider (OECD, 2011). Indeed, despite habitual field splitting, epitomized in the MT pillars, MS repeatedly delegated tasks to the EC upon a practical necessity of bridging gaps between economic and FP integration mitigating inconsistency. The idea behind the EEAS was to no longer need the EC for FP purposes (Dijkstra, 2014:2).

A closer look at history shows the EC has always been target of suspicion. In contrast to the EDC or Fouchet Planes, the Luxembourg Report was a victory covering geographic and thematic policy areas, introducing public diplomacy, quiet diplomacy, and Joint Actions (EPC, 1970). Yet, it was limited to information exchange and Joint Action if *desirable and feasible*. Placed outside Treaty framework, it bared minimalist institutional structure due to disagreements on its set up. The EC had to fight to be present, despite the EPC providing for its consultation in cross-pillar issues. Only when the USSR Afghan invasion led to the London Report did MS agree the EC should be fully EPC-associated, with access to all meetings and information (*ibid*:5).

Subsequent discussions arose on how to give EPC a formal Treaty base. In the 80's the EC began to play a bigger FP role through the use of sanctions. Thus, while the imposition of sanctions was a political decision made by the EPC, implementation was tasked to the EC to assure policy consistency. The sanctions role it played led to positions endorsing closer EC-EPC relations. Nevertheless, negotiations leading up to the ESA settled for a Communities-EPC consistency requirement which allowed restructuring of the EC apparatus, setting an EPC Directorate, and a permanent small scale EPC secretariat (*ibid*:6).

Though ESA barely improved EC-EPC work, the fall of the Berlin Wall was a watershed moment. Given its *acquis communautaire* expertise, the EC was key for German reunification debates, becoming the international aid coordinator for Central and Eastern Europe. Thus, the dire need for policy consistency opened the EC to the highest-tier EPC dossiers, arising endorsement for greater FP coordination in the leadup to the MT. Yet

Black Monday halted the momentum. When the overwhelming consensus had been a pillar system, the Dutch presidency proposed a single tree-like system – Belgium was the sole endorser. Ultimately, the EPC merged with the GSC to assist the CEURP, becoming the CFSP Unit, and the EC gained right of initiative. Yet, the EC's status was unchanged, provoking the EC to establish a new DG RELEX, creating bureaucratic tension, with the CEURP preferring to rely on the CFSP Unit's support (*ibid*:8).

The Bosnian War exposed the dysfunctional institutional set up. Thus, the AT's Reflection Group stressed the importance of providing better means for an effective CFSP. The GSC would have a Policy Unit to bridge EA gaps, and to address the need to give CFSP higher profile, the HR was created within the GSC. The emphasis was on collective representation of MS, thwarting the EC. The HR and the Policy Unit impacted the EC, except regarding traditional FP (diplomacy & representation). While Solana focused on establishing his status *vis-à-vis* CEURP, Patten focused on restructuring the Aid budget and EC Delegations, being complementary in the that they neither conflicted nor cooperated. While Solana and Patten thus avoided confrontation, they also avoided collaboration. Where tensions arose however, was in CCM. The ECOWAS/Small arms case is a case in point. The ECJ ruled in the EC's favor, since its action fell within community competences. Within said competences, MS placed Development policy with many security-related instruments *i.e.*, the EC conducted several CSDP police, border guard, judicial reform missions, and de-mining contracts. Thus, technically the EC was not encroaching the second pillar (*ibid*:9).

The Laeken Declaration sparked the CFE, and thus debates on these tensions. To improve horizontal and institutional consistency emerged the idea of the EEAS to support the HR. Initially, MS refused placing them within the EC, intent on remaining the HR's formal *Pater*. The logic was: omnifariously fusing FP would cease the need for EC provision of horizontal or institutional consistency. Thus, its inception wasn't an end in of itself, but rather a means to an end *i.e.*, keeping the EC in check through the CEU, hence the double-hat. A slight qualification is that the EC rejected endowing privileged status to the HR within the College *e.g.*, Ashton did not coordinate Trade or Development Commissioners, despite her VP hat. Merging the HR and DG RELEX Commissioner was more about restraining the EC than increasing consistency. Regarding the EEAS and EU Delegations, while joining EC/GSC/MS officials aimed for economies of scale, during the negotiations the EC refused conceding expert Trade and Aid officials and managed to hold a seat at the EUMC (*ibid*:10).

Currently, Arts. 24.1 TEU and 19.4 CEU RoP legally downgrade the EC. *Full association* replaced by the HR's VP hat (Thym, 2011:15). The EC lacks formal decision making, the HR being EC VP does not formally affect this, a demotion compared to AT Art. J.8.4. Displaced by the EEAS, the LT reduced the EC's CFSP role through the HR and the non-interchangeability of its double-hat powers (Riddervold, 2016:3). When wearing the VP

hat, the HR is bound by supranationality (Art. 18.4 TEU). There is no need of a reverse Art. 18.4, stipulating an intergovernmental anchor, since the root intent was to keep the HR firmly within CEU grasp as its AT prototype, exhibited in Art. 18.2 TEU (Thym, 2011:8).

However, TEU Art. 21.3 calls for CEU-EC-HR cooperation in assuring cross-policy consistency, a Consistency Principle reinforced by the May 2014 CEU conclusions. As such, the comprehensive approach model must apply to CSDP (Ojeda, 2017:55). This results in the EC significantly leveraging authority over CFSP/CSDP budgetary matters, seeing the EEAS/CFSP/CSDP as a threat to its bureaucratic interests. The LT not only failed to set a clear EC/CEU/EEAS division of labor in the longstanding clash between the EU's development and security policy agendas, it formally institutionalized the problem, thus having two executive bodies for EU FP: the EC for Trade, Development, Enlargement, and Aid; and the EEAS for CFSP/CSDP and most crisis management. Further, the clash between ECHO's Humanitarian Assistance and the EEAS' CRS only led to more confusion within the EEAS and ECHO, which the LT promoted to DG, made more confusing in 2013 with the EC's ERCC. Ultimately, the system is too unwieldy for the HR to assert authority over (Smith, 2017:258).

Holding pivotal responsibility in budget implementation (Arts. 317 & 318 TFEU), the EC has both geographic and thematic instruments. Nevertheless, non-CFSP EC external instruments *ibnl.*: the IPA; ENPI; the geographic DCI; EUDF; IcSP; PI; EIDHR; INSC; and thematic DCI. Aside from its EA competences the EC also finances internal policies with external dimension *e.g.*, Security, Migration, Climate, or Space (Ojeda, 2017:55).

Underlying the complex FP system is a complex financing system. CFSP/CSDP policies are funded by different mechanisms, depending on whether they are civil or military. Civ-missions are funded by the MFF CFSP budget. Mil-missions are funded by participating MS. To ease MS early contributions, D2011/871 set up Athena, which *may* cover OHQ implementation and running costs, including local staff and services; infrastructure; medical expenses; satellite recon and surveillance; and FHQ costs such as logging and essential items, theater-level capabilities and CBRN protection; and NATO and UN reimbursements (EUACO, 2021). Yet, though the *ultra*-budget Athena mechanism exists, it is under the authority of a special committee composed of MS representatives *i.e.*, it requires *ad hoc* arrangements and negotiations for every operation, again limiting swift action. *Applying the Costs Lie Where They Fall Principle*, like NATO, further complicates the process, leaving near all financial burden on the on-call MS at time of deployment, this is problematic since multiple MS may be involved despite not being deployed at all times, discouraging and undermining CSDP (Homan, 2006:27).

Regardless, upon closer look, even EU budget funded actions suffer comparable obstinance. Inter and intrainstitutional tensions bite both the annual and MFF budget,

which is not made easier given the 7-year MFF does not coincide with the EC's 5-year mandate, despite Art. 312 TEU merely setting a minimum of 5 years. This system's rigidity and control is a double-edged sword. Though it benefits the EC in promoting Community Method mechanisms, the ultimate goal of enhanced EU EA finds an upstream hurdle at the get go, limiting both translation of financial instruments into leverage and influence, and rapid response to unforeseen international events *e.g.*, the 2014-20 MFF earmarked 11 separate financial instruments for FP not including CFSP (Keukeleire & Delreux, 2014:108).

The LT intensified Civ-Mil disputes by retaining several separate funding lines each with different decision making and activation procedures. Lisbon failed to ease efficient CSDP funding, more complex than before, the EU must now additionally deal with Art. 41 which, apart from the *Costs Lie Where They Fall Principle*, mentions two new funding procedures: Preparatory Measures, and the Start-Up Fund. The former allows for rapid access to EU budget in general, for non-defense/military actions, upon CEU unanimity after EP consultation. The latter is a start-up fund for early measures concerning defense/military actions, upon HR proposal and CEU QMV, and without EP consultation. Yet, neither of these have been activated, the reason being that they are remarkably similar to already existing mechanisms, the former to the 2006 ISF, the latter to the 2004 Athena mechanism (Ramopoulos, 2019:271). Post-LT, the EC made another financing mechanism, the FPI, aimed at a comprehensive geopolitical vision and CFSP objectives as defined in Art. 21 TEU, specifically regarding conflict prevention, democracy, ROL, and human dignity (EC, 2021:7). Yet, this is very similar to the IFS, setup after the EC's 2006 external funding reform, aimed at transregional threats and CBRN proliferation (Art. 4 R230/2014), applied to several Joint Actions in CFSP/CSDP (Incas, 2011:11). The FPI, like the IFS, is housed in the EEAS but under DEVCO control, another awkward compromise between the EC's supranational responsibilities regarding EU finances and the CEU's intergovernmental arrangements. Moreover, as in pre-LT, the EC retains control of several other FP and financing instruments for, *inter alia* Aid, ENP, and Development, culminating in bureaucratic disputes in conducting crisis response (Smith, 2017:258).

Ultimately, as aforementioned regarding missions' operating expenditure, not only is it often hard to distinguish between civ/mil implications, but lines are often blurred *a posteriori* (Ramopoulos, 2019:270). Though CEU Decisions are the legal basis of all CFSP/CSDP action and policy, and EUCO provides overall strategic guidance, with PSC mission oversight, and MS military contributions are voluntary, two cases clearly show how the EC holds *de facto* influence over both strategy and operations: the EUMSS and Atalanta. These examples are useful in assessing EC *de facto* influence, given both defense and maritime policy are sensitive sovereignty issues (Riddervold, 2016:4).

EC impact on the EUMSS is clear from EUCO conclusions. Sprung by the Spanish presidency in 2010, the CEU adopted its first conclusions on Maritime Security within the CSDP. In 2010, the HR was tasked to use the EEAS, in contact with the EC and MS to prepare a possible global EUMSS in the context of CFSP/CSDP. However, drafting stalled due to EC-EEAS disagreements. In 2013, EUCO reframed the task to be jointly drawn by the HR and EC, accounting for MS' opinion; in fact, while before 9 DGs were involved, afterwards 11 were listed as key contributors. EC influence is clear in redefining the EUMSS from a defense oriented to a cross-sectional strategy, indeed both the HR and the DG MARE Commissioner presented its launch (*ibid:9*).

Regarding Atalanta, it was the EU's first naval military operation. Its mandate allowed use of force to deter, prevent and repress piracy off the Somali coast and all MS contributed both military assets and personnel (CEU, 2008). According to MS delegates, the EC was very active in Atalanta's buildup, present and speaking in all meetings and correspondence. In fact along with the CEURP, the EC also took the stage while presenting the EP the possibility of an EU military mission. MS delegates confessed this was not new, giving Chad as an example, the first thing the CEU and PSC did was approach the EC (*ibid:3*).

Atalanta was contentious, given ESDP had yet to execute a naval operation and NATO ships were already in the region. Testimonies explain the EC's role was unrelated to defining the operation's mandate, rather it impacted the impetus to launch a Naval mission, given it would facilitate establishing EU agreements with States in the region on pirates' prosecution. To achieve this the EC's Development Aid tools were indispensable. MS delegates confessed, though the military sphere is MS competency, planning becomes unfeasible without EC support. Moreover, though the EC leverages budgetary power in interlinked policy fields, an OPCEN official confirmed that connection with the EC allows greater resource management efficiency, converging with delegates' interest in EC funds, given defense ministries' budget cuts. Furthermore, both MS delegates and EEAS officials highlighted the benefit of DEVCO expertise (*ibid:10*).

## Section IV

### The EDF

Since the 90's the EC has boldly pushed to influence EU security/defense *e.g.*, its failed attempt at annulling Art. 346 TFEU; even as EDA was born, tasked with supporting joint R&D in defense, in 2005 the EC launched the CESRP, which allowed the EC to invest in dual-use tech; and in 2009 the EC pushed DR2009/81, the first supranational legal text on defense procurement, and a dedicated DTF (Hakansson, 2021:2).

Yet, the DR has not been fully applied, for reasons addressed below the Internal Market is still far from open. Despite a publication rate increase of open tender procedures at EU level, most awards occur in favor of national entities or are assigned by restricted or negotiated procurement procedures. To date, the EC opened formal infringement procedures against five MS accused of not complying with the DR, yet none have appeared before the CJEU, with both the EC and the defendants reluctant to move forward due to the issue's political nature. Thus, things stand akin to pre-DR status quo. The silver lining concerns its provisions to increase SME participation. Despite their barriers to entry (legal, administrative, geographic, linguistic, access to classified information), from 2009 to 2019 SME presence in the defense market doubled (Sabatino, 2022:7).

Juncker made security and defense a big priority in his campaign for EC President allowing Mogherini ample leeway in security/defense initiatives. The EUGS opened the floodgates of EU defense initiatives, most of which intergovernmental *e.g.*, CARD, PESCO, MPCC (Hakansson, 2021:3). To achieve the EUGS's ambitions a promising EC initiative emerged, the EDF, which in promoting cooperation and investment in joint defense tech R&D may be a breakthrough for the MS-driven PESCO. The EDF is unique in its supranationality, now managed by a new DG, DEFIS. What is impressive is the apparent taboo erosion of EC involvement in defense (Csernatoni, 2021).

To avoid Art. 41.2 TEU prohibiting EU military expenditure, the EDF finds its legal basis in Arts. 173 and 182 TFEU regarding EU industry competitiveness, innovation, and research, and EU industrial policy respectively. On this basis, the EDF can restructure the EDTIB's competitiveness (Fiott, 2018). Thus, in another bold move to supranationalize defense, the EC doesn't consider the EDF a defense policy, but rather tech and industry policy (Csernatoni, 2021).



Juncker and Mogherini succeeded in setting up the EDF, despite resistance from MS deeply tied to the US fearing a threat to NATO (Hakansson, 2021:5). Of the near €8B allocated by the 2021-27 MFF, 2/3 are devoted to capability development, the other 1/3 to R&D. Of these allocations, research-related projects can receive financing up to 100% of eligible costs, the prototyping phase can receive financing up to 20% and actions beyond prototyping up to 80% of costs (Art. 13.2 EC2021/697). In tune with DR2009/81 support for SME's, the EDF allows increases up to 15% for projects involving SME's and an additional 15% when involving mid-caps (Art. 13.3 EC2021/697). Moreover, to generate EDTIB synergies and reinforce PESCO projects, an additional 10% increase may be allocated to PESCO projects (Art. 13.3 EC2021/697). However, despite aiming at increasing NATO interoperability, the EDF allows for third states and third state entities in the proposed projects (Sabatino, 2022:7) Which may preserve US dependency.

Finally, projects receiving EDF funds are administered by DEFIS, a novelty of VdL's EC. Nevertheless, grant allocation depends on another Committee (Para. 18 of EC2021/697) composed by MS representatives, assisted by the EEAS, and EDA having observer status (Para. 44, EC2021/697), and annual Work Programs are to be agreed with the Committee (Para. 39, EC2021/697), and where the Committee has issued no opinion, the EC may not adopt implementing acts (Art. 34, EC2021/697). Thus, by deciding what projects are included in the Work Program, how to allocate financial support at national level, and whether to partner with smaller countries and industries, MS, especially *Big 5 MS*, *de facto* determine EDF policy (*ibid*:9), despite balancing supra and intergovernmentalism.

## Section V

### EDA

Joint Action 2004/551 established EDA for defense capability development, R&D and arms acquisition, now under Arts. 42.3 & 45 TEU. The HR heads EDA (Art. 7 D2015/1835), tasked with its organization and negotiation with third countries and IO. Heavily criticized, since concentration of so many offices deprive the HR of time and resources to perform effectively, emerging debates on a separate Defense HR. EDA also prepares CEU decisions, meaning EDA's ECAP is quite intergovernmental (Art. 45 TEU). Holding a broad mandate, EDA's main tasks include project management, evaluation of MS commitments and joint R&D projects, with policy development highlighted in Arts. 42.3 TEU and 5 D2015/1835. Regarding its project manager role (Art. 5.3 D2015/1835), in a clear case of duplication, EDA prefers delegating it to OCCAR; and its security research role also overlaps with the EC and EEAS' own security research competencies (Trybus, 2014:186).

Conducted by EDA, under Lisbon ECAP integrates CSDP. Thus, EDA is tasked with promoting arms cooperation and a competitive EDEM and EDTIB for a sustainable CSDP (Art. 2 D2015/1835). However, suspension of EDA's Procurement and Supply Chain codes made collaborative R&D procurement one of the most concerning issues regarding EDA and procurement. While the Internal Market has jurisdiction over defense procurement with the 2009 Defense Directive, under Art. 346 TFEU remits, DR2009/81 Art. 13 explicitly excludes R&D projects (*ibid*:187).

Analyzing its main role, policy development and preparing CEU decisions, both Art. 5.3 D2015/1835 and Art. 45.1 TEU highlight EDA is tasked with harmonizing procurement. Given its supranationality, the TFEU doesn't apply to goods EDA deals with. This becomes problematic in harmonization, limiting EDA to non-binding rules and codes of conduct. EDA's Steering Board, comprised of MS Defense Ministers, agreed to a voluntary non-binding code of conduct for defense procurement in 2005, aiming for an internationally competitive EDEM and strengthening the EDTIB. This code was meant to establish an EU arms market, applicable when Art. 346 exemptions were used. Yet, exactly given it applies to exemptions found in primary law, it is voluntary, non-binding, and reciprocal, with no sanctions for non-compliance. Based on Art. 346 TFEU, the code was to apply only to hard defense contracts, above €1M, and to MS' separate authorities, not EDA itself. Strikingly, it included even more exemptions: research and tech

procurement; collaborative procurements; nuclear weapons and propulsion systems procurement; chemical, bacterial and radiologic goods and services; cryptographic equipment; *operational urgency*; follow-up work or supplementary goods and services; or for extraordinary security reasons. Two issues are immediately obvious on EU armaments cooperation: first, EDA was born out of the abuse of Art. 346 TFEU *i.e.*, an *ultra*-Internal Market regime was created for contracts that should be awarded in it; second, it places faith in an intergovernmental body's ability to solve fragmentation and capability shortfalls absent binding decisions, binding legal framework or sanctions (*ibid*:191).

Closely related to the latter, EDA isn't the only institution intended to manage arms policy falling outside TFEU scope, other bodies (*ultra*-EU) exist with similar tasks *e.g.*, OCCAR or LOI. Additionally, all three compete with EC initiatives, despite these two not setting rules on MS defense procurement. OCCAR emerged in 1996 by the UK, France, Italy and Germany, with Spain and Belgium entering in 2014 (Turkey is semi participant), due to dissatisfaction over the WEU Arms Agency. The LOI is more problematic. Signed by the UK, France, Italy, Germany, Sweden and Spain in 1998, it resulted in legally binding commitments aimed at integrating defense goods and services trade among its members. As if this were not enough there are several NATO agencies (NETMA, NH90, NAHEMA, and NSPA) dedicated to defense procurement. The existence and activity of multiple overlapping legal institutional structures aimed at regulating laws and policies of some but not all EU MS, means even more duplication, overlap and inconsistency (*ibid*:230).

## Subsection I

### Directive 2009/81

Given EDA's short reach, the EC pushed a Defense Directive (2009/81), meant to avoid derogation based on Art. 346 TFEU. Art. 2 DR2009/81 frames its scope, applying not only to military equipment but also sensitive equipment, work and services, expanding beyond the 1958 list (regarded below), despite not covering dual-use items. Regardless, because there is primacy of primary law, the DR annuls not the possibility of derogation, merely attempting to address MS security concerns, to avoid derogation (*ibid*:268).

As a procurement directive, it is secondary law based on primary Internal Market regimes including anti-trust, subsidies, and third-country regimes. The Internal Market is a partial

EU exclusive competence (Art. 3 TFEU) aiming to harmonize procurement under Arts. 34, 49 and 56 TFEU (free movement of goods, establishment and services respectively), representing transfer of sovereignty specially regarding Art. 18 TFEU against protectionism. Yet, a caveat of Art. 18 is that it only applies to MS nationals and legal resident persons, not to third-country nationals. Moreover, Art. 36 TFEU provides a national security exemption. Thus, while the TFEU aims at market integration, it's not intended as an instrument of defense and security integration - notable by the lack of provisions for such integration and the many TFEU defense exemptions (*ibid:61*).

Yet, in regulating exemptions, the Directive itself contains exemptions. Strikingly, in-house contracts are omitted *i.e.*, if the contracting authority exerts sufficient control over the entity it procures from, and said entity is economically dependent on them, the contract is considered in-house, thus not public procurement, being outside the Directive's scope. Seeing as the EDTIB is characterized as monopolistic and monopsonic, most defense contracts can be interpreted as in-house. Moreover, in theory MS could legally protect their defense industry by controlling and making them dependent (*ibid:269*).

Explicit exemptions are framed its Arts. 12 and 13. Art. 12 regards contracts awarded under international rules *e.g.*, NATO agencies or memorandums of understanding with third countries. The only requirement is the involvement of an EU MS and a third-party government, which excludes EDA, OCCAR and LOI. Art. 13 lays out an extensive exemption list, namely regarding secrecy, intelligence, cooperative programs, forces deployed outside EU territory, government-to-government contracts and contracts for R&D services (*ibid:272*).

Value thresholds are another blind spot. Art. 8 DR2009/81 sets a minimum threshold of €414K and €5,186M for supply and services contracts and works contracts respectively. While the most obvious hard defense contracts are above threshold, many relevant contracts covering resupply, repair, training, accessories, smaller weapon systems or ammunition, are usually under threshold (*ibid:270*).

Indeed, while it applies to Defense Ministries and any public body procuring armaments, work and related services, most of these exceed its scope. Though it aims to limit Art. 346 TFEU, it remains exploitable. Crucially, its omissions exempt the bulk of the arms market, especially regarding collaborative projects *i.e.*, Defense Ministries can fluidly switch from Art. 346 exemptions to the Directive's exemptions. Further, value threshold exemptions mustn't be underestimated, as these need no justification. Strikingly, the share of contracts subject to the Directive is estimated at best to be 10% (*ibid:308*).

## Subsection II

### Articles 346 & 347 TFEU

The Internal Market and CCP have several caveats, namely derogations in Art. 346 TFEU applicable to arms, security and secrecy. Since DR2009/81 aims at its limitation, we must analyze it. Art. 346.1.b concerns arms, to this extent Art. 346.2 cites a list from 1958 setting the items to which it applies. The legal status of the list is unclear, undefined in Treaties - its insertion would have been excessive for a founding treaty. Unamended, it's assumed outdated, yet broadly held to be warlike or hard defense material, to be interpreted according to military/tech evolution (*ibid*:88)

Under Art. 346.1.a the secrecy exemption allows further derogation from the Internal Market, preventing information disclosure on security grounds, easily subject to abuse, as MS can keep evidence away from ECJ scrutiny. In tune with the TFEU, the Directive requires transparency and prohibits protectionism in defense procurement. Beyond Art. 346, Arts. 45.3, 52.1, 65.1, and 72 TFEU allow derogation. Yet though these allow exemptions from specific regimes (goods, workers, services, establishment, capital and payments), Art. 346 allows derogation from the whole Treaty (*ibid*:135).

Regarding competition law, primary anti-trust law is framed by Arts. 101-6 TFEU. Article 101.1 TFEU prohibits undertakings and concerted practices distorting competition/trade among MS. The fewer and bigger the firms, the more likely it is that Art. 101 is overstepped. Taking each MS in isolation, many products can only be produced by few or even just one producer *e.g.*, only three EU producers make large combat aircraft: the 1994 Eurofighter Typhoon (UK/Germany/Italy/Spain), the 2001 French Rafale, and the 1996 Gripen (UK/Sweden). Furthermore, companies are only exempt by Art.346 under a MS protection, thus it is not mere speculation that MS encourage monopoly creation *e.g.*, Eurocopter SA (France/Germany), Europe's leading helicopter producer (*ibid*:171)

State ownership of defense industries is another issue lacking TFEU contemplation. Since much of European defense industries are publicly owned by the MS they're registered in, this affects competition and trade as MS ensure benefits for publicly owned firms. Thus, as MS support both their private and public defense industries, this may affect the TFEU State Aid regime, framed by Arts. 107-9. Moreover, support comprising State Aid may breach Art. 10 TFEU if the measure distorts competition/trade among MS. However, since aid can come from any ministry or public body, Defense Ministries often are

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unaware of all awarded aid, again signaling lack of transparency and level playing fields (*ibid*:176).

Furthermore, excluding the many State Aid exemptions within Art. 107, a contract award is State Aid if it does not represent a *normal* commercial transaction. However, in defense contracts there is usually no market comparison to determine what a *normal* transaction is, a problem further complicated by dual-use goods which, with cross-subsidization, makes it difficult to differentiate civil sector aid (*ibid*:182).

## Section VI

### Defense Economics

Analyzing Europe's defense market is crucial. Having seen the rules of the game, we'll now look at the playing field. The EDF and PESCO haven't changed defense contract law at all. The volume of MS' US imports is so high because nothing discourages buying American. These instruments attempt to consolidate the EDTIB in a system akin to the US', but fail when compared to the extensiveness, rigor in application, and extraterritorial criteria of the US system (French Senate, 2019).

While Defense represents a multi-billion market in the EU, MS' Defense budget consistently decreased since the 1980's, with a sharp decrease post 2008 and tame increase since 2014, maxing at €198B in 2020 (1.5% of EU GDP) (EDA, 2021).

MS' differing economic power affects their military ambitions and needs, thus most MS procure abroad and often not in the EU, hindering market integration. MS' industrial defense capabilities vary greatly, usually categorized into *The Big 6* (UK, France, Germany, Italy, Spain and Sweden), and *the rest*. Post-Brexit, France is the only MS with a solid defense industry backed by solid FP ambitions, even pre-Brexit, France's military industry was EU-orientated, while the UK held closer US ties (Trybus, 2014:23).

Regardless, what the now *Big 5 and the rest* have in common is that none of their national industrial bases provide the full range of required equipment, much less affordably. Indeed, cutting-edge tech requires cooperation, however two contradictory obstacles emerge: if the trend of merging into larger defense firms *e.g.*, in aerospace or electronics, makes competition near impossible; State ownership being common and actively avoiding mergers, makes consolidation near impossible. Analyzing the supply side, the provider base for such a broad variety of goods and services greatly varies according to category and contract size. Moreover, few MS can agree large high-tech contracts. Those that do however, are faced with another obstacle to competition and development: given these goods' long life cycles, there is a question as to what equipment to buy and sell in and outside the EU. Thus, competitiveness is not only determined by the size and number of competitors, but also whether they will have anything competitive to sell in the future and the risk of redundancy (*ibid*:25).

## Section VII

### Defense Procurement Economics

The categorical procurement dichotomy in EU defense is protectionism vs buying American. Orbiting this dichotomy are monopolies, monopsonies, duplication, State ownership, high equipment costs, and inefficiency. Having 27 closed and fragmented markets, and protectionism employed by MS with industrial defense capabilities, culminates in increased costs and consequently, other MS prefer buying American, with the alternative being a last resort. The lack of information transparency is unsurprisingly abysmal. The latest estimates point that in 2005 (EDA's first year of existence) 80% of equipment expenditure was spent exclusively on national procurement projects, with only 13% on imports from other MS (*ibid*:28); over 60% of defence procurement budget spent on non-EU military imports between 2007-16 (EC, 2022); and a huge openness to US markets relative to MS markets with a 10 to 1 trade deficit ratio (French Senate, 2019).

Defense protectionism is reinforced by economic and political events, EU record arms expenditure having been during the Cuban Missile Crisis, with inconsistent but steady decline on investment until 9/11, seeing vertical increase until the 2008 crisis, and a tame increase since the start of Mogherini's mandate (WB, 2020). These consistent budget cuts are at the root of monopsony, monopoly, duplication, inefficiency and high costs. Further, protectionism only makes sense for MS with some national capacity, meaning that for MS who lack such capacity, expensive European products push them towards cheaper and cutting-edge US products. Vital for any possibility of a true internal defense market, is whether these MS opt to replace US value for money for investing in other MS' inefficient industries (Trybus, 2014:30).

Regarding monopsony, arms producers often only have one buyer, the State. Export control laws restrain exports to other States even within Schengen, and private buyer sales are usually outlawed. Since export policy limits liberalization, MS and firms are discouraged from cooperating, generating two circular issues: first, concern over supply security *i.e.*, assuring supply of both defense products' and contracts' long life cycle both in peace and hostile times; consequently, MS feel responsible for national industrial capacity, employment and R&D, leading to recurrent contract awards aimed at keeping the single provider in business; culminating in MS greatly controlling their national



defense industries, either by ownership, golden shares allowing heavy intervention in management decisions, or by generous State aid (*ibid*:32).

Economists have long criticized EU defense procurement inefficiency, known as expensive, lengthy completion time, and underwhelming quality and service. Indeed, due to *Big 5* monopolies and monopsonies, and the EU markets' fragmented nature, duplication is another obstacle, as many products have several providers. Comparatively, the US market, more than twice the combined size of MS' markets, has fewer providers for many more products. Despite increasing competition, given protectionism, it also means higher costs absent of economies of scale (*ibid*:34).

MS have long held defense to be at the root of sovereignty, yet this tunnel vision neglects the fact that near all MS are aligned to NATO, meaning sovereignty is exercised in tune with NATO *i.e.*, the US. Consequently, for most MS (even *Big 5*, due to political barriers to increase spending), defense autarky is unfeasible. In fact, *Big 5* collaboration (e.g., Eurofighter/Typhoon, air-to-air Meteor or the A400M), is a regular occurrence for the development of new defence equipment (*ibid*:53). Being fragmented in 27 markets and procurement systems means 27 separate armed forces with different and often incompatible equipment. This would not be a problem, were it not for operability concerns regarding UN, NATO, and CSDP missions. Translating into a quagmire that isn't even justifiable for Atlanticist MS that generally oppose EU defense integration, with a senior NATO commander confessing to have needed 9 separate intercom systems to communicate with all unites (Menon, 2011).

## Section VIII

### NATO

CSDP ambiguity starts in its name which, like CFSP, misuses *Common*, misleading both Treaty signatories' intentions on extending the Community Method, and the quality of policy development. Analyzing LT Art. 42, the shot at mil-civ operations is first limited to peacekeeping and conflict prevention outside EU territory, thus not providing for its territorial defense. Further, relying on MS' assets contradicts *Common* in CSDP, as it does not provide for common instruments, troops or HQ. Moreover, employing the historical method in interpreting LT Arts. 42.2, 42.7, and Protocols 10 & 11, we see the CSDP was not set despite NATO, rather, NATO was protected despite the CSDP, as these set NATO as bedrock of EU collective defense (Keukeleire & Delreux, 2014:173). Thus, addressing EU-NATO dynamics is unescapable.

The WEU was the original vector by which NATO capped EU defense autonomy. While MBT Art. IV foresaw WEU reliance on NATO, MT Art. J.4 indexed all defense policy to the WEU, despite Art. J.1 creating the CFSP and extending its scope to all foreign/security areas; AT Art. J.7 limited EU defense operability to WEU framework, under which defense policy was to be compatible with NATO. Thus, NATO kept a foot in, as the WEU was expected to conform to NATO positions (Blockmans, 2013:246).

However, contrasting previous Treaties, LT Art. 3.5 introduces a set of guiding FP values. This resembles NATO's Art. 2. Comparatively, while not the same, they are similar, complementing values (Duke, 2011:3). Raising the question: absent conflicting values, does friction arise regarding competences? *Prima facie*, no. We can boil NATO down to Art. 5, its core purpose being collective defense. Its geographic reach is Europe (Art. 6 NATO), and it limits ascension to European states (Art. 10 NATO), thus scope is limited to members' territories (Daalder & Goldgeier, 2006:108).

While the EU has seen sundry steps toward defense capabilities in evolving Treaty provisions, multiplication of defense oriented institutions, posts, and secondary law; NATO has never striven beyond intergovernmentalism, its Treaty remaining untouched (NATO, 2022). Moving towards common defense *seems* to encroach NATO's *raison d'être*, by LT Art. 42.2 stating that progressive framing *will* lead to a common defense, as opposed to *might* in MT and AT Art. B. Nevertheless, Treaty drafters accounted for

the Precautionary Principle, given issues such as Cyprus or Denmark. Thus, the same article safeguards MS' policy as well as MS' NATO alignment (Duke, 2011:10).

Furthermore, *collective* defense and *common* defense are not the same. While NATO Art. 5 is activated provided a MS is attacked in its territory, LT Art. 42.1 explicitly states CSDP is to be employed outside EU territory, thus having contrasting geographic reaches. Moreover, where the WT does mention its external role, it is not through defense, but rather in a *lead by example* tone. WT Art. 2 stating NATO parties' contribution to peace in IR by strengthening their free institutions and promoting the principles upon which these are based and eliminating conflict in international economic policy. This is clearly distinct from LT Art. 41.1 stating its external role in peacekeeping, conflict prevention and international security. It may seem, comparing LT Art. 42.7 and WT Art. 5, that the use of *by all means* has a stronger tone than NATO's *such action as it deems necessary, including the use of force*. Yet, the commonly held corollary to WT Art. 5, Art. 42.7 TEU, emerged out of discussions at CFE Working Group VIII. The Solidarity Clause aimed not at collective defense but at obliging military assistance in case of threats from non-state entities *i.e.*, antiterrorism (Duke, 2011:12) In fact, the only instance of Art. 42.7 invocation was France post 2015 Paris attacks. There was no direct support for France's security, rather a relief of French military commitments abroad, support coming from rallied MS, not the EU itself (*id.*, 2018:158). Thus, between NATO and CSDP, *a priori* neither values conflict nor competences overlap. We should therefore review the EU's security and defense legal evolution, to better comprehend the CSDP *status quo*.

As afore alluded, the WEU, and thus European intent on defense cooperation, predates NATO. Yet, NATO set the stage for US military and defense dependency (Deighton, 2002:722). NATO has shaped EU defense applying political pressure to frame the Treaties' preservation of its sway (Blockmans, 2013:246). In the time between the BT and the MBT, the US Truman Doctrine and Containment policy poisoned the EDC's set up, heightening disagreements on the FRG's status and the prospect of GDR reunification. Thus, in the next 40 years, European FP in the military sphere was kept out of reach (Deighton 2002:721) and the European powers became used to free riding on the US through NATO (Howorth, 2012). The first evidence of this is comparing BT Art. IV, whereby if a party is victim to an armed attack, the others will afford *all* the military and other aid in their power, to MBT Art. IV, which established close WUE-NATO cooperation, explicitly setting its reliance on NATO (Lindstrom, 2017:16).

Notwithstanding further criticism, though Europe has striven for defense and security autonomy, evidence shows it is inept absent NATO military and intel capabilities (Duffield, 1994). The EU has launched more than 30 missions, but only 12 of military character. Though these missions shape EU security identity, militarily they score very low on levels of complexity, intrusiveness and coercion, a far cry from a common defense union's ambition (Fiott, 2017). Still, capability shortcomings apply to both EU and

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NATO, given membership overlap, and both have attempted mitigation *e.g.*, NATO's PCC and the EU's EDA (Duke, 2011:15). Crucially, NATO's defense spending target lowered from 3 to 2% GDP post-CW, yet few MS reached either (Howorth, 2012).

NATO's most positive impact, aside from deterrence, was acting as a facilitator in easing tension among MS. Much like the European Community, NATO succeeded in confidence building, minimizing misinformation and distrust with transparency. NATO meetings between MS across several hierarchical levels on a wide range of issues gave MS fora to clarify intentions and concerns (Duffield, 1994:772). Yet, this would backfire as the post-CW questioned NATO's purpose. Despite the massive sunken costs argument, the intangible worth of trust building among recently warring states with sceptic instincts was so vital, any word of dismemberment would jeopardize relations (Wallander, 2000:711).

Whereas, given asymmetric burden sharing, post-CW US expected the EU to hold its own, the EU finally had legitimacy in setting a common policy to face its external reality (Varwick & Koops, 2009:110). Yet, the US remained adamant of EU *ultra*-NATO initiatives. While the MT pegged EU defense to the WEU, its capabilities were unfit for purpose in the Balkans. Thus, amid NATO's identity crisis, the 1996 Berlin Agreement allowed WEU access to NATO assets for missions where NATO was not active (Varwick & Koops, 2009:104), bolstering NATO politically while mildly aiding the EU militarily (Blockmans, 2013:252).

St-Malo ignited ESDP in that two traditionally opposing forces, France (Europeanist) and the UK (Atlanticist) agreed that the EU need for credible autonomy, and NATO capability were not mutually exclusive, but mutually enforcing. Despite this, seeing its WEU influence eroded by the AT, US Secretary of State Albright reacted by indexing the infamous 3 Ds to Berlin Plus: no decoupling ESDP from NATO; no duplication of capabilities; and no discrimination of non-EU NATO MS (Anderson & Winter, 2011:4). Thus, the 3Ds weren't a NATO conditionality, but a US conditionality. Yet, while this banked some political equity, facilitating the 2003 ISA that allowed EU takeover of Allied Harmony (Haine, 2007); it opened involvement of non-EU NATO partners in EU-led operations using separable, but not separate NATO assets and capabilities (Blockmans, 2013:254).

The AT set the PSC, EUMC, and EUMS mirroring the NAC, NMC, and NIMS respectively (*id.*, 2013). Yet, despite institutional upgrades accounted for in NATO's 1999 Strategic Concept, the EU still lacked the operational capabilities to execute crisis management autonomously (Varwick & Koops, 2009:105). Berlin and Berlin Plus were not enough to fill the capabilities gap. Berlin Plus providing EU access to NATO military assets and planning capabilities. Yet, interaction between ESDP institutions and NATO were tense with distrust and information blocking. In 2003, France, Belgium, Luxemburg and Germany tried to set a standing OHQ for EU military missions, yet the Pentagon

responded stating that Berlin Plus' purpose was to prevent an EU corollary to SHAPE (Posen, 2006:183).

Despite being administratively dense, the EU has no permanent HQ where missions may be planed or overseen (Koutrakos, 2013). While politically, the EUMC and EUMS provide options for PSC and CEU adoption, operationally, 3 doors lead to CSDP operations, none of which particularly European or integrated. First is Berlin Plus and SHAPE, under SACEUR operational command. While this option was only used twice upon the EU replacing NATO (Concordia & Althea), all 20 SACEUR have been American. Though MS are not always willing to provide OHQ due to financial or political costs, door 2 is use of facilities provided by France, UK, Germany, Italy, or Greece, assuring greater autonomy, the operational commander being the MS providing OHQ. Third is use of Brussels based OpsCen, which is not a standing or permanent OHQ, but may be CEU-activated for missions up to 2k troops and civilian experts. Yet, the need to activate and install an OHQ that cannot support complex or large scale operations is unappealing; further, while an option since 2007, the UK has blocked it except for 3 HoA operations. The obvious solution, creating a permanent HQ, has been consistently UK blocked (Keukeleire & Delreux, 2014:181).

Comparatively, not only is SHAPE a permanent OHQ, it has a clear hierarchical structure, and oversees permanent command centers with clearly defined non-overlapping competences. SHAPE oversees JFC Brunssum and JFC Naples, each capable of force deployment, and at a lower level are the tactical commands LANDCOM, MARCOM, and AIRCOM, each with a permanent HQ (NATO, 2018).

A final nail hammered by NATO allows non-EU NATO MS to interfere in EU defense, killing any idea of autonomy. Turkey has also been consistently attritious to EU defense autonomy, having stalled Berlin Plus conclusions for 4 years. During the 1999 Cologne EU CO, EU leaders agreed on a position whereby any views expressed by non-MS, up to and including a decision to launch an operation, would not be binding on the EU. Turkey felt this was contrary to NATO's role and minified Turkey's WEU status, concerned about an EU-led operation in Cyprus. Thus, Turkey blocked Berlin Plus until it held a favorable position in the ESDP structure, aiming at participation in planning of EU-led missions (Blockmans, 2013:256). Thus, under NATO's institutional structure, a collective EU voice is blocked by all angles (Varwick & Koops, 2009:124).

Yet, the essential NATO nuisance is identity. Here, WT Art. 2 is central. While its cornerstone is Art. 5, post-CW, Art. 2 kept NATO purposeful. NATO moved from collective security towards security provision, thus clashing with CSDP. Despite US-EU open disagreements over several fundamental security and defense issues (Iraq, Afghanistan, multilateralism, Guantanamo, etc), the EU and NATO are strategically aligned. The 2003 ESS is not so dissimilar to the 2002 NSS, with much of the same main

challenges and mentioning US and NATO importance to EU and global security. What has occurred is a strategic division of labor, the Petersburg Tasks, defined by the WEU in 1992 then passed to AT Art. J7 and LT Art. 43, while not exclusive EU competences, in EU-NATO dynamics, they point to EU Normative Power strength *e.g.*, DDR, peacekeeping & peacebuilding, crisis management *etc. i.e.*, not interventionist in nature (Duke, 2011:7).

While Hard Power is closer associated to NATO, not always is it advantageous. First because most security provision entails non-combat missions *e.g.*, post conflict stabilization, vital asset security, or humanitarian operations - a broad range of security tasks must be executed delicately with expertise. In these missions, EU MS have both expertise and credibility, having in this respect greater security capabilities than NATO, whose leverage relies on US military might. Further, due to US Hard Power dominance and NATO's dependence on US military might for deterrence and credibility, few allies are able to interoperably work with US forces. The greater the gap, the more overwhelmed allies are to foot the bill of shortening it. Yet, despite this freeriding nuisance, it seems to imply ally consent towards US defense policy pressure (*ibid*:6).

Some have argued in favor of making NATO more effective by keeping it as is regarding Art. 5, whilst making a more solid and reliable CSDP, even at the cost of NATO assets becoming full on CSDP assets to facilitate the transition. In this context, the EU would be a single member of NATO, and would be able to consult the NAC as well as deciding collectively whether to ask NATO to assist in a given mission, may the situation arise. In fact, the US has been losing confidence in NATO's military capabilities for years *e.g.*, when NATO volunteered to fight the Taliban post 9/11, the US dismissed its offer and did the job by itself. NATO supposedly runs the Afghan war, but no NATO official was present at Obama's side when he swore in NATO's new Afghan commander, leaving out both NATO's SG and SACEUR, responsible for all NATO operations (Kashmeri, 2010).

## **Conclusion**

Europe's intent on military cooperation is older than NATO, the BT's provisions being more robust than NATO's. While NATO restored healthy relations among its MS, it became a wedge by which all subsequent attempts at upgrading EU Defense underwhelmed expectations.

However, it would be intellectually dishonest to blame all CSDP shortcomings on NATO. Bold initiatives *e.g.*, PESCO, EDF seem promising. Yet, though differentiation is a net positive for flexibility, the immense holes in the Internal Market are far too wide, culminating in such US dependence that bandwagoning became freeriding, thus being detrimental even for Atlanticist MS given the spillover effect of impairing interoperability with NATO.

Moreover, as in the CFSP, not only is the CSDP Regime burdened by duplication, multiple bodies with overlapping competences, and oblique lines of command; it also has complex financing schemes which hinder readiness and EU FP influence. The EEAS are specially constrained in CSDP, arguably more than the EC, given its financial and expertise leverage.

### Title III

#### On the HR's Legacy

##### Introduction

The usual top job criteria is found in Art. 17.5 TEU, with due respect for equitable distribution regarding geography, gender and political affiliation – tangential to the Spitzenkandidat Doctrine *i.e.*, if the EPP wins the elections, and its EC President candidate is male *e.g.*, Juncker, it's unlikely the remaining top posts be conservative males, despite the EP only once having been able to enforce its strict Art. 17.7 interpretation (Gatti, 2016:174). However, HR selection is also linked to MS domestic politics. While the UK's Ashton bid was a last resort, given the failed bid for Brown as EUCO President (Charlemagne, 2009); Italy's Mogherini bid was linked to Renzi's move to avoid Letta becoming EUCO President or NATO SG (Bindi, 2014).

If one holds MS, the EC and EUCO Presidents as masters of CFSP/EA, the Roman Law concept of *Pater Familias* offers a solid frame in evaluating both shared responsibility and systemic structural design. The idea originated in Senators, called *Patres*, community elders collectively, not individually, seen as *Patres Gentes* – protectors and masters of the *Domus* (Botsford, 1906:5). The *Pater* was the sole holder of legal rights and obligations, *fili* only indirectly subjects of legal rights (White & Chopra, 2014:157). Authority came from incurring responsibility for subjects' shortcomings (JCH, 1925:2). Though *Pater Potestas* was absolute, it came with significant duties toward their subjects, notably, a command could not be given to a subject without affording powers and resources required to fulfill the objective (Bresch, 1963), rights also require remedies (Lillich, 1970).

*Pater Potestas* was not crushing, lower ranking *fili* would be included in decision making to assimilate and breed trust (Martin, 1995:3), intrinsically linked to cohesion, *fili* owed more than obedience, but *pietas* (Stevens, 1913:7). By order and hierarchy, Augustinian definitions qualify *Dominus* representing and reproducing order, cutting superfluousness and correcting subjects' functions. Each *Domus* thus had their own purpose and master.



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Jurisdiction and punishment ascended in order (Dorschel, 2012:189), no one *Domus* subject to more than one *Dominus* of equal rank (Fischer, 2000:7). Each *fili* protected by their *Dominus* (Periñán, 2012:2), similarly applying to administrative systems (Honoré, 2017).

Though *Pater Familias* specifically is a central conceptual lens by which to evaluate the relations among the EU's top actors, Political Science and International Relations offer an abundance of Theory applicable to the EU, notably Liberalism (Burchill, 2005), Realism (Donnelly, 2005), Constructivism (Hopf, 1998), Regime Theory (Krasner, 1982), and Classic Leadership Theory (Preston, 2010).

This Title thus sets first to make brief use of pertinent theoretical lenses by which to analyze the CFSP Regime; and finally, approach the dynamics and legacy of each top job's generational legacy.

## Chapter I

### Theoretic Lenses

Post-WW2, Liberals saw Institutionalism as Nation States acting in self-interest given multilevel governance reduced costs on autonomous action (Ruggie & Abdelal, 2009). Fukuyama and neo-Kantian Perpetual Peace shaped the ECSC, maximizing absolute, not relative gains (Burshill, 2005). NATO symbolized both Realism's self-preservation, and Structural Realism's *Bandwagoning* and *Freeriding* (Mattelaer, 2016), CSDP offsetting US Offensive Realism, with Defensive Realism at a Realist-Liberal cross-section, Functionalism (Corbey, 1995).

Neofunctionalists see institutional integration as a spillover process whereby progress requires stagnation. Applied to the EU, integration is *stop & go*. As MS avoid integrating too much in a particular area, deficiencies in the same or adjacent areas emerge, requiring new integration waves (Corbey, 1995). Yet, given risk aversion and *status quo* management typical of Realism, when opting between institutional reform or the creation of a new institution altogether, States usually opt the former, spurring nested or overlapping institutions (Stein, 2008).

Regime Theory focuses on autonomy through lags and feedback. Lags are attunement factors between causal variables and the regime. Feedback is *how* interests and power alter, *vis-à-vis* a regime's output. While lags don't explain a regime's continuity, they justify behavioral patterns based on its principles, norms, and procedures. Lags may come by Custom, adherence by force of habit; Uncertainty, if a shift is unknown to be permanent or temporary, or reform acceptance is doubtful; or Miscognition, if dissatisfaction is preferable to an alternative. Given sunken costs, power/interest shifts rarely change regimes, so outdated/dysfunctional regimes persist, often dragging bureaucracy, excessive complexity, slowed decision-making, duplication of functions and overlapping competences (Krasner, 1982).

Where no dominant leader exists, bureaucratic entanglement centers around where loyalty lies (Hermann & Hagan, 1998). Leadership is a determinant variable in regimes' performance. At minimum, leaders are agents whose acts affect other agents more than their acts affect them. Classic Leadership Theory offers three propositions on whether an

agent's acts are likely to affect events: the agent's position within the regime; the extent to which the regime allows restructuring; and their personal traits (Preston, 2010).

Linked to *Pater Familias* and within Leadership Theory is Principal-Agent Theory. Once power is delegated, Agents gain authority, and thus a Principal-Agent dynamic emerges. A Principal delegates power to an Agent when beneficial, either for cost efficiency or to signal commitment. MS have increasingly delegated power supranationally to solve collective action issues. Costs of delegation point to Agents' autonomy straying away from Principals' wants, thus *ex ante* & *ex post* checks are placed to balance dynamics favoring Principals. Solana being the only HR to serve 2 mandates might point to an *ex post* check. Applied to the HR, EUCO and the EC President are collective Principals. However, the bridge that was supposed to be the double-hatted HR, has limited discretion, since unclear roles and hierarchies lead to agent competition (Delreux & Adriaensen, 2017).

Image cultivation and *rapport* are key to soft power (Melissen, 2005). Thus, for Classic Leadership Theory's third proposition, Leaderization Theory is ideal in analyzing the HR. Leaderization analyzes leaders' impressionism, visibility, and copresence, vis-à-vis its administration, media, and the public. Since the HR's *raison d'être* is to increase EU FP visibility, consistency, continuity and coherence, it is prudent to observe each HR's leaderization (Aggestem & Hedling, 2020).

## Chapter II

### Generation 1

A juggernaut of Spanish public office, Solana was the first HR after being NATO SG and overseeing its first peacekeeping operation: Bosnia. Nicknamed *The Smile*, for his consensus-building skills, he oversaw crucial EU developments like the EU's first military operation: Concordia (Barros, 2008).

He inherited an EU post US/Iraq controversy (Biscop & Andersson, 2008) patching up EU FP with the ESS doctrine of Effective Multilateralism, entwining EU security ambitions and UN credibility in crisis management (Dannreuther, 2008). Just 3 years post-ESS, there were 3 military missions, 2 military assistances missions, 5 police missions, 2 border control missions, 2 RoL missions and a peace monitoring mission in 15 different countries, as far as a DDR mission in Indonesia (Howorth, 2008). Though small in scale, they merit for building EU defense identity (Gowan, 2008).

BiH's war merits mention given its awkward timing: 2 months post-AT gradually absorbing the WEU (Quille, 2006); now a Union, yet too young to act decisively in ending much less preventing the war (Delalic, 2018). It was character defining. Critics blame the UN for its failure, yet even if the EU had an agreed policy, its tools weren't fit for purpose (NIOD, 2002).

Regarding Iran's nuclear activities, France, Germany and UK began ultra-EU cooperation. Solana was only invited a year later, upon realizing the EU held greater leverage. Under resourced, Solana relied mostly on EU+3 for intel. Regardless, his reputation and being the focal interlocutor was highly impactful, facilitating negotiations (Tabrizi & Kienzle, 2020).

Despite weak formal power, Solana was impactful shaping policy, specially on security e.g., Counterterrorism Policy, framing it within the CSDP and setting up SITCEN (Viceré, 2015); and ENP, solidifying the Barcelona Process and UFM including Arab states and Israel - later derailed by the Second Intifada. Yet, his ENP South weakness was

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applying the economic principle of *ceteris paribus* (all things remaining equal) to FP, though it led to the Maghreb's development, it was a one size fits all approach (Bremberg, 2020). Facing the challenge, Solana's legacy exposed the need of an HR leading a structurally solid CFSP, his success set in having been the only HR to have served 2 mandates (Moustakis & Violakis, 2008).

Given the EC's history, Solana didn't really feel impacted by the EC, both closer to the CEU, and the EC being more disarticulated. Prodi benefited from Kinnock yet didn't take full advantage. It was Barroso who solidified the EC and its Presidency, having also served 2 mandates. Barroso inverted the EC SG into his personal team, extending his resources and scope over the College (Bauer, 2008).

Perceiving hostility against Brussels red tape, Barroso employed disciplined leadership and political restraint. Policy packages replaced disarticulated DG initiatives; the SOTEU was introduced, setting the tone for policy output; a IAB was set to filter ill-timed or trivial proposals; and REFIT aimed at better, lighter, and cheaper regulation. By 2014, Barroso repealed 5,590, reducing the EU burden in €30B (Kassim, 2017).

With Solana, Barroso was unbothered by CFSP in his first mandate. In his second his prudence was rewarded, nominated unanimously by the 27 MS (Isenson, 2009). Ambitiously, he imposed conditions on agreeing to serve a second term (France 24, 2009), advocating for a strong EU in times of crisis, aiming for a policy package aimed at financial and banking sectors (Taylor, 2009).

### Chapter III

#### Generation 2

Ashton was criticized for having no name or FP experience – big shoes to fill after Solana. Yet she filled preconditions: center-left, woman, and satisfying the UK wish for a top position. Ashton was criticized for leaving a void in EU public presence e.g., not visiting Haiti post-2010 earthquakes, whereas her US analogue, Hillary Clinton was instantly on site; and top-level meeting absence, like the first post-LT meeting of Defense Ministers with the NATO SG (Rüger, 2012).

In fairness, much of her faults were not necessarily hers, being overblown with the EEAS set up and all post-LT HR tasks. In Haiti, UN SG Ban Ki-moon expressed concern with overloading Haiti's airport traffic capacity amid the humanitarian crisis. Though not in photos or press, Ashton did secure €400M in relief aid in less than a week. Her absence at the Defense meeting was justified, as Ukraine's newly elected President's inauguration ceremony was taking place, and neither Barroso nor Van Rompuy accepted the invitation - had the EU not been present, Ashton would still be criticized. Moreover, one cannot deny Barroso inherited Solana's FP clout, nominating the outspoken Füle as DG NEAR Commissioner, after the EC kept the ENP portfolio. Ashton was spread thin, lacking resources and clout while Füle actively managed important dossiers like Ukraine (*id.*, 2012). Ultimately, EEAS set up took much of her initial focus, losing first foot momentum. For instance, she took office amid the Arab Spring, and despite the LT's new enhanced competencies, Ashton was not a policy entrepreneur. Shy in debates, officials looked elsewhere to push agendas, culminating not only in her own decision-making marginalization, but general disunity within the EU, as if CFSP/CSDP hit pause during her tenure (Viceré, 2015).

Where Ashton made good use of HR powers was on the Kosovo dossier, having been vital at all stages and earning trust of both Belgrade and Pristina (*id.*, 2018). Strikingly, though lacking Solana's trust building skill, being a no name played to her advantage in Iran, Tehran seeing her as a true honest broker, despite UNSC endorsement – likely the first major dossier where the EEAS gave the HR a return on investment (Tabrizi &

Kienzle, 2020). For a while, saturated by Füle's brashness, EUCO turned to Ashton on the Ukraine dossier, yet her lack of FP dexterity again led EUCO to allow Barroso protagonism (Viceré, 2018).

While Barroso mostly overshadowed Ashton, Van Rompuy mostly focused on economics (Radtke, 2012). His nomination is linked to 2 failed bids: Blair, too Atlanticist and prone to diminishing the HR's role (Peneoasu, 2017); and Balkenende, too bland regarding FP. Failing his EUCO bid, Blair promoted Brown for EC President, yet Brown endorsed Van Rompuy, appreciating his fiscal pragmatism (Ruyt, 2015).

Van Rompuy, seen as a low-profile safe bet, turned out to be exemplary in a role with marginally more power than that of a chairperson. He kept close contact with the GAC, holding meetings on the eve of EUCO summits; worked daily with the CEURP; and was pivotal regarding the Eurozone crisis, softening Merkle's reaction to Greece's debt, and managing the Franco-German axis (Dauvergne, 2011). Many expected a Barroso-Rompuy rivalry, yet they met weekly, setting informal rules on division of FP labor and presence on international fora (Schoutheete, 2012).

Conversely, being economy focused, Von Rompuy endorsed Ashton as HR, having been Trade Commissioner and succeeding in high-profile Trade negotiations (WEF). Yet, Ashton's legacy is marked by shortcomings and criticism both at EU and UK level, accused of depriving the UK its place at the EU table (Waterfield, 2011).

## Chapter IV

### Generation 3

Like Solana, Mogherini often conducted CFSP absent EUCO's formal approval, immediately reopening dossiers Ashton had left, keeping Ashton in her Iran team to ensure continuity and coherence (Tabrizi & Kienzle 2020).

In the Balkans, she negotiated for public security e.g., energy, telecom, and civil protection, utilizing all EC/EEAS hierarchical levels, in link with Ashton, ensuring continuity. Inheriting crisis recovery, Syria (Badarin & Schumacher, 2020), Ukraine, and migration (Molnar, 2021), absent formal EUCO impetus she opened Ukraine's dossier and led FAC in launching EAUM Ukraine. Seeking to impose her FP presence she cooperated with her US analog, holding joint press conferences explaining collaborated sanctions regimes (Peterson, 2016).

Thought of as soft on Russia (Kaca, 2018), much can be said about Merkle barring her inclusion in the Normandy format, despite talking regularly with Moscow and Kiev; coordinating DG Trade and ENER based on the AA, DCFTA, and Minsk I&II; calling for a 3rd Ukrainian MFAP; establishing an EEAS counter Russian misinformation team with the UK, Denmark, and Balkans; and pushing Ukraine's eased ascension (Viceré, 2018).

Proactive in the HJA Counterterrorism *dossier*, achieved FAC agreement to fully incorporate it within CFSP, and linking ENP (Rouet, 2016), EC allocation of €1B directed at her strategy, linked to ENP, and with Tusk, holds the record for fastest CSDP mission ever launched – Sophia, 2 months (Viceré, 2015).

She understood Public Diplomacy and Media in framing narratives - *The Mogherini Effect*, increased EU FP visibility bridging the EU public gap. Professionalizing social media, EEAS officials had to use common hashtags e.g., #EUGS. Called to update the ESS, while Solana drew it privately in a small diplomatic group, EUGS was transparent,



against MS wishes, involving NGO, think tanks, media, upgrading visibility (Aggestam & Holding, 2020).

Faced with Brexit and EU identity crisis, she presented EUGS 5 days later to revive confidence, winning EUCO's trust, mobilizing a common EU identity (Viceré, 2018). Though she always had Juncker and EC support, EUGS's momentum vertically lit CSDP, introducing a Resilience Doctrine (Lindstrom, 2017).

Juncker and Barroso were rather similar, yet Barroso was more risk-averse toward Euroscepticism. Indeed, Spitzenkandidaten legitimized his boldness in proving EU's worth (Kassim, 2017). His College hierarchical division was more Presidential than Barroso's, proposals screened by VPs for compliance with his priorities, and allowing the IAB to block proposals. Juncker empowered his HR, supporting her nomination expecting her to maximize her role's potential (Calcara, 2020), placing her above DG Trade (Peterson, 2016).

The Visegrad Group's lobbying for Tusk, against the Danish bid, as EUCO President seemed like perfect timing given the IR context. Tusk's greatest personal trait were versatility, which along with being Polish, made him pivotal to EU FP during his tenure (Brown, 2014).

Well known in EUCO, many insisted he become EC, not EUCO, President. Unlike his predecessor, he was ambitious in FP, particularly regarding ENP East, and EU integration, having studied a plan to overturn Brexit so the UK remained a MS. However, it were his strong FP stances which excluded him from the Normandy Format, since Merkel considered him too bias (Galbert, 2015). Ultimately, Van Rompuy was more impactful through moderation. Unlike her predecessor, Mogherini overshadowed EUCO's President.

## Chapter V

### Generation 4

This generation seems the least articulated. Previous experience leads us to expect the HR be outshined by the EUCO and EC Presidents while these two usually work closely. Yet Michel and Von der Leyen are known to avoid each other e.g., at the 2022 G20 Bali Summit, both their staff were under strict instructions to avoid overlap in itineraries. They have actually preferred holding separate meetings with foreign officials. This has had a negative impact on EU FP, with institutional retaliation e.g., while Von der Leyen refused allowing Michel to attend a meeting with Modi, Michel rejected inviting Von der Leyen to a meeting with Xi Jinping (Lynch, 2022).

From the onset of Ursula's attendance at the UNGA, she has cultivated her relations with the US, emerging as the US's EU point of contact particularly regarding the Ukraine *dossier*. This is apparently a reflection of her standing among EU institutional officials, even EC officials, given her preference for secrecy and small circle driven profile, contrasting previous generations' consensus building profile, with members of the College speaking of her trust issues, alienating herself from colleagues (Lynch & Gridneff, 2022).

EU officials are in agreement that this generation stands in stark contrast to the previous, with meetings between the EUCO and EC Presidents almost inexistent. Not only have several EU officials been cut off of *dossiers* they had previously worked on (given this rivalry), several third-party countries and IO have been confused and divided on who to contact when wishing to address the EU, or even to approach these two at all given their relationship (Lynch, 2022).

One might assume this is fertile ground for the HR to shine, not only as a consensus builder, but as the main face of the EU, this could not be further from reality. Not only has Borrell been outshined, he has been used as the EU's weakest link. A far cry from Solana's clout, Mogherini's pedigree, or even Ashton's discreet.

After being warned by Poland and the Baltics to not visit Moscow upon Navalny's imprisonment, in a press conference with Lavrov, Lavrov openly described the EU as an unreliable partner and mocked both Borrell and the EU for suppressing Catalan independence and EU integration. Moreover, while Borrell was there the Kremlin

expelled German, Swedish and Polish diplomats from Russia (The Economist, 2021). Borrell has also been known to be a weak consensus builder internally, to the point of being unable to appoint the next EUISS director (Wheaton, 2022).

When it comes to coherence, consistency and continuity, since we are just halfway through this generation's mandate, there is not much information to go on, and that which exists doesn't paint the most laudable picture. Yet, we can exercise some quantitative comparisons to the previous generation regarding visibility, using social media and Google as measures of public diplomacy reach.

Borrell's first Instagram post was only in August of 2022, with his posts' likes rarely reaching double figures, his most liked post only reaching 24 likes (@josep\_borrell\_f). Though Mogherini has deleted her Instagram, her old profile still holds more followers than Borrell's despite not having any posts, and she is still found tagged in several other profiles (@federicamogheriniofficial).

Mogherini is also active on Twitter, with over 10k tweets and well over 500k followers (@FedericaMog), Borrell on the other hand has almost half the number of tweets and followers only recently having been more active on social media (@JosepBorrellF).

We may use Google trends to analyze research popularity ratings throughout the HR's mandates. While Mogherini achieved an average monthly rating of 24.35%, having been above 25% 14 times, and 50 % 6 times (Google Trends, n.d.a), Borrell has so far had an average monthly rating of 8.9%, only reaching 25% 5 times, and only once over 50% (Google Trends, n.d.b) - after Germany announced increased military spending (Marsh & Sheahan, 2022).

## Conclusion

*Pater Familias* was effective in that it reduced structural inefficiencies. Similarly to the EU's architecture, *Potestas* is shared, in contrast however, lines of command and competences are nebulously allocated. Another contrast is seen in that the norm of endowing *fili* with the required power and resources to execute objectives is neglected regarding the HR.

MS, the EC and EUCO Presidents seem to be the HR's collective *Paters*, however contrary to *Pater Familias*, Lisbon is quite oblique regarding questions of hierarchy and lines of command, made particularly confusing by the role prescribed to the HR. While *taking part* in EUCO's work in itself is nebulous, being called upon to enforce MS FP to be in line with EU FP seems naïve for two reasons, first because EUCO and the EC tend to assign the HR leadership over less contentious *dossiers*; and because its formal place within the Regime's hierarchy doesn't facilitate this task – made impossible, absent informal enforcement by either the EUCO or EC Presidents.

Crucially, taking the contributions of Regime Theory, the HR's selection system reinforces this status quo maintenance. Thus, all actors having a stake in EU FP have an interest in choosing a low-profile figure, unlikely to outshine them. The exceptions to this rule seem to have been Solana, given the international conjecture of the time and the need for a high-profile figure to inaugurate the post; and Mogherini, given Juncker's commitment to CFSP.

In a slight distinction regarding shared *Potestas*, contrasting the HR-EC dynamic, as the EUCO-HR/EEAS hierarchical dynamic is quite thin, mainly linked by Arts. 15.2 and 18.1 TEU, so too is HR-EUCO accountability. A distinct quality of the post-LT HR regards its appointment being a race to the bottom rather than a race to the top, resulting in the lowest common denominator in balancing interests rather than the highest degree of confidence at the highest level of MS representation. The only thing all HR's have had in common is that all came from the S&D. Taking place amid other appointments, the lack of two-way accountability mechanisms limits the caliber of HR selected. As a result of this bargaining, it's more likely candidates gain pedigree whilst being HR (Mogherini), then having pedigree *a priori* (Solana), that is, if they gain pedigree at all (Ashton or Borrell).

Moreover, since hierarchy is oblique, bureaucratic entanglement centers around where loyalty lies, which is a big risk for the HR's task in enhancing coherence, consistency, continuity and visibility, which is playing out during the current generation's dynamic

given the sour relations between Von der Leyen and Michel. This is made all the more difficult given the cacophony of duplications, overlapping mandates and diminishing marginal returns within the CFSP Regime, along with the NATO quagmire. Ultimately, one can only hope that the Neofunctionalist spillover effect eventually positively addresses the HR and CFSP Regime.

## Conclusion

This thesis seeks not to shake off Intergovernmentalism and Unanimity as marginal, yet these refer to decision-making. Rather, it aims to highlight overlooked hindrances, often seen as marginal, arguing that these are of greater importance than what is commonly calculated, namely procedural and implementation issues.

Analyzing the EU as a Regime and focusing on the CFSP and HR, this thesis concludes 3 propositions. The success of an institution shall depend on 3 factors: a Regime's legal configurations; leadership roles; and how individual and collective actors interact in and around the Regime. This means that success is dependent on too many variables.

Having analyzed the CFSP's Regime in depth, this thesis finds a series of instances where risks to its success may be averted to a greater or lesser extent, arriving at a set of reasonings. First, how actors interact is a gamble. Even with QMV, there are notable episodes where a MS whose population holds marginal weight tips the scales in one way or the other. To reduce the possibility of CFSP's success to the Principle of Unanimity oversimplifies a complex set of issues and neglects the possibility of negative and unintended spillover effects.

Second, though one cannot change someone's personal traits, one can affect what type of person arrives or gets to arrive at a certain place. Meaning, although a leader's personality and skill might be a gamble, it is less of a gamble than the previous reasoning. One can affect how the leader is chosen, how much time he/she has to work, how much resources are at his/her disposal, and how he/she can enforce his/her will and commands.

Third, how the Regime is legally configured is the most important dependent variable in the sense that it is the most malleable *ab initio*. How a Regime is erected will affect its success until the moment it is reformed and readjusted. Thus, it is the least likely factor to be a gamble. Knowing it is the least likely to be a gamble, one may measure and compare the intent of its legal configurations, both the obvious and the obscure.

Concerning the obvious, the HR's *raison d'être* is to enhance EU FP coherence, consistency, visibility, and continuity. While evaluating the return on investment is an inherently subjective action, this thesis concludes the following: Regarding coherence, it has been the bolstering of the EC's power, in particular its President's power which has shown the most return on investment, thanks to their progressively disciplined *modus*

*operandi*. An honorable mention must be made to reducing the extent of the CEURP's influence over FP. Nevertheless, the popular expression *too many chefs spoil the broth*, is perfectly applicable to the cacophony that is the CFSP, both concerning its obtuse hierarchy inefficiently leading to unclear lines of command, and its financing mechanisms compromising effectiveness. If Barroso and Juncker effectively managed their Colleges employing the law of diminishing marginal returns. The same cannot be said for any HR, seemingly unable to effectively address the inefficiencies of duplication and overlapping competences, somewhat cause and effect of Lisbon having spread them so thin.

Regarding consistency, it must be pointed that it highly depends individual traits, namely how pressure resistant the individual is. Whenever an actor is bound to a plurality of orders, all of which have a stake in its appointment, its ability to act and enforce consistency is tainted. This is particularly the case for the HR. Beyond the HR's resource and time limitations, and limited hierarchical control over personnel, they must also contend with controlling pressures from the EC and CEU. Moreover, consistency linked to coordination, paucity control of its own staff and budget mutes independence, *sic* operative independence, *sic* a trusted neutral *cachet* among other authorities, *ergo* impairing coordination power.

Regarding continuity, it is prudent to qualify it with a nuanced approach. First, what is the extent of continuity? If akin to administrative posts such as the EC SG, one may interpret that only Solana, Barroso, Delors, and Hallstein held continuity, given they were the only ones who managed to secure consecutive mandates. These were indeed highly impactful individuals in EU history. Arguably, absent explicit primary law provisions, only the most exceptional individuals may one day fulfil this HR goal. Second, is continuity desirable, given the risk of stagnation to which highly complex structures are prone to? Such *status quo* maintenance is characteristic of the EU, exhibited in the difficulty in affecting tangible change despite the somewhat frequent Treaty reform. Third, is this even a feasible goal to require of the HR? On one hand, the HR lacks legal and hierarchical prerogatives endowing it the autonomy and authority to sanction derogation; on the other the CJEU is judicially handicapped in near all areas of the HR's competence, which are not few.

Regarding visibility, on the one hand, Lisbon maintained a split IR profile, on the other, conceding that it is prudent to respect the nomination criteria for the top jobs, it may be beneficial in that one can compensate for another's deficiencies. Regardless, this goal is once more highly dependent on the incumbent's personal traits, not only requiring a charismatic individual with public eye dexterity, but an individual who is simultaneously capable of cooperating with his split profile colleagues, in addition to said colleagues (who *a priori* are hierarchically superior) manifesting similar traits. To date, including the incumbent, only Solana and Mogherini manifested returns on investment in this respect. Nevertheless, yet again, is this a reasonable goal to require of the HR, given the

lack of provisions on the HR's status (and the EU's status) at international fora? Particularly accounting for how diplomatically disarticulated the EU is *e.g.*, ECHO FO.

Regarding the most obscure intents behind the Regime's legal configurations, if the HR is neither *de facto* nor significantly *de jure* hierarchically superior to other Commissioners – its CFSP powers intended by MS to be within the CEU's remit, to offset EC FP influence; and its appointment depends on the agreement of both forces in dispute (CEU & EC), meaning both benefit in selecting a weak personality, unlikely to challenge either of them, how much authority or autonomy can it truly hold? At the risk of cynicism, two questions emerge. First, to what extent have MS succeeded in putting the EC on a leash? Second, if the formal reason given for the creation of the HR is true, or at least truer than the cynical hypothesis, to what extent has the HR's personality and leadership benefited EU FP? The paradox by which the HR was born is entirely contrary to the Roman *Pater Familias*, regardless of whether the HR's *Pater* is EUCO or the EC. The way the legal architecture, and the field of play were set up allows for instances where neither *Pater* has a genuine interest in seeing it succeed. Have the *schemes* that built Lisbon been a shot in the foot, due to having achieved neither objective? Have the LT drafters *mate-ed* their own check?

Despite the surprisingly abundant machiavellic answers to these hypotheses existing in Academia, this thesis rejects such prepositions. There have been progressive improvements to the CFSP and HR, both formally *e.g.*, PESCO in Defense, and the double-hatted HR/VP; and informally *e.g.*, Juncker's confidence in Mogherini. Ultimately, Regimes are subject to reform, and the extent to which certain legal configurations' unintended consequences were predictable is questionable, let alone stakeholder's intentional self-sabotage.

Regardless, where this thesis found the most detrimental institutional factor to CFSP was clearly in the oblique hierarchies and obtuse lines of command. The overwhelming instances permeable to turf wars and institutional rivalry dilutes any attempt at greater coherence, consistency, continuity and visibility that any HR might wish to achieve. Thus being beyond what hindrance Intergovernmentalism can be.

Further, where this thesis found the most detrimental economic factor to CFSP had neither to do with the HR, nor the CFSP's legal configuration. Rather, it concerns the Internal Market's extensive security-related exemptions. Hindering a healthy EU defense market, and consequently its capability development – vital to any pragmatic ambition for EU FP. It is unignorable how detrimental the EU's reliance on the US is, even for the most Atlanticist MS. Compromising interoperability in NATO engagements, and thus the Alliance's deterrence credibility.



Finally, worse than Intergovernmentalism and Unanimity could ever be for CFSP success is how US-centered NATO is, particularly since, when comparing NATO to CSDP, NATO is a mutual security agreement, whereas CSDP is a policy aiming for a common EU Defense doctrine. Flagrantly, while the WT only has 14 articles and 15 protocols, it mentions the US 70 times, and WT Arts. 10, 11, 13 and 14 centralize all procedural aspects of ascension, ratification, withdrawal, and Treaty archive through the US.

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