1. Introduction

The further integration of the EU’s Common Foreign and Security Policy (CFSP) into the Union’s legal order has brought about new questions related to the legal nature of the acts adopted under CFSP as well as to their legal basis. The ‘normalisation’ of CFSP has been analysed quite extensively over the past years.¹

These analyses highlighted the consolidation of EU foreign policy – as well its constitutionalisation as part of the Union’s legal order – by studying subsequent treaty modifications (inter alia integrating the Union’s external objectives²) as well as institutional adaptations (such as the introduction of the European External Action Service and the combination of the High Representative for CFSP and the Commission for external relations³). These changes have largely made an end to


² Art. 21(3) TEU; see below. See also Luigi Lonardo, ‘Common Foreign and Security Policy and the EU’s external action objectives: an analysis of Article 21 of the Treaty on the European Union’, European Constitutional Law Review, pp. 584-608, 2018. As argued by Larik, “The Lisbon Treaty has both expanded and streamlined the Union’s global objectives. [W]e can see that the EU Treaties codify a range of global objectives both in terms of substance but also specifically harnessing law […] Together, these elements coincide with the idea of the Union as a ‘transformative power’, changing not only fundamentally the relations among its members but also of the world around it.” J. Larik, ‘Entrenching Global Governance: The EU’s Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality’, in B. Van Vooren, S. Blockmans and J. Wouters (Eds.), The EU’s Role in Global Governance: The Legal Dimension (Oxford University Press, 2013), pp. 7-22 at 10-11.

³ On the EEAS see for instance M. Gatti, European External Action Service: Promoting Coherence through Autonomy and Coordination, Brill|Nijhoff, 2017; and G. De Baere and R.A. Wessel, ‘EU Law and the EEAS: Of Complex Competences and Constitutional Consequences’, in J. Bátor and D. Spence (Eds.), The European External Action Service: European Diplomacy Post-Westphalia,
the (partly perceived\(^4\)) distinction between CFSP and other external Union policy areas.

The normalisation of CFSP is also reflected in the way in which CFSP acts are currently assessed. While in the early days it may have been difficult to convince both academics and politicians of the binding nature of CFSP norms,\(^5\) these days it is more and more accepted that CFSP can be seen as “a policy producing norms just as any other EU public policy does.”\(^6\) This statement is largely supported by recent case law of the Court of Justice of the European Union, revealing a principled effort “to further embed the CFSP into the EU legal order.”\(^7\) The two consequences of this development form the main topic of the present contribution. First of all, we will briefly revisit the nature CFSP acts as well as their consequences in the light of the ‘normalisation’ of CFSP. It has been rightly argued that within the EU “different legal instruments entail different legal effects” and that “this may be an important factor for legal basis litigation”\(^8\). Secondly, we will analyse the choice of legal basis and the possibility to combine CFSP and other legal bases for acts covering both CFSP and other external policies.

The analysis in the present paper is largely informed by the emphasis on the principle of consistency in the current treaty regime, in particular to establish a legal connection between all external objectives.\(^9\) Thus, Article 21(3) TEU provides:

“The Union shall respect the principles and pursue the objectives […] in the development and implementation of the different areas of the Union’s external action covered by this

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\(^4\) Cardwell pointed to the difficulty to change the “tradition of otherness” in analyses of CFSP, which made it difficult to fully value the (post-Lisbon) changes. P.J. Cardwell, ‘On ‘ring-fencing’ the Common Foreign and Security Policy in the legal order of the European Union’, *Northern Ireland Legal Quarterly*, 64(4), 2015, pp. 443–463.


Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.
The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.”

Indeed, this provision imposes a binding obligation of coherence in EU external relations on the Union, connecting the list of policy objectives in 21(2) to each other, and to the functioning of pertinent legal principles. Specifically through the case-law of the Court of Justice the obligation of loyalty has become directly connected to the objective of “ensur[ing] the coherence and consistency of the action and its [the Union’s] international representation”. In other words, the principle of consistency forces us to assess not only the legal nature of CFSP acts, but also the choice of legal basis, as well as the possibility to combine legal bases, in the context of the overall legal order of the Union.

2. CFSP Acts as Legal Acts

The provision in Article 24(1) TEU that CFSP is formed on the basis of “specific rules and procedures” as well as the exclusion of the use of “legislative acts” seem to form the basis for a different assessment of the CFSP acts and has traditionally been behind the idea that combining legal bases is difficult, if not impossible. Both notions, however, largely relate to decision-making procedures and tell us less about the legal nature of the acts. The fact that no “legislative acts” can be concluded is mainly intended to exclude the use of the ‘legislative procedure’ which leads to the regular EU types of decisions: Regulations, Directives and Decisions (Art. 288 TFEU). Indeed, the exclusion of the legislative procedure (as the regular decision-making procedure for other Union policies), the requirement of unanimity rather than QMV as the default voting rule, the “specific role of the European Parliament and of the Commission” and the fact that “the Court of Justice of the European Union shall not have jurisdiction” with respect to a number of specific CFSP provisions, seem to have had an impact on how we have perceived the ‘legality’ of CFSP acts. At the same time, the Treaties are quite clear about the legal

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11 Cf. also Sánchez-Taberno, op.cit.
12 See on EU legal acts also an earlier volume in the Academy’s series: Marise Cremona and Claire Kilpatrick (Eds.), EU Legal Acts: Challenges and Transformations, Oxford University Press, 2018.
(and even binding) nature of CFSP treaty provisions and acts. CFSP decisions are
to be found under ‘legal acts’ in the EurLex databases and are published in the L-
series of the Official Journal. It thus goes without saying that both the procedural
norms in the treaties as well as the decisions taken under CFSP are ‘legal’ in the
sense that they form part of the Union’s legal order.\textsuperscript{13} In that sense they form part
of the choice menu of institutions, which will take the specific legal effects of
instruments into account in the choice of legal basis. The present section will briefly
revisit that starting point as it is essential to understand the rules of the choice for
legal basis that will be analysed in the next section.

A. The Binding Nature of CFSP Acts

Article 26(2) TEU entails a general competence for the Council to “frame the
common foreign and security policy and take the decisions necessary for defining
and implementing it on the basis of the general guidelines and strategic lines defined
by the European Council”. A combination of this provision and the more specific
key legal bases in Articles 28 (actions), 29 (positions), 33 (appointment of special
representatives), 37 (international agreements), 42/43 (military and civilian
missions) 46 (permanent structured cooperation) allows for the Council to adopt
different CFSP legal and political instruments. Article 25 TEU lists them as
follows: \textit{general guidelines} (a specific task for the European Council), \textit{decisions}
(entailing both actions and positions as well as arrangements for the implementation
of the decisions), and \textit{systematic cooperation} between Member States. For the topic
of the present contribution, we focus on the ‘decisions’ (that are not to be confused
with the ‘Decisions’ in Article 288 TFEU) and leave the more informal instruments
(including ‘declarations’ or Council minutes that are the result of the systematic
cooperation) aside. In clear contrast to the many legal acts that adopted on the basis
of the TFEU on a daily basis, the adoption of CFSP legal acts is a relatively rare
phenomenon. In many cases the minutes of the Council meetings contain the
decisions of the Council, without these being adopted as formal CFSP Decisions at
a later stage. Most CFSP Decisions are related to restrictive measures or to the
Common Security and Defence Policy (CSDP) (see further below).

It remains noteworthy that the Treaties are quite clear about the binding
nature of these CFSP acts. The mandatory force of CFSP Decisions can clearly be
derived from Article 28(2) TEU: “Decisions referred to in paragraph 1 shall commit
the Member States in the positions they adopt and in the conduct of their activity.”

\textsuperscript{13} See for a more extensive analysis of the legal nature of CFSP norms and procedures R.A. Wessel,
‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’, \textit{European Foreign Affairs Review},
2015, pp. 123-146. Parts of this section are based on that publication.
Hence, CFSP Decisions, once adopted, limit the freedom of Member States in their individual policies. Member states are not allowed to adopt positions or otherwise to act contrary to the Decisions. They have committed themselves to adapting their national policies to the agreed Decisions.14

Overall, the system is based on a duty of good faith, which is clearly laid down in Article 24 TEU: “The member states shall support the common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area.” The nature of CFSP acts as concrete norms of conduct demanding a certain unconditional behaviour from the Member States, is underlined by the strict ways in which exceptions are allowed.15

### B. The Court’s View on the Nature of CFSP Norms

Already pre-Lisbon, the Court underlined the committing nature of CFSP norms and the need to assess them in the context of the overall EU legal order. A first step in that regard was taken in the Segi case in 2007, when the Court for the first time confirmed the binding nature of Common Positions (currently CFSP Decisions based on Article 29 TEU): “A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular to ensure fulfilment of their obligations under European Union law.”16 The early case law already made clear that in certain constitutional areas’ the Court opted for a Union-wide application of certain fundamental rules and principles. Thus, the Court, for instance, made clear that wherever access of information is concerned no distinction is made on the basis of the content of the requested document.17 Similarly, the Court argued that judicial protection was to be applied Union-wide. It referred to Article 6 TEU and

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14 It is even tempting to make comparisons with EU Regulations, which also demand the unconditional obedience of Member States once they are adopted. The notion that CFSP acts restrain the EU Member States is of course far from new. See already C. Hillion and R.A. Wessel, ‘Restraining External Competences of EU Member States under CFSP’, in M. Cremona and B. De Witte (Eds.), EU Foreign Relations Law: Constitutional Fundamentals, Oxford: Hart Publishing, 2008, pp. 79-121
15 See on the exceptions Wessel, ‘Resiting Legal Norms’, op.cit.
16 Case C-355/04 P, Segi and Others v. Council [2007] ECR I-1657, para. 52. While the case primarily concerned the (former) area of police and judicial cooperation in criminal matters (PJCC), a transposition to CFSP seems legitimate as the Common Position in question could also be regarded a CFSP decision since it was equally based on both PJCC and CFSP.
concluded: “the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles […] It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union.”

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

More recent case law confirms the notion that the exclusion of the Court’s jurisdiction in relation to CFSP which could be derived from Articles 24(1) TEU and 275 TFEU is to be seem as the exception rather than as the rule. The case law that has developed since the entry into force of these provisions displays the Court’s broad conception of its CFSP-related jurisdiction. Thus, in a fundamental judgment, the Court held that

“[T]he final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be interpreted narrowly.”

Articles 24(1) TEU and 275(2) TFEU are thus not interpreted as establishing a distinct jurisdiction of the Court for the purpose of the CFSP. Rather, the judicial

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19 Article 24(1) TEU provides: “[…] The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union. […]”. Article 275 TFEU adds that “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. […]”.
20 Hillion and Wessel, ‘The Good, the Bad and the Ugly’, op.cit. Parts of this section draw from that publication.
21 Case C-658/11 EP v Council (Mauritius) ECLI:EU:C:2014:2025, para 70 (emphasis added). See also Case C-439/13P Elitaliana ECLI:EU:C:2015:753, para 41; Case C-455/14P H v Council ECLI:EU:C:2016:569, para 40.
control it intends to perform in relation to that policy appears to be the same as the
one it exercises generally, as envisaged in Article 19 TEU, albeit within the limits
spelled out in those Articles.

Thus, legality control over CFSP restrictive measures is not limited to
annulment proceedings envisaged in Article 263(4) TFEU, but includes the
possibility for it to give a preliminary ruling on their validity. In Rosneft, the Court
considered CFSP acts to be fit to be the subject of a preliminary question:

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

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

Recent case law thus points to an interesting presumption, keeping in mind the
distinctive nature of CFSP: the Court’s legality control over certain CFSP acts is
the same as the one it exercises over other EU acts. It is an expression of its general
mandate as established in Article 19 TEU; it is governed by the same principles, in
particular the principle of effective judicial remedies enshrined in Article 47 of the
Charter of Fundamental Rights. The application of the general EU rules on legality
control to the CFSP context illustrates that the Court considers the CFSP as firmly
embedded in the EU legal order, despite its procedural specificity mentioned in
Article 24(1) TEU. Indeed, as was convincingly argued by Butler, one may view
this development in the light of the “complete system of legal remedies” that lied
behind the ground-breaking Les Verts case.

This development is further illustrated by a number of cases with a CFSP
dimension. First, the Court has made clear that since international agreements in
the area of CFSP are concluded on the basis of the general provisions of Article 218

22 Case C-72/15 Rosneft, ECLI:EU:C:2017:236
23 Graham Butler, ‘Implementing a Complete System of Legal Remedies in EU Foreign Affairs
to a number of complexities that flow from the Court’s recent approach.
TFEU, albeit subject to some specific arrangements. The Court would exercise judicial control to ensure compliance with the terms of that procedure. Second, and in the same vein, the Court has considered that it would have jurisdiction to control the legality of a decision which, despite its CFSP context, relates to a more general or different issue, such as awarding a public service contract in the context of an EU CSDP Mission, or staff issues. The latter situation formed the background of *H. v Council and Commission* – a case brought by a staff member of the EU Police Mission in Bosnia and Herzegovina (EUPM), established under the CFSP:

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

The above-mentioned rulings confirm that the Court of Justice considers the CFSP is part and parcel of the Union’s constitutional set-up and that it sees CFSP acts as legal acts that can be subject to legal scrutiny. That this has consequences for the choice and possible combination of legal bases will be address below (section 3).

**C. Procedural Obligations**

Before dealing with the correct choice of legal basis, it is important to recall the procedures guiding the adoption of CFSP acts. While the procedural requirements give occasional leeway to the Member States, most obligations reveal quite some precision and concreteness. The systematic cooperation referred to in the list of CFSP means in Article 25 TEU is to be established in accordance with Article 32 TEU, which contains the actual procedural obligations. In principle, the scope of issues to which the systematic cooperation applies is not subject to any limitation regarding time or space: “Member States shall inform and consult one another within the European Council and Council on any matter of foreign and security policy [...].” Admittedly, Article 32 adds the words ‘of general interest’. The European Council has never provided a strict definition of ‘general interest’ in Article 32. Nevertheless, it can be asserted that the Member States are indeed *obliged* to inform and consult one another. Through the information and consultation obligation the Member States ordered themselves to use it as one of

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24 *Elitaliana*, para 49.
25 Case C-455/14P *H v Council* ECLI:EU:C:2016:569
26 *Hillion and Wessel, ‘The Good, the Bad and the Ugly’, op.cit.*
the means to attain the CFSP objectives in Article 11. The procedures stipulated in Article 32 only reflect the methods by which the Member States implement CFSP. Moreover, the content of the norm does not provide any other conditions than that the issue should be of general interest; which at least amount to an obligation by Member States who wish to argue that a specific case is not of general interest (in which case it could indeed rightfully kept out of CFSP).

There are no reasons to assume that the notion of consultation as used in Article 32 deviates from these general definitions, which leads us to conclude that the EU Member States are to refrain from making national positions on CFSP issues of general interest public before they have discussed these positions in the framework of the CFSP cooperation.

Informing and consulting one another should take place “within the European Council and the Council”. Keeping in mind the requirement of systematic cooperation, this should not be interpreted as only within those institutions. Cooperation within the preparatory organs (Political and Security Committee, COREPER, and working parties), as well as bilateral and multilateral consultations are equally covered by this obligation. In fact, it is in these bodies that the actual systematic cooperation takes place. A second reason not to limit the cooperation to meetings of the Member States in the Council, may be found in Article 34 on the basis of which Member States shall coordinate their action in international organisations and at international conferences. Even when not all Member States are represented in an international organisation or an international conference, the ones that do participate are to keep the absent states informed of any matter of common interest.

The procedural obligations again underline the notion of CFSP as a Union policy, that is made by the Union’s key decision-making institution (the Council). The treaty lays down strict rules and procedures to Council to adopt the CFSP acts.

3. The Choice of Legal Basis

A. Article 40 TEU and its Current Value

The legal nature of CFSP acts and the fact that they form part of the Union’s legal order just like other EU instruments, has implications for both the choice of the

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27 Cf. also Article 2(4) TFEU, which clearly refers to CFSP as an EU competence: “The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.” Similar references to the Union as the actor in CFSP can be found in other provisions.
correct legal basis (this section) as well as for the possibility to combine legal bases in case decisions cover both CFSP and other policy aspects (section 4).

Obviously, the choice of legal basis is closely related to the effects of the different legal instruments as well as to the procedures. As the Court reminded us in *Tanzania*:

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

In different legal and political contexts, institutions may prefer to influence the procedure and their own involvement as well as the preferred effects of measures by opting for a specific legal basis. In the context of the present contribution, the role of the European Parliament or the voting requirements may differ greatly when either the legislative procedure is (or has to be) used or when it can be argued that that main aim and content of a decision is CFSP-related.

Above we were already reminded of the fact that CFSP acts form part of the Union’s legal order and that they should be assessed and interpreted in the context of the overall EU legal order (see also the rules on consistency referred to above). Yet, apart from the example of restrictive measures, which present a CFSP Decision as the foundation for subsequent action in that area (see below), no automatic hierarchy exists. In the pre-Lisbon version of the TEU, choices for the correct legal basis were to be made on the basis of (former) Article 47 TEU. This so-called ‘non-affect clause’ had as its main purpose to ‘protect’ the *acquis communautaire* from incursion by the special CFSP method, and provided that “nothing in [the TEU] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them”. The landmark case at that

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28 Case C-263/14, *European Parliament v. Council* (*Tanzania*). Dashwood has formulated the legal basis rule (‘Rule (i)’) as follows: “[T]he choice of the legal basis for a European Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest on objective factors amenable to judicial review, which include the aim and content of that measure.” Alan Dashwood, ‘EU Acts and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements’, in Cremona and Kilpatrick, *op.cit.*, pp. 189-249, at 210.

29 See extensively on these choices Engel, *op.cit*. Cf. also Pieter Jan Kuijper, ‘The Case Law of the Court of Justice of the EU and the Allocation of External Relations Powers: Whither the Traditional Role of the Executive in EU Foreign Relations’, in M. Cremona and A. Thies (Eds.) *The European Court of Justice and External Relations Law: Constitutional Challenges*, Hart Publishing, 2013, pp. 95-114 at 102 on the somewhat mundane nature of the legal basis quarrels: “[…] as a consequence of the ‘multi-power character’ of some institutions, litigation on so-called ‘separation of power issues’ of the takes the character of ultra vires claims in respect of the powers allocated to individual institutions and seems closer to questions of the constitutional attribution of precise powers to these institutions than to questions related to broad constitutional principles […]”
time was ECOWAS (or Small Arms and Light Weapons). The result of the ECOWAS case was that the Council CFSP Decision was annulled because it also included aspects of development cooperation, an area that was not covered by the CFSP legal basis. Post-Lisbon, the pillars no longer exists and Article 47 has been replaced by 40 TEU. This provision reflects the current focus on coherent EU external relations, and is therefore more balanced between the TFEU policy fields and CFSP. In substantive terms, it essentially reflects the method whereby the correct legal basis is found through establishing the ‘centre of gravity’ of the decision at stake (see further below).

Art. 40 TEU simply provides:

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

In other words: in adopting CFSP decisions the Council should be aware of the external policies in the TFEU, and vice versa. Despite its ‘balanced’ approach, Article 40 implies that foreign policy measures are excluded once they would interfere with exclusive powers of the Union, for instance in the area of Common Commercial Policy. This could thus limit the freedom of the Member States in, for instance, the area of restrictive measures or the export of ‘dual goods’ (commodities which can also have a military application). Article 40 TEU forces the Court to take a different view on the relationship between CFSP and other areas of external action. No longer should an automatic preference be given to a non-CFSP legal basis whenever this is possible. One could argue that Art. 40 is merely a confirmation of the principle of consistency, now that it does no longer establish a hierarchy between CFSP and other policies. The question may also rightfully be


31 Council Regulation 1334/2000/EC setting up a Community regime for the control of exports of dual-use items and technology, OJ 2000 No. L159/1; in the meantime replaced by Council Regulation 428/2009/EC setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ 2009 No. L134/1. Exception was only made for certain services considered not to come under the CCP competence. For these services (again) a CFSP measure was adopted: Council Joint Action 2000/401/CFSP concerning the control of technical assistance related to certain military end-uses, OJ 2000 No. L159/216.

32 Pre-Lisbon, Art. 47 TEU contained the clear rule that ‘nothing in the TEU shall affect the EC Treaty’. See also Case C-91/05 Commission v Council (Small Arms/ECOWAS) [2008] ECR I-3651.
posed what the current value of Article 40 is, since it mainly seems to repeat a general starting point in EU law.\textsuperscript{33}

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

While practice continues to pose problems, the rules on the correct choice of legal basis are quite clear and – as argued here – equally apply to instruments partly dealing with CFSP issues.\textsuperscript{34} It is well known that in \textit{Titanium Dioxide} the Court started to develop the ‘centre of gravity’ test which included “in particular the aim and content of the measure” as the decisive criterion.\textsuperscript{35} Defining the centre of gravity was necessary to avoid having to use incompatible procedures. The test was further developed in subsequent case law, in which the Court also held that a mere incidental effect was not decisive for the choice of legal basis.\textsuperscript{36}

The latter point was recently confirmed in a CFSP context in the \textit{Kazakhstan} case,\textsuperscript{37} where the Court was given a chance to clarify how to deal with the legal basis questions for decisions or agreements that cover both CFSP and other policy areas. The ‘Enhanced Partnership and Cooperation Agreement’ is a bilateral mixed agreement between the EU and its Member States of the one part and the Republic of Kazakhstan of the other part. It was based on both CFSP (Articles 31(1) and 37 TEU) and TFEU provisions (Articles 91 and 100(2) (transport), and Articles 207

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\textsuperscript{33} At the same time, it has been argued that the fact that Art. 40 does not really add anything to the treaty regime may be interpreted as confirming a separate status of CFSP, which again underlines what has been termed the ‘integration-delimitation paradox’ which from the outset has characterised the position of CFSP in the treaties. See H. Merket, \textit{The European Union and the Security-Development Nexus: Bridging the Legal Divide}, Brill|Nijhoff, 2016; see on this issue in particular Chapter 2.

\textsuperscript{34} See also F. Naert, ‘The Use of the CFSP Legal Basis for EU International Agreements in Combination with Other Legal Bases’, in Jenő Czuczai and Frederik Naert (Eds.), \textit{The EU as a Global Actor - Bridging Legal Theory and Practice: Liber Amicorum in honour of Ricardo Gosalbo Bono}, Brill|Nijhoff, 2017, pp. 394-423 at 402: “[The Mauritius and Tanzania] cases clarify that the CJEU applies its traditional jurisprudence on the choice of legal bases also where the choice is between a CFSP and a non-CFSP legal basis.”

\textsuperscript{35} Case C-30/89, Commission v. Council (\textit{Titanium Dioxide}), EU:C:1991:244, par. 10. Cf. also ‘Rule (ii)’ formulated by Dashwood (\textit{op.cit.}, at 211) on the basis of the case law: “If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component.”


\textsuperscript{37} Case C-244/17, Commission v Council (PCA with Kazakhstan), ECLI:EU:C:2018:662.
and 209 (trade and development cooperation). The case was about the correct legal basis for the adoption of an EU position in the Cooperation Council that was established on the basis of the Agreement. Article 37 TEU was added as the legal basis for the conclusion of CFSP agreements, but the Council felt that also Article 31(1) TEU (on the CFSP voting requirements) was to be included as a legal basis of the decision, as it had also been included in the decision approving the provisional application of the Agreement with Kazakhstan. The Court thus had to apply the ‘centre of gravity test’ to decide whether it was indeed necessary for the Decision to be adopted by unanimity, and whether the inclusion of a CFSP legal basis was at all necessary.\textsuperscript{38} As the judgment may form the basis for answering similar questions in the future, it is important to quote some paragraphs in full (emphasis added):

“42 It is true that, as the Advocate General has noted in points 64 to 68 of her Opinion, the Partnership Agreement displays certain links with the CFSP. Thus, Article 6 of that agreement, in Title II headed ‘Political dialogue, cooperation in the field of foreign and security policy’, is specifically devoted to that policy, the first paragraph of Article 6 providing that the parties are to intensify their dialogue and cooperation in the area of foreign and security policy and are to address, in particular, issues of conflict prevention and crisis management, regional stability, non-proliferation, disarmament and arms control, nuclear security and export control of arms and dual-use goods. Furthermore, Articles 9 to 12 of the Partnership Agreement, which define the framework of the cooperation between the parties regarding conflict prevention and crisis management, regional stability, countering the proliferation of weapons of mass destruction and the fight against illicit trade in small arms and light weapons, may also be linked with the CFSP.  
43 However, it is clear that, as the Advocate General has observed in essence in point 69 of her Opinion, those links between the Partnership Agreement and the CFSP are not sufficient for it to be held that the legal basis of the decision on the signing of that agreement, on behalf of the European Union, and its provisional application had to include Article 37 TEU.
44 First, most of the provisions of the Partnership Agreement, which contains 287 articles, fall within the common commercial policy of the European Union or its development cooperation policy.
45 Second, the provisions of the Partnership Agreement displaying a link with the CFSP and cited in paragraph 42 of the present judgment, apart from being few in number in comparison with the agreement’s provisions as a whole, are limited to declarations of the contracting parties on the aims that their cooperation must pursue and the subjects to which that cooperation will have to relate, and do not determine in concrete terms the manner in

which the cooperation will be implemented (see, by analogy, judgment of 11 June 2014, Commission v Council, C-377/12, EU:C:2014:1903, paragraph 56).

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

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

The point the Court makes is that although there is a clear CFSP dimension in the decision and the agreement, it is “incidental to that agreement’s two components constituted by the common commercial policy and development cooperation”. In other words: it is not necessary to include a CFSP basis merely because there are CFSP elements in a certain agreement or decision. This line of reasoning is consistent with views earlier held by the Court in judgments relating to the agreements bringing Somali pirates before courts in Mauritius and Tanzania (the Pirates cases; see also below). 39

At the same time, earlier case law has revealed that the ‘gravity text’ is not the only test used by the Court in deciding on the correct legal basis. The Court also made clear that a more specific provision shall prevail over the use of generic legal bases. 40 Engel has summarised the distinction between the two test as follows: “while under the ‘centre of gravity’ theory two different provisions with two different aims are at stake; the lex specialis derogat legi generali principle concerns two different provisions, both of which have the same aim, but one being more specific than the other”. 41

The rules on the correct choice of legal basis have particularly proven their value in internal market cases, 42 but there are no reasons not to apply them in CFSP-related cases as well. This has to be done on a case-by-case basis. Thus, the ‘centre of gravity’ test would define whether an instrument falls more in the area of CFSP than, for instance development cooperation or the AFSJ. The ‘lex specialis’ test could favour a CFSP legal basis in for instance decisions on security and defence policy (CSDP), but it could also lead to a TFEU legal basis when for instance specific financial individual sanctions are issued for which a ‘lex specialis’ exists

39 See respectively Case C-658/11, European Parliament v. Council (Mauritius) and Case C-263/14, European Parliament v. Council (Tanzania).
40 The lex specialis derogat legi generali principle; Case C-48/14, European Parliament v. Council (Euratom), EU:C:2-15:91.
41 Engel, op.cit., at 19.
42 Engel, op.cit, at pp. 20-27.
(Art. 75 TFEU). Yet, practice reveals that outcomes are difficult to predict. In the 2012 case C-130/10 European Parliament v. Council the Court was given a first chance to develop an approach towards the function of Article 40. Being confronted with the question of the appropriate legal basis for ‘restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban’, the Court held that Article 215 TFEU (following a previous CFSP decision) rather than Article 75 TFEU (in the Area of Freedom, Security and Justice – AFSJ) was the correct choice. As in the later Mauritius case, the context of peace and security proved to be decisive for the Court’s conclusion rather than the specific content of the decision. These cases also revealed that the limited role of the European Parliament in the CFSP procedures was not decisive.

In general, it has been argued that, while a ‘CFSP context’ may be relatively easy to establish in view of its broad scope (CFSP “shall cover all areas of foreign policy and all questions relating to the Union’s security”), the same would not hold for the ‘lex specialis’ nature of a CFSP provision, due to that same broad general description. At the same time, this argument could be used the other way around as this provision seems to point to a CFSP legal basis as the default starting point whenever issues of foreign policy or security are at stake.

4. Combinations of CFSP and other Legal Bases

A. Problematic Procedural Combinations

On the basis of the integrated external objectives in the current treaty text it has become increasingly difficult to clearly separate CFSP from other external action or to link external objectives to certain specific EU competences. The need to combine CFSP and other issues in single decisions or international agreements has

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46 Despite the fact that this element was part of the Court’s reasoning in Titanium Dioxide, op.cit.
47 Engel, op.cit., at 122; referring to Article 24(1) TEU.
48 As argued by Merket on the basis of a study on the relationship between development (TFEU) and security policy (TEU), “Objectives of conflict prevention, crisis management, reconciliation and post-conflict reconstruction cannot be assigned to one or the other EU competence, forging an indissoluble link between development cooperation and the CFSP.” Merket, op.cit., Chapter 3.
become more apparent. The above analysis on the ‘normalisation’ of CFSP implies that the general rules, largely based on the Titanium Dioxide case law, continue to apply in this area. Yet, the different procedures to adopt CFSP and other EU acts make it difficult to combine legal bases, despite an ongoing discussion triggered by the integration and consolidation of the Union’s external objectives. Thus, in relation to the conclusion of international agreements, Advocate Kokott in her Opinion in the Tanzania case argued that “[...] the Court has certainly not thus far rejected the possibility of such a dual legal basis in a case like the present one” (on CFSP and AFSJ). She concluded:

“It is by no means impossible to rely on legal bases other than the CFSP for the Union’s external action as the Parliament and the Commission argue. For example, it is expressly recognised in Article 21(3) TEU that, in addition to the CFSP, the Union’s other policies can include ‘external aspects. It is therefore perfectly conceivable, in principle, to have recourse, for the approval of an international agreement for the European Union, to competences in the area of freedom, security and justice or to have a dual substantive legal basis by exercising additional competences”. Yet, it remains clear that combinations may be difficult or impossible in practice due to diverging procedural requirements. In the above-mentioned Case C-130/10, the European Parliament challenged a Council Regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden. The Court confirmed the following:

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

45. None the less, the Court has held also, in particular in paragraphs 17 to 21 of Case C-300/89 Commission v Council [1991] ECR I-2867 (‘Titanium dioxide’), that recourse

49 Cf. ‘Rule (iii)’ formulated by Dashwood (op.cit., at 211) on the basis of the relevant case law: “By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary or indirect in relation to the other, the measure must be founded on the various corresponding legal bases.”

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

to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other (see, in particular, Parliament v Council, paragraph 37 and case-law cited).”

The different decision-making procedures and legal instruments thus render combinations of CFSP and other legal bases difficult. With all this in mind, it is interesting to see that combinations do occur and have in the past been accepted by the Court in case of diverging procedures, even when voting requirements were not compatible.

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

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

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

In particular in relation to the conclusion of international agreements, it has not been unusual to use a dual legal basis. Already pre-Lisbon one could come across many examples of international agreements that were adopted both on the

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52 Previously also presented in Case C-155/07 Parliament v Council (EIB Guarantees) [2008] ECR I-8103.
53 Cf. Cases C-94/03, and C-178/03, in which the Court approved the combination of the CCP legal basis (then Article 133 EC), which gave the European Parliament no formal role, with the legal basis for action on the environment (then Article 175(1) EC), under which codecision was the prescribed procedure. In these case, however, QMV applied for both policy fields and the prerogatives of the European Parliament would not be encroached upon. Cf. also Dashwood, op.cit., at 219.
54 An example is formed by Case C-166/07, Parliament v. Council ECLI:EU:C:2009:499), par. 69, where the Court saw no objection to complying with both the co-decision procedure and the requirement that the Council act by unanimity. But combinations of Art. 352 TFEU (previously 308 EC), requiring unanimity, with provisions using the co-decision have occasionally also been acceptable. Cf. Kadi I, Joined Cases C-402 and C-415/05P, at paras 235-236.
55 The CFSP decision is based on Art. 29 TEU. See or instance Council Decision (CFSP) 2019/25 of 8 January 2019 amending and updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2018/1084, OJ L 6, 9.1.2019.
basis of what was then Article 24 TEU (CFSP) and Article 38 TEU (Police and Judicial Cooperation in Criminal Matters). However, this ‘cross-pillar mixity’ was easier as the procedures as well as the effects were similar in both policy areas.\(^{56}\) One may even argue that those combinations were necessary as the procedure for both policy areas was laid down in Article 24 TEU and not in Article 38. CFSP and Community combinations were difficult, not only because of the diverging decision-making procedures, but also because of the unwillingness of Member States at that time to mix the Community method with the perceived ‘intergovernmental’ CFSP procedures. The solution was found in the conclusion of such agreements through the adoption by two distinct, although related, decisions; one “on behalf of the European Union” (with a reference to the CFSP and/or PJCCM legal bases) and one “on behalf of the European Community” (on the basis of EC legal bases).\(^{57}\)

Post-Lisbon, a combination of TEU and TFEU legal bases has proven to be easier. In the above-mentioned Mauritius and Tanzania cases, the Council Decision challenged by the European Parliament was based on Articles 37 TEU (CFSP) and Article 218(5) and (6) TFEU.\(^{58}\) One could argue that this was an obvious combination as Article 218 TFEU also provides the procedure to conclude CFSP international agreements (and the combination is in fact used quite frequently; see below). Hence, in this case the problem was not so much the incompatibility of procedures, but rather the main aim and content of the decision. As we have seen, in that case the Court decided in favour of ‘CFSP-only’ because of the foreign policy context, whereas in Kazakhstan a CFSP legal basis was not deemed necessary because of the ‘indicential’ nature of that policy in the agreement.

The reluctance to opt for a dual legal basis can mainly be found in the Council. As Naert found: “at the stages of signature and conclusion, the Council has generally opted for not accepting that the CFSP competence should be exercised

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by the Union, leaving it to be exercised by the Member States as part of national
competences in mixed agreements”.59 This points to a preference for mixity rather
than for a dual legal basis solution. One could argue that this is contrary both to the
fact that CFSP is mentioned as a Union competence in the treaties and that the same
Union is to reach its external objectives in an integrated manner. By opting for
mixity rather than for and EU-only agreement with a dual legal basis, the Council
stands in the way of a further consolidation of the Union’s external action and a
possible violation of the loyalty principle (Article 4(3) and 24(3) TEU) comes to
mind.60

Similar confusion also arises in relation to some of the so-called ‘horizontal’
agreements, the CFSP parts of which were (at least pre-Lisbon) often seen not as
Union but as Member State competences, which would be covered by the mixed
nature of the agreement. So-called horizontal agreements cover a wide range of
issues; they may be ‘deep and comprehensive’ and usually take the shape of an
Association Agreement or a Partnership and Cooperation Agreement. Although it
is clear that these agreements do not ‘exclusively or principally relate to CFSP’
(Article 218(3) TFEU), the High Representative may in practice be appointed to
negotiate CFSP matters.61 Despite the CFSP being a Union competence, and Article
218 dealing with the conclusion of all international agreements,62 it proves difficult
in practice to simply take CFSP parts of agreements along during the negotiation,
signing and conclusion phase.

B. Combining Legal Bases for the Conclusion of International Agreements

Earlier, Alan Dashwood wrote: “An important issue is whether the Court will prove
willing to countenance the combination of legal bases for the exercise of EU
competence in the field of the common foreign and security policy (CFSP) with
legal bases figuring in the Treaty on the Functioning of the European Union

59 Naert, op.cit., at 412.
60 Art. 24(3) TEU: “The Member States shall support the Union’s external and security policy
actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the
Union's action in this area. […] They shall refrain from any action which is contrary to the interests
of the Union or likely to impair its effectiveness as a cohesive force in international relations.”
61 Se for instance Council Decision authorising the opening of negotiations with the Republic of
Kazakhstan for an enhanced Partnership and Cooperation Agreements between the European Union
and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (Council
doc. 8282/11 of 13 April 2011, art 2(2).
62 Cf. Dashwood, op.cit., at 190: “Article 218 TFEU contains the most complete procedural code
governing the negotiation and conclusion of international agreements on behalf of the EU, as well
as certain related matters, that have existed to date. […] As such, it tends to reinforce the view that
the Treaty of Lisbon has created an integral Union structure […]” This contribution also provides
a good overview of the many aspects of the Article 218 procedure.
By now, we know that a combination of CFSP and other legal bases can often be discovered. Examples include the Agreement continuing the International Science and Technology Center and the Agreement establishing the EU-LAC International Foundation. Another case in point is formed by the accession of the EU to the Treaty of Amity and Cooperation in Southeast Asia. There, the Decision’s legal basis is defined as follows:

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

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 209 and 212 in conjunction with Article 218(6)(a) and Article 218(8), second subparagraph, thereof […]”

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

“(2) The Treaty aims to promote peace, stability and cooperation in the region. To this end, it calls for the settlement of disputes by peaceful means, the preservation of peace, the prevention of conflicts and the strengthening of security in Southeast Asia. Hence, the rules and principles set out in the Treaty correspond to the objectives of the Union’s common foreign and security polity.

(3) Furthermore, the Treaty provides for enhancing cooperation in economic, trade, social, technical and scientific fields as well as for the acceleration of economic growth in the region by promoting a greater utilisation of the agriculture and industries of the nations in Southeast Asia, the expansion of their trade and the improvement of their economic infrastructure. Therefore, the Treaty promotes cooperation with the developing countries of that region as well as economic, financial and technical cooperation with countries other than developing countries.”

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63 Dashwood, op.cit., at 189-190.
65 Many thanks to Dr. Frederik Naert (Council Legal Service) for pointing me to these examples.
67 A similar reason could already be found in the proposal that was jointly submitted by the High Representative and the Commission. Joint Proposal for a Council Decision on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia, Brussels, 16.2.2012.
Naert rightfully pointed to the fact that in this case not only the Council, but also the Commission, the High Representative and the European Parliament were of the opinion that dual legal bases were possible.\textsuperscript{68} One could argue that this should not come as a surprise. As we have seen, Article 218(3) TFEU mentions agreements that relate ‘principally’ (but not ‘exclusively’) to the CFSP and this may hint at the possibility of a dual legal basis.\textsuperscript{69}

Because of their more ‘comprehensive’ scope, multiple legal bases are often used for the conclusion of ‘horizontal’ agreements, as the (mixed) Association Agreements with Ukraine, Georgia and Moldova, or the Enhanced Partnership and Cooperation with Kazakhstan reveal. The respective Council Decisions\textsuperscript{70} use Article 37 TEU as a substantive legal basis alongside legal bases in the TFEU.\textsuperscript{71} Similarly, the negotiation, signing as well as conclusion of the (EU-only) Stabilisation and Association Agreement with Kosovo was done on the basis of Council Decisions using a CFSP legal basis as well.\textsuperscript{72} The same goes for the Council Decision on the signing, provisional application, and/or conclusion of the agreement with Japan,\textsuperscript{73} Armenia,\textsuperscript{74} and Canada,\textsuperscript{75} to mention some recent


\textsuperscript{68} Naert, \textit{op.cit.}, p. 405.

\textsuperscript{69} Wessel, ‘Cross-Pillar Mixity’, \textit{op.cit.}


\textsuperscript{71} Naert found that in these cases the reason for the dual legal basis was to be found in the need for a swift provisional application which would include CFSP parts. Naert, \textit{op.cit.}, at 412.

\textsuperscript{72} Council Decision (EU) 2016/342 of 12 February 2016 on the conclusion, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, OJ L 71, 16.3.2016 (referring to Art. 37 in conjunction with Article 31(1) TEU, and Art. 217, in conjunction with Arts. 218(7), 218(6)(a)(i) and the second subparagraph of Article 218(8) TFEU). See on this agreement and the political reasons for the EU-only nature Peter Van Elsuwege (2017), ‘Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo’, \textit{European Foreign Affairs Review}, 22(3), pp. 393-410.

\textsuperscript{73} Council Decision (EU) 2018/1197 of 26 June 2018 on the signing, on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part, OJ L 216/1, 24.8.2018 (referring to Art. 37 TEU as well as Art. 212(1) TFEU, in conjunction with Article 218(5) and the second subparagraph of Article 218(8) thereof).

\textsuperscript{74} Council Decision (EU) 2018/104 of 20 November 2017 on the signing, on behalf of the Union, and provisional application of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, OJ L23/1, 26.1.18 (referring to Article 37 TEU, and Arts. 91, 100(2), 207 and 209, in conjunction with Article 218(5) and (7) and the second paragraph of Article 218(8) TFEU).

\textsuperscript{75} Council Decision (CFSP) 2017/2322 of 29 May 2017 concerning the signing and conclusion of the Agreement between Canada and the European Union on security procedures for exchanging and
examples. While these decisions are not listed as ‘CFSP Decisions’ (using ‘CFSP’ in the numbering), but as ‘EU’ decisions, one may come across a dual legal basis even in decisions that are categorised as a ‘CFSP Decision’. Whereas Article 37 TEU forms the key CFSP legal basis for CFSP agreements, the Ukraine, Kosovo and Southeast Asia agreements form examples of the fact that occasional reference is also – or perhaps even – made to Article 31(1) TEU on the CFSP voting requirements (see on this also the Kazakhstan case above). This is interesting since here the incompatibility of different voting rules is even made explicit in the combination of legal bases used to adopt the decision.

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

Apart from combined legal bases in decisions dealing with international agreements, practice also reveals the possibility of using both CFSP and other legal

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76 See for instance Council Decision (CFSP) 2017/718 of 27 March 2017 concerning the signing and conclusion of the Agreement between the European Union and the Republic of Moldova on security procedures for exchanging and protecting classified information, OJ L 106, 22.4.2017 (referring to At. 37 TEU and Art. 218(6) TFEU); or Council Decision (CFSP) 2016/2360 of 28 November 2016 on the signing and conclusion of the Acquisition and Cross-Servicing Agreement between the European Union and the United States of America, OJ L 350, 22.12.2016 (Art. 37 TEU and Art. 218 (5) and (6) TFEU). One may argue, however, that in these cases the reference to Art. 218 TFEU is merely of a procedural nature.

77 Art. 217 TFEU: “The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.” CFSP is not in any way excluded from this provision. At the same time, the Court has sometimes asked for an additional legal basis. See for instance Case C-81/13, United Kingdom v. Council (EU:C:2014:2449), where next to Art. 217 an additional legal basis had to be found in relation to the free movement of workers (Art. 48 TFEU). Cf. Ivan Smyth, ‘Variable Geometry, Justice and Home Affairs and the Conduct of EU External Relations’, in Naert and Czuczai, op.cit., pp. 337-361.

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

79 Art. 217 TFEU simply provides: “The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.”
bases in other types of Council decisions. Thus, a combination can be found in decisions on the position of the Union in other international organizations or in the framework of a Cooperation Council based on an international agreement.\(^\text{80}\)

Combinations of CFSP and other legal bases are thus possible and applied in certain specific situations in relation to the conclusion of international agreements. It is interesting that different voting requirements do not seem to stand in the way of this combination; something that, as observed above, was occasionally accepted by the Court in ‘intra-TFEU’ cases.\(^\text{81}\) At the same time, it seems to remain impossible to combine the legislative procedure with CFSP decision-making, which explains why it is much harder for internal decisions to have a dual legal basis. In fact, EurLex currently lists 67 Council decisions in which CFSP and TFEU legal bases are combined, and all of them relate to international agreements. The combination often already starts in the preparatory phase. Despite the rule in Article 218(3) TFEU that the initiative is either done by the Commission or by the High Representative, joint proposals occur.\(^\text{82}\) We have witnessed similar developments

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\(^\text{80}\) Recent examples include: Council Decision (EU) 2018/1552 of 28 September 2018 on the position to be taken, on behalf of the European Union, within the Cooperation Council established by the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, with regard to the adoption of the EU-Azerbaijan Partnership Priorities, OJ L260/20, 17.10.2018 (referring to Art. 37 TEU, and 207, 209, 218(9) TFEU); Council Dent examples include: Decision (EU) 2018/253 of 15 February 2018 on the position to be taken on behalf of the European Union within the Joint Committee established by the Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part, as regards the adoption of decisions on the rules of procedure of the Joint Committee and the adoption of the terms of reference of the subcommittees and working groups, OJ L46/9, 20.2.2018 (Art. 37 TEU and Arts. 207 and 212(1), in conjunction with Art. 218(9) TFEU); Council Decision (EU) 2017/2434 of 18 December 2017 on the position to be adopted on behalf of the European Union within the Joint Council established by the Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, as regards the adoption of a decision of the Joint Council on the rules of procedure of the Joint Council and those of the Joint Committee, OJ L344/26, 23.12.2017 (Art. 37 TEU and Arts. 207 and 209 in conjunction with Art. 218(9) TFEU); Council Decision (EU) 2017/2431 of 11 December 2017 on the position to be taken, on behalf of the European Union, within the Joint Committee established by the Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, as regards the adoption of the Rules of Procedure of the Joint Committee and the setting-up of two special working groups, OJ L 344, 23.12.2017 ((Art. 37 TEU and Arts. 207 and 209 in conjunction with Art. 218(9) TFEU).


\(^\text{82}\) Cf. S. Marquart, ‘Still New Kids on the EU’s Institutional Block? The High Representative and the European External Action Service Seven Years after the Entry into Force of the Treaty of Lisbon’, in Naert and Czuczai, op.cit., pp. 1-37. See for an example the Joint Recommendation for a Council Decision authorizing the opening of negotiations for a Framework Agreement between the European Union and Japan referred to above. In these cases, the Council Decision would state:
in relation to the composition and functioning of the ‘negotiating team’. According to Article 218(3) TFEU, “the Union negotiator or the head of the Union’s negotiating team” are nominated with a view to the subject of the agreement envisaged. In cases involving CFSP, the Council would usually nominate either the Commission representative or the High Representative as head of the negotiating team. In practice, when the Commission representative is nominated, he or she may allow the EEAS representative to take the lead. Naert has explained this by pointing to the fact that the establishment of the EEAS also implied the moving of geographical desks from the Commission to that Service.

5. Conclusion

From a legal perspective, the choices made do not always make perfect sense. First of all, CFSP being a Union competence renders the choice for mixity or the addition of a CFSP legal basis to Association Agreements illogical. More generally, the Court made clear that the centre of gravity test should be used to avoid an unnecessary combination of legal bases, also in horizontal agreements. In other words: a proliferation of legal bases in horizontal agreements is no longer necessary. The possibility of leaving out a CFSP legal basis when foreign and security policy is merely ‘ancillary’ also underlines that separate Council Decisions are not necessary (an instrument, that in practice indeed no longer used by the Council). Obviously, this ‘normalises’ CFSP even further as certain elements of the ‘specific’ CFSP decision-making rules are not applied. […]

“Having regard to the joint proposal by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy”.


84 See for instance the Council Decision on the opening of negotiations of the Kazakhstan Agreement (above). Cf. also Dashwood, op.cit. at 202 in support of this development: “There would clearly be a strong case for the High Representative to be formally associated with the Commission in negotiating such an agreement.”

85 Naert, op.cit., at 419.


87 Case C-377/12, Commission v. Council (Philippines); EU:C:2014:1903; as well as the Kazakhstan case referred to above.