

The Common Foreign and Security Policy of the European Union

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Evolution of the CFSP

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- In the 1970s, it became clear that a coordination of the foreign policies of the member states of what back then was the European Economic Community would be helpful.
- Initially, the CFSP was a form of intergovernmental cooperation in the context of the European Political Cooperation.
- Today, the CFSP is more institutionalized and an integral part of EU law.

Article 3 (5) TEU

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“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”

Article 24 (1) TEU

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“The common foreign and security policy is subject to specific rules and procedures.”

- CFSP still does not come as naturally to the EU as e.g. the common agricultural policy (CAP), but it is increasingly perceived as a normal aspect of the work of the EU.
 - Key difference: member states still engage in foreign policy and are de facto reluctant to give up e.g. their national foreign ministries in favor of a single EU ministry.
 - This is similar in other fields but in foreign policy it becomes clear that the EU is not speaking with one voice.

How far does the competence of the EU reach?

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How far does the competence of the EU reach?

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- Article 2 (4) TFEU: “The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy [...]”.
- No clear definition of the scope of the competence of the EU.
 - De facto shared competence.

Obstacles on the way to a real, standalone, EU foreign policy

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- Different roles of the European Commission and the European Parliament in the decision-making process when compared to other policy areas
- impossibility of the CJEU to rule on most CFSP decisions and treaty provisions
- the different effects of CFSP decisions in the domestic legal orders of the member States,
- different nature of the instruments themselves.

Obligations of EU member states under the CFSP

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- Article 11 TEU

“1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.”

The principle of conferral

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- Article 5 TEU

“1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. [...]”

The subsidiarity principle

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- Article 5 TEU

“[...] 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. [...]

The principle of proportionality

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- Article 5 TEU

“[...] 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.”

How the CFSP is conducted

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- Article 25 TEU

“The Union shall conduct the common foreign and security policy by:

(a) defining the general guidelines;

(b) adopting decisions defining:

(i) actions to be undertaken by the Union;

(ii) positions to be taken by the Union;

(iii) arrangements for the implementation of the decisions referred to in points (i) and (ii);

and by

(c) strengthening systematic cooperation between Member States in the conduct of policy.”

CFSP in the European Council and the Council of Ministers

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- Article 32 TEU

“Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.

When the European Council or the Council has defined a common approach of the Union within the meaning of the first paragraph, the High Representative of the Union for Foreign Affairs and Security Policy and the Ministers for Foreign Affairs of the Member States shall coordinate their activities within the Council.

The diplomatic missions of the Member States and the Union delegations in third countries and at international organisations shall cooperate and shall contribute to formulating and implementing the common approach.”

Information and consultation

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- Cooperation within the preparatory organs (Political and Security Committee, COREPER, and working parties - infra), as well as bilateral and multilateral consultations are equally covered by this obligation.
- Article 34 TEU
 - “1. Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organise this coordination.
 - In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the Union's positions.

Information and consultation

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- Article 34 TEU continued

2. In accordance with Article 24(3), Member States represented in international organisations or international conferences where not all the Member States participate shall keep the other Member States and the High Representative informed of any matter of common interest.

Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.

When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position.”

Practical implementation

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- There is a very real risk that more powerful member states want to continue their own foreign policy and refrain from the transparency which would be required by the spirit of the TEU in order to create an effective CFSP.
- CFSP is important in practice, both from the perspective of national foreign ministries and from the perspective of the EU.
- Coordination with the EU and with other EU member states is an important aspect of the practical work of the foreign ministries of EU member states.
- But there might always be an invisible line at which national interests might trump EU loyalties.

Institutions

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- Preamble TEU: "single institutional framework"

- Article 13 TEU

"1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

- the European Parliament,
- the European Council,
- the Council,
- the European Commission (hereinafter referred to as 'the Commission'),
- the Court of Justice of the European Union,
- the European Central Bank,
- the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity."

The CFSP competence of the EU

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- Article 24 TEU

“1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.

The CFSP competence of the EU

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- Article 24 TEU continued

2. Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions.

3. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council and the High Representative shall ensure compliance with these principles.”

The European Council

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- European Council (not to be confused with the Council of Ministers [more in a moment] and the Council of Europe [same flag but totally different institution, distinct from the European Union]) meets four times a year and consists of the heads of state / heads of government of the European Union.
- The European Council defines the EU's overall strategy / policies but is not involved in legislation.
- Only indirect competence of the European Council with regard to CFSP.

The European Council

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- Article 15 (especially (6)) TEU

“1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.

3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.

4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.

5. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure.

6. The President of the European Council:

(a) shall chair it and drive forward its work;

(b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;

(c) shall endeavour to facilitate cohesion and consensus within the European Council;

(d) shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

The President of the European Council shall not hold a national office.”

The European Council

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- Article 26 (1) TEU

“1. The European Council shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.

If international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union's policy in the face of such developments.”

- Article 22 TEU

“1. On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.

Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties.

2. The High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council.”

Cooperation with non-members and international organizations

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- Article 216 TFEU

“1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

The Council of Ministers

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- Main decision-making body of the European Union (together with the European Parliament)

- Article 26 (2) TEU

“2. The Council shall frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council.

The Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union.”

- Article 28 TEU

“1. Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.

If there is a change in circumstances having a substantial effect on a question subject to such a decision, the Council shall review the principles and objectives of that decision and take the necessary decisions.

2. Decisions referred to in paragraph 1 shall commit the Member States in the positions they adopt and in the conduct of their activity.

3. Whenever there is any plan to adopt a national position or take national action pursuant to a decision as referred to in paragraph 1, information shall be provided by the Member State concerned in time to allow, if necessary, for prior consultations within the Council. The obligation to provide prior information shall not apply to measures which are merely a national transposition of Council decisions.

4. In cases of imperative need arising from changes in the situation and failing a review of the Council decision as referred to in paragraph 1, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of that decision. The Member State concerned shall inform the Council immediately of any such measures.

5. Should there be any major difficulties in implementing a decision as referred to in this Article, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the decision referred to in paragraph 1 or impair its effectiveness.”

The Council of Ministers

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- Article 29 TEU

“The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.”
- CFSP decisions will usually be taken by the general affairs Council, which consists of the ministers for foreign affairs.
- Council of Ministers “decides on the voting procedures and it reviews the principles and objectives of the decisions in order to allow for possible national derogations” (Wessel, 2016).

The Council of Ministers

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- Unanimity usually required, unless EU law allows otherwise (Article 24 (1) TEU).
- Qualified Voting Majority (QVM) possible.
- Right of the High Representative to make suggestions.
 - ”In addition QMV may be used for setting up, financing and administering a start-up fund to ensure rapid access to appropriations in the Union budget for urgent financing of CFSP initiatives (Article 41(3) TEU). This start-up fund may be used for crisis management initiatives as well, which would potentially speed up the financing process of operations. [...] Overall, however, it is clear that any action on the part of the EU will in the end continue to depend on the consent of its Member States.” (Wessel, 2016)
- Usually decisions are adopted without debate in the Council because they have already been prepared by the preparatory organs and because there is already a consensus between the foreign ministers (Wessel, 2016).

The Council of Ministers

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- Article 240 TFEU
 - “1. A committee consisting of the Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the latter. The Committee may adopt procedural decisions in cases provided for in the Council's Rules of Procedure.
 - 2. The Council shall be assisted by a General Secretariat, under the responsibility of a Secretary General appointed by the Council. The Council shall decide on the organisation of the General Secretariat by a simple majority.
 - 3. The Council shall act by a simple majority regarding procedural matters and for the adoption of its Rules of Procedure.”
- The Committee of Permanent Representatives of the Member States (COREPER), which prepares Council decisions, is not mentioned explicitly in the CFSP but matters in practice. (Wessel, 2016)

The Political and Security Committee (PSC)

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- “Over the years, th[e] Political and Security Committee (PSC) has developed into the key preparatory and implementing organ for the CFSP and CSDP. [...] During the period of the European Political Cooperation (EPC), a ‘Political Committee’ was created. [...] This committee consisted of the Political Directors of the national Foreign Ministries. The current PSC is a standing committee, composed of representatives from the Member States.” (Wessel, 2016)

The Political and Security Committee (PSC)

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- Article 38 TEU

“Without prejudice to Article 240 of the Treaty on the Functioning of the European Union, a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or of the High Representative of the Union for Foreign Affairs and Security Policy or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative.

Within the scope of this Chapter, the Political and Security Committee shall exercise, under the responsibility of the Council and of the High Representative, the political control and strategic direction of the crisis management operations referred to in Article 43.”

Practical importance of working groups

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- “As in all other areas, CFSP decisions are prepared in working groups or working parties (composed of representatives of the Member States and the Commission). The preparatory bodies are installed by the Council [...] and have an important function during the first phase of the decision-making process. According to Article 19 (3) of the Council’s Rules of Procedure, the main task of the working groups is to carry out certain preparatory work or studies defined in advance. These may include all possible ‘CFSP output’, ranging from démarches to decisions in the form of Joint Actions. The Secretariat prepares reports of the discussions of the working group meetings, which are circulated to all delegations through the Coreu network. On all CFSP matters the working groups report to the PSC.” (Wessel, 2016)
- Practical location of power = working groups
- démarche = diplomatic communication of views / ideas
- Coreu network = Correspondance Européenne = secure communications network between foreign ministries of EU member states plus EU institutions for fast communication, e.g. in crisis situations

The High Representative of the Union for Foreign Affairs and Security Policy

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- When the Council of Ministers meets as the Council of *Foreign Ministers*, it is chaired by the High Representative.
- Article 18 (3) TEU
“The High Representative shall preside over the Foreign Affairs Council.”

The High Representative of the Union for Foreign Affairs and Security Policy

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- Article 36 TEU

“The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament.

The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.”

The High Representative of the Union for Foreign Affairs and Security Policy

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- Currently: Federica Mogherini (1 November 2014 - 31 October 2019)
- EU External Action Service
 - 5,500 employees
 - 139 missions abroad
 - Annual budget approx. 600 million EUR

- Article 34 (2) TEU

“2. In accordance with Article 24(3), Member States represented in international organisations or international conferences where not all the Member States participate shall keep the other Member States and the High Representative informed of any matter of common interest.

Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.

When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position.”

A Paradigm shift in recent years

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- 2003 European security strategy: focus on transformation of other regions (human rights, democracy, rule of law)
- 2016 Global Strategy for Foreign and Security Policy
 - “Shared vision, common action: a stronger Europe”
 - Focus on resilience in the face of new challenges
 - Ability to repel external risks and dangers
 - Capacity to stabilize neighboring states
 - Currently still falling short of this goal
- 2016 European Defense Action Plan (EDAP)
- Move towards a real Security and Defense Union
 - Security Union based on the Area of Freedom, Security and Justice

Area of Freedom, Security and Justice

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- Article 4 (2) TFEU

“2. Shared competence between the Union and the Member States applies in the following

principal areas:

(a) internal market;

(b) social policy, for the aspects defined in this Treaty;

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy;

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty”

Area of Freedom, Security and Justice

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- Article 72 TFEU

“This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”

Towards a true EU foreign policy

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- Since the Lisbon Treaty, the role of the EU has been elevated in the context of the CFSP.
- Article 30 (1) TEU
 - “1. Any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission's support, may refer any question relating to the common foreign and security policy to the Council and may submit to it, respectively, initiatives or proposals.”

- Article 22 TEU

“1. On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.

Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties.

2. The High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council.”

- The Commission and the High Representative can submit joint proposals.
 - The High Representative is, qua office, a vice-president of the Commission (Article 17 (4) and (5) TEU).
- So far rarely used but from the perspective of 'constitutional' or primary EU law, this provides a distinct opening towards a real EU-driven foreign policy.

The Court of Justice of the European Union

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- Article 24 (1) TEU

“1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.”

The Court of Justice of the European Union

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- Article 275 TFEU

” The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.”

The Court of Justice of the European Union

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- Article 263 TFEU

”The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives. [...]”

The Court of Justice of the European Union

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- Article 263 TFEU

” [...] Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.”

The Court of Justice of the European Union

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- Article 40 TEU

“The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.”

The Court of Justice of the European Union

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- Even though the capacity of the ECJ is limited with regard to the CFSP, Article 40 TEU shows that the Court of Justice of the European Union can decide in which policy field a specific issue is located.
- Therefore the ECJ is not completely powerless when it comes to the CFSP.
 - But: the ECJ - crucially - cannot examine matters concerning CFSP-related competences and proceedings.
 - This is a function which the ECJ as *the* (quasi-constitutional) Court of the European Union should have.
 - In so far, the current legal regime is imperfect, although the gap in competence is hardly surprising in this sensitive field.

- Article 26 (2) TEU

“2. The Council shall frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council.

The Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union.”

- Article 25 TEU

“The Union shall conduct the common foreign and security policy by:

(a) defining the general guidelines;

(b) adopting decisions defining:

(i) actions to be undertaken by the Union;

(ii) positions to be taken by the Union;

(iii) arrangements for the implementation of the decisions referred to in points (i) and (ii); and by

(c) strengthening systematic cooperation between Member States in the conduct of policy.”

Identifying the strategic interests of the EU

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- Article 26 (1) TEU

“1. The European Council shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.

If international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union's policy in the face of such developments.”

Informal CFSP Instruments

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- Declarations are political rather than legal in nature.
 - Practical value can exceed that of more formal instruments.
- Political dialogues with non-EU countries
 - High practical importance
 - At different levels (ministerial, parliamentary, High Representative, President of the Commission)

- Legal acts

- Only decisions

- Not to be confused with decisions within the meaning of Article 288 TFEU

- Not regulations or directives

- CFSP decisions are legal acts but do not follow the regular legislative procedures for regulations or directives

- The legal nature of CFSP decisions is still debated from an academic perspective
 - Remember that the ECJ is not competent to rule on CFSP decisions
 - Therefore limited juridical guidance regarding the interpretation of CFSP decisions
- Decisions are
 - adopted by the Council
 - legally binding

Decisions are legally binding

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- Article 28 TEU

“1. Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.

If there is a change in circumstances having a substantial effect on a question subject to such a decision, the Council shall review the principles and objectives of that decision and take the necessary decisions.

2. Decisions referred to in paragraph 1 shall commit the Member States in the positions they adopt and in the conduct of their activity.

3. Whenever there is any plan to adopt a national position or take national action pursuant to a decision as referred to in paragraph 1, information shall be provided by the Member State concerned in time to allow, if necessary, for prior consultations within the Council. The obligation to provide prior information shall not apply to measures which are merely a national transposition of Council decisions.

4. In cases of imperative need arising from changes in the situation and failing a review of the Council decision as referred to in paragraph 1, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of that decision. The Member State concerned shall inform the Council immediately of any such measures.

5. Should there be any major difficulties in implementing a decision as referred to in this Article, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the decision referred to in paragraph 1 or impair its effectiveness.”

The guiding role of the Council of Ministers

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- Article 29 TEU

„The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.”

Deviation from binding CFSP decisions

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Article 28 (1) TEU

“1. Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.

If there is a change in circumstances having a substantial effect on a question subject to such a decision, the Council shall review the principles and objectives of that decision and take the necessary decisions.”

Article 62 Vienna Convention on the Law of Treaties

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) If the treaty establishes a boundary; or

(b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Information requirement prior to adoption

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- Article 28 (3) TEU
 - „3. Whenever there is any plan to adopt a national position or take national action pursuant to a decision as referred to in paragraph 1, information shall be provided by the Member State concerned in time to allow, if necessary, for prior consultations within the Council. The obligation to provide prior information shall not apply to measures which are merely a national transposition of Council decisions.”
- Purpose of this norm: identify possible conflicting national policies as early as possible

Information requirement of member states

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- Member states are not required to inform the Council of national implementation measures.
- But:
 - Article 28 (5) TEU
 - “5. Should there be any major difficulties in implementing a decision as referred to in this Article, a Member State shall refer them to the Council which shall discuss them and seek appropriate solutions. Such solutions shall not run counter to the objectives of the decision referred to in paragraph 1 or impair its effectiveness.”

Imperative needs of a member state to deviate from a CFSP decision

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- Article 28 (4) TEU

„4. In cases of imperative need arising from changes in the situation and failing a review of the Council decision as referred to in paragraph 1, Member States may take the necessary measures as a matter of urgency having regard to the general objectives of that decision. The Member State concerned shall inform the Council immediately of any such measures”.

CFSP: still a different kind of policy

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- The special nature of foreign policy is reflected in the EU's approach to CFSP when compared to other policies.
 - Awareness of the special importance of foreign policy
 - Status of the office of the High Representative as a member and vice-president of the Commission
 - But different approaches to decision-making.
 - In the draft Constitution, what is today referred to as the High Representative was referred to as
 - Dependence of the High Representative on other actors, such as the Commission
 - Special Institution in the form of the EU External Action Service (EEAS)

CFSP: still a different kind of policy

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- The separation between member state competences and EU competences is clearer in other fields (e.g. Common Agricultural Policy).
 - This makes it clear e.g. which competences a national agriculture ministry can have and which competences rest with the EU.
 - In terms of foreign policy, this distinction is often more difficult, if not impossible.
 - In some multilateral contexts, the EU is the actor which speaks on behalf of all member states.
 - In other contexts, it is the individual member states which are e.g. parties to a multilateral treaty.
 - The EU is party to some international treaties but this possibility depends on the willingness of third parties to interact with the EU rather than (or in addition to) the member states.
 - Having 28 seats at the table in the negotiation of a multilateral treaty can be an advantage, but this still limits the development of the EU towards a truly integrated political union.
- CFSP is not an exclusive competence of the EU. The EU is not (yet?) a federal state.

The Common Security and Defense Policy (CSDP) as part of the CFSP

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- Article 21(2) TEU

“2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters; and
- (h) promote an international system based on stronger multilateral cooperation and good global governance.

Regulation of the CSDP

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- CSDP is regulated in Chapter 2 Section 2 TEU
- Article 42 (1) TEU
 - „1. The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.”

What is "security"?

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- No definition in the treaties.
- Different dimensions of security
 - Environmental security
 - Economic security
 - International crime
 - Terrorism
- All of these issues which have been taken into account by the EU in the past are largely internal / non-military.
- Today, the CSDP also has a military dimension.
 - Although the EU does not have an army in the classical sense of the term (yet?).

- Article 42 (4) TEU

„4. Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State. The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate.”

- Article 42 (1) TEU

“1. The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.”

CSDP beyond the borders of the EU

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- Article 43 (1) TEU

“1. The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.”

CSDP is a work in progress

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- Article 42 (2) TEU

“2. The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.”

Solidarity clause

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Article 42 (7) TEU

“If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.”

Article 5 North Atlantic Treaty

”The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.”

Collective defense clause

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- Article 222 TFEU

”1. Union delegations in third countries and at international organisations shall represent the Union.

2. Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. They shall act in close cooperation with Member States’ diplomatic and consular missions.”

CSDP missions (examples)

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- Peace brokering (Aceh, Indonesia)
- Border management assistance (Moldova/Indonesia)
- Justice reform advisory (Georgia)
- Police and prison staff training (Iraq)
- Security sector reform (Guinea-Bissau)
- Peacekeeping upon the invitation of the host country (North Macedonia)
- Part of international administrations (UNMIK, Kosovo)
- Operations under UN Security Council Mandate
- Not (yet): peace enforcement, self-defense

Current state of development

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- Good progress in crisis management operations
- EU is capable of delivering results
 - E.g. Operation Atalanta (anti-piracy mission off the coast of Somalia)
- EU is capable of maintaining several missions at the same time
 - 2016 European Defense Action Plan: 10 civilian and 5 military operations simultaneously
- Cooperation with NATO and non-Member States (Ukraine, North Macedonia)
- More complex, difficult and dangerous operations
 - Kosovo, Afghanistan, Chad
- Still not yet routine, work in progress

Permanent Structured Cooperation (PESCO)

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- Cooperation between 25 EU member states
 - not participating: Denmark (which has opted out from CSDP), Malta (over constitutional law concerns, might join later), United Kingdom (due to Brexit)
 - planned in the failed Constitution
 - De facto implemented since 2017
- Aim: realize the common defense envisaged in Article 42 TEU
- PESCO is a process, allowing member states to participate to different degrees

Legal basis for PESCO

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- Article 42 (6) TEU

„6. Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Article 46. It shall not affect the provisions of Article 43.”

- Article 46 TEU

“1. Those Member States which wish to participate in the permanent structured cooperation referred to in Article 42(6), which fulfil the criteria and have made the commitments on military capabilities set out in the Protocol on permanent structured cooperation, shall notify their intention to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy.

2. Within three months following the notification referred to in paragraph 1 the Council shall adopt a decision establishing permanent structured cooperation and determining the list of participating Member States. The Council shall act by a qualified majority after consulting the High Representative.

3. Any Member State which, at a later stage, wishes to participate in the permanent structured cooperation shall notify its intention to the Council and to the High Representative.

The Council shall adopt a decision confirming the participation of the Member State concerned which fulfils the criteria and makes the commitments referred to in Articles 1 and 2 of the Protocol on permanent structured cooperation. The Council shall act by a qualified majority after consulting the High Representative. Only members of the Council representing the participating Member States shall take part in the vote.

A qualified majority shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.”

- Article 46 TEU continued

“4. If a participating Member State no longer fulfils the criteria or is no longer able to meet the commitments referred to in Articles 1 and 2 of the Protocol on permanent structured cooperation, the Council may adopt a decision suspending the participation of the Member State concerned.

The Council shall act by a qualified majority. Only members of the Council representing the participating Member States, with the exception of the Member State in question, shall take part in the vote.

A qualified majority shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.

5. Any participating Member State which wishes to withdraw from permanent structured cooperation shall notify its intention to the Council, which shall take note that the Member State in question has ceased to participate.

6. The decisions and recommendations of the Council within the framework of permanent structured cooperation, other than those provided for in paragraphs 2 to 5, shall be adopted by unanimity. For the purposes of this paragraph, unanimity shall be constituted by the votes of the representatives of the participating Member States only.”

PESCO measures

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- Shared requirements for military equipment to make the acquisition of military equipment easier
- Contribute troops to EU battlegroups
 - 18 battlegroups of approx. 1,500 soldiers each
 - Deployment within 5-10 days after Council decision
 - Operations would range from 30 to 120 days
 - Not yet used in combat
 - Non-EU states also contribute (e.g. Ukraine is contributing troops to the Balkan Battle Group led by Greece)
- Carry out operations (humanitarian, disarmament, rescue...)

- 2013 Cyber Security Strategy
- 2015 Strategy for a Digital Single Market
- 2016 EU Hybrid Fusion Cell (analytical unit for hybrid threats)
- 2016 Directive on measures for a high common level of security of network and information systems across the Union (NIS Directive)
- 2017 European Centre for Excellence for Countering Hybrid Threats, Helsinki
- Network of Cyber Security Incident Response Teams

- Implementation of UN sanctions regimes by the EU must comply with minimum standards required by the rule of law
 - ECJ: Kadi I and II decisions
 - Practical effect: UN Security Council now takes rule of law concerns more into account (Resolution 1822 (2008))
 - Despite Article 103 UN Charter
 - "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
 - and Article 24 UN Charter
 - "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."
 - for the EU, rule of law takes precedence over the implementation of UN sanctions.

EU Sanctions against Russia

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- July 2014: resolution and regulation on restrictive measures which limit
 - Money transfers
 - Export of sensitive goods and technologies
 - Access to capital markets
 - Services related to the oil sector
- Aim: impose a financial cost on Russia for actions against Ukraine
- Targets (e.g.): Rosneft
 - Rosneft lawsuit
 - Based on EU-Russia partnership and cooperation agreement
 - dismissed by ECJ

Concluding remarks

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- CFSP and CSDP are part of the daily reality of EU operations
- CSDP is an integral part of CFSP
- Both undergo a continuous evolution
 - From inter-governmental coordination to legal institutionalization
 - Experience gained
- The EU has gained power while the member states have not lost anything.
 - Member states have multiple possibilities to engage in their own foreign policy.
 - This increases acceptance of CFSP by EU member states...
 - ...but also hinders the emergence of true EU statehood (for which there currently is no political will).
- No great leaps forward but steady development and reason for optimism for the future.

Concluding remarks

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- The EU is a normative power
 - Leading by example, e.g. regarding human rights
 - Reliance more on soft power rather than on military force

Sources for this presentation / suggested reading

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- A. Bendiek, *A Paradigm Shift in the EU's Common Foreign and Security Policy: From Transformation to Resilience* (2017).
- Robert Schumann Foundation, *European Issues*, No. 299.
- R. A. Wessels, "Common Foreign, Security and Defense Policy", in: D. Patterson / A. Södersten (eds.), *A Companion to European Union Law and International Law*, 1st ed., Wiley-Blackwell, Oxford / Malden (2016), pp. 394-412.

Thank you for your attention.