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The line between EU external action under the TFEU and CFSP: Case C-180/2020 and the legal bases for Partnership Agreements

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Introduction

In the preamble of the Treaty of Rome (1957) the signatories defined themselves as:

> "[a]nxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions"[1].

This emphasis on the communal character of the European Union has been upheld countless times since its foundation. As the Community developed, this principle stayed at its very core and inspired both enlargements and agreements with third countries. However, with time, the necessity emerged for closer regulation of the terms of said initiatives. The Copenhagen criteria for accession, as formulated during the European Council meeting in Copenhagen in 1993, provide that any State that wishes to join the EU needs to fulfill the following basic requirements: "(1) stable political institutions and the guarantee of human rights and the rule of law; (2) economic stability and the existence of a robust market that could cope with economic integration with the EU; and (3) an acceptance of the Community Acquis, the body of EU law that has developed since the beginning of European integration in the 1950s"[2]. These objectives were laid down to ease the integration of former USSR countries in the EU, as to allow them to take proper action to conform to the Union's standards. In particular, the Eastern enlargements (2004 and 2007) highlighted the incompatibility of the legal order of post-Soviet countries with that of the Union, and the consequent necessity to devise new mechanisms with the objective of preparing the States on the path to accession. It is precisely within this framework that initiatives such as the European Neighborhood Policy ('ENP') were created. The ENP was launched in 2004 to foster prosperity and stability in the States closest to the borders of the EU, with the incidental objective of "promoting universal values"[3], such as respect for human rights and non-discrimination. With time, the partnership evolved to account for new historical, social and economic developments. For instance, in June 2008, Poland and Sweden put forward a proposal to strengthen the Eastern dimension of the ENP. The result was the creation of the Eastern Partnership ('EaP'), considered a response to the willingness of the countries of Eastern Europe and of the Southern Caucasus to intensify relations with the European Union to achieve "stability, better governance and economic development"[4]. The Eastern Partnership was developed in a broader context of increasing tensions in specific areas. Indeed, the Russo-Georgian war over the status of the regions

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[1] Treaty establishing the European Economic Community, 25 March 1957, Rome.
[2] PALMOWSKI (2016).
[3] Joint communication of the European Commission, 18 November 2015, to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, JOIN(2015) 50 final, *on the Review of the European Neighbourhood Policy*.
[4] Communication of the European Commission, 3 December 2008, to the European Parliament and the Council COM(2008) 823 final, *on the Eastern Partnership*.

of South Ossetia and Abkhazia called for the European Union to issue "a clearer signal of EU commitment"[5], concretized in the EaP. The Partnership was launched in 2009, effectively granting the members (Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine) the possibility to enter Deep and Comprehensive Free Trade Agreements ('DCFTAs') and allowing the EU to create new areas of multilateral cooperation in a number of sectors that would significantly simplify collaboration with those countries. More generally, the ultimate objective of the EaP can be understood as a broad reform process of the normative and economic apparatus of the Eastern partners to achieve closer alignment with the EU, potentially leading to accession. As a matter of fact, the European Neighborhood Policy and, consequently, the Eastern Partnership have been deeply influenced by the experience of the 2004 enlargement. This is reflected in the similar composition of the team of EU officials that worked to develop the Partnership, as many had already contributed to drafting the agreements for the enlargements, and in the documents employed to construct the juridical basis of the EaP, that mirror those of the Eastern expansion[6]. In particular, the emphasis on conditionalities, benchmarks and approximation of domestic legislation point to an evolution of the framework to account for its previous shortcomings[7] and adapt it to the particular geopolitical situation of the Eastern neighbors. The benefits reaped by participating in the Eastern Partnership are, in this sense, essentially dependent upon the ability of each country to conform to the standards set by the Union[8]. These include humanitarian values, such as respect for human dignity and equality, as well as political and economic ones, like strong institutions and economic stability. Since its launch, the EaP has produced mixed results, due to the influence that Russia still wishes to exert in post-Soviet countries and the internal issues experienced by the Union itself. In particular, the European Union is perceived to be declining, and this can be largely attributed to its economic downturn, most notably caused by the Eurozone crisis. Between 2004 and 2014, the EU's share of the world economy fell by almost one-quarter, from 22 to 17%, a testament to the increasingly limited capabilities of the Union to retain economic power[9]. The effects of the COVID-19 crisis are yet to be assessed, though it is plausible to assume it will contribute to said situation. In this sense, the European Union cannot presently be considered among the world powers, though it remains an influential player in its neighborhood.

As a matter of fact, individual partnerships have been developed within the EaP framework and in adjoining areas, such as Kazakhstan and Iraq, although not without disputes concerning the basis of said agreements. After the entry

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[5] *Ibidem.*
[6] KELLEY (2006: 32).
[7] CROMBOIS (2019: 91).
[8] PETERS et al. (2009: 7).
[9] WEBBER (2016: 47).

into force of the Treaty of Lisbon (2009)[10], the European Union acquired the capability to conclude international agreements on its own behalf. The latter can be negotiated by the Union in the cases provided by the Treaties, as written in Art. 216 of the Treaty on the Functioning of the European Union ('TFEU') concerning the external competences of the organization. While Art. 216 TFEU specifies the instances where the Union can act, the procedures are described in Art. 218 instead. Throughout the years, the European Union has negotiated a number of Cooperation and Partnership Agreements with non-member States covering a wide variety of policy areas. In order to better grasp the extent of this capacity, it is important to remember that the Union's external action is found in two distinct constitutional sites: Title V of the TEU, which regulates the Common Foreign and Security Policy ('CFSP'), and Part V of the TFEU, that instead covers more general external policies. This division is fundamental, for the treaty-makers intended to highlight the peculiarity of CFSP, it being intergovernmental in character rather than supranational[11], as the external competences of the Union usually are. This differential status has the important implication of establishing a different procedure for the adoption of legal acts on the basis of CFSP provisions. In the Lisbon Treaty, the distinctive character of the EU's Common Foreign and Security Policy was further underlined with actions such as the creation of the position of High Representative for Foreign Affairs and Security Policy. However, this distinctiveness has not been reflected in the action of the European Court of Justice, as it can be argued that it has minimized the special status envisioned for CFSP within the Treaties. This is evident in the cases in which the Court was asked to rule within the framework of Enhanced Partnership and Cooperation Agreements ('EPCA'). The most relevant case to discuss in this context is Case C-244/17[12], for it was arguably the first instance in which the Court was explicitly asked to "clarify the delimitation between CFSP and non-CFSP competences with respect to the implementation of an international agreement"[13]. In fact, the action for annulment concerned a Council Decision on the EU's position for the adoption of working arrangements in the joint bodies established on the basis of the EPCA with the Republic of Kazakhstan. This brought to light the necessity for a more detailed reflection on the choice of legal basis of the acts implementing international agreements, for they cover a wide variety of topics, including CFSP. The Court was essentially asked to rule on the significance of the relation between the Agreement and CFSP, and whether this was enough to justify a CFSP procedural basis. It was found that the ties

[10] Treaty amending the Treaty on the European Union and the Treaty establishing the European Community, 17 December 2007, Lisbon.
[11] SCHÜTZE (2018: 241).
[12] Judgement of the Court of Justice of the European Union, 4 September 2018, Case C-244/17, *European Commission v. Council*.
[13] VAN ELSUWEGE et al. (2019: 1745).

were insufficient to warrant the inclusion of Art. 37 TEU as a procedural basis. However, the reasoning of the Court on this matter will be discussed afterward in closer detail.

A case similar to that of Kazakhstan was brought before the Court in 2020 within the framework of the Comprehensive Enhanced Partnership Agreement ('CEPA') with the Republic of Armenia. The Middle Eastern country first familiarized with European values when it signed the Partnership and Co-operation Agreement ('PCA') in 1996, and then again when it entered the European Neighborhood Policy in 2004. Despite becoming a member of the Eastern Partnership in 2009, the "Europeanization" of Armenia was derailed by its accession to the Eurasian Economic Union ('EAEU') that called for a recalibration of the bilateral relations with the EU. In response to the EAEU membership, the EU decided to intensify relations with Armenia by initiating the negotiations for the CEPA in 2015. However, Armenian cooperation with the EU was to be carried out within the limits provided by the EAEU membership. The negotiations for the CEPA were concluded in 2017, preserving most parts of the previous PCA, but essentially eliminating all parts of the DCFTA, for they were contrary to the obligations posed by the EAEU. During a meeting with the EU's Special Envoys for the EaP in February 2019, Armenian Prime Minister Nikol Pashinyan strongly argued in favor of the CEPA:

> "[t]he Comprehensive and Enhanced Partnership Agreement is the main instrument of our cooperation, and Armenia is fully committed to its implementation. This is a landmark strategic document, which provides effective mechanisms for advancing both our partnership with Europe and the reforms in our country"[14].

The partnership with Armenia is proving to be crucial from the geopolitical, as well as the economic, point of view for both parties. As Armenia does not enjoy friendly relations with its neighbors, it is heavily reliant on Russia in economic and political terms. The achievement of better ties with the West could potentially improve the Republic's stance in the Middle East, and ultimately reduce Russian influence in the country. On the EU's side, the organization can benefit both from being more "politically present" in the Middle East and from the country's natural resources.

The CEPA entered into force in 2021, though not without issues. In 2020, the Commission sought the annulment of two Council decisions (respectively 2020/245 and 2020/246) on the position to be taken on behalf of the European Union within the Partnership Council established by CEPA with the Republic of Armenia. Therefore, the ultimate goal of the present document is to highlight the line of demarcation between external action and CFSP via the discussion of Case C-180/2020 *Commission v. Council*. The first chapter will be devoted to some preliminary remarks on the main proceeding, the CEPA itself and the contested decisions, along with the legal framework of reference

[14] Declaration of Armenian Prime Minister Nikol Pashinyan, 12 February 2019.

within which the Court eventually issued its judgment. The second chapter will instead take into account the Opinion issued by Advocate General Pitruzzella, as well as a more detailed discussion of the pleas raised during the case. The third chapter will expand further on Case C-244/17 concerning the Agreement with Kazakhstan, for it is an essential element of the reasoning of the Court, and on the rarity in the case law of the use of two legal bases, as well as providing a closer look to the Agreement itself, for its purpose arguably goes beyond simple CFSP. The relevance of this case is to be found in the geopolitical context of Armenia, for its peculiar situation induced the Council to include a CFSP legal basis despite the broader scope of the Agreement.

Chapter 1 – Case C-180/2020, *European Commission v. Council*

In Case C-180/2020 *European Commission v. Council*, the Grand Chamber of the Court ruled, in light of Case C-244/2017 (*Commission v. Council*, on the EPCA with Kazakhstan) and the Treaties, on the annulment of two Council decisions (Decisions 245/2020 and 246/2020, hereafter 'the contested decisions') taken within the framework of the CEPA with the Republic of Armenia. The contested decisions concerned the adoption of the rules of procedure for the Partnership Council, the Partnership Committee and the relative subcommittees as established by the CEPA. The Commission's objection can be divided in two main parts: firstly, the inclusion of Art. 37 TEU as a substantive legal basis in Decision 246/2020; and secondly, the unlawful division of the act adopting the rules of procedure in the contested decisions.

In the present chapter, a brief summary of the main proceeding of the case will be provided, as well as an analysis of the CEPA and of the purpose of the contested decisions, in order to construct and discuss the legal framework of reference on which the arguments of the parties and the ruling of the Court were based.

1.1. Main Proceeding

The European Union is not a sovereign State and, as such, the powers it enjoys are derived, or *conferred* to it, by the Member States. The principle of conferral is specified in Art. 5, para. 2, TEU, and states that:

> "[u]nder 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"[15].

From this principle derives the necessity of justifying the Union's actions with an appropriate legal basis, in order to guarantee the full respect of the individual sovereignty of each Member State. To this end, said legal basis must respect two main requirements: firstly, it "must rest on objective factors that are amenable to judicial review, including the aim and content of the act"[16]; and secondly, its appropriateness is determined via the so-called "center of gravity test", most recently revised in the aforementioned Case C-244/17. While the first expectation is self-explanatory, the second requires a more detailed analysis. In the context of international agreements, it is frequent that the choice of legal basis be controversial, due to the intrinsic multifaceted character of such documents. The center of gravity test serves the purpose of isolating the

[15] Art. 5, para. 2, TEU.

[16] Judgement of the Court of Justice of the European Union, 14 June 2014, Case C-263/14, *European Parliament v. Council*, point 27.

most relevant field, or *fields*, of the document in order to determine the relative pertinent legal basis. Once it has been ascertained, the procedural requirements for the adoption of the act are set according to Art. 218 TFEU in the case of international agreements. This was clarified by the Court in Case C-658/2011, for "the substantive legal basis of the decision concluding the agreement determines the type of procedure applicable under Article 218(6) TFEU"[17]. Art. 218 holds that if the agreement is found to be falling predominantly within the domain of CFSP, the provision is to be adopted via unanimity, as it is foreseen for such matters. When this is not the case, the Council votes via qualified majority voting ('QMV'). For instance, in the Kazakhstan case, the Court ruled that the Agreement had insufficient ties with CFSP to justify a vote by unanimity, ultimately leading to the annulment of the decisions in question. Likewise, the question of Case C-180/2020 was brought before the Grand Chamber according to the action for annulment procedure, as provided in Art. 263 TFEU. In particular, the lawfulness of the contested decisions was challenged by the Commission due to the alleged infringement of procedural requirements on the part of the Council[18]. The issue arose due to the inclusion by the Council of Art. 37 TEU as a substantive legal basis for Decision 246/2020. Art. 37 falls in Chapter 2 of the Treaty on the European Union, covering the "Specific Provisions on the Common Foreign and Security Policy" that requires the Council to adopt the decisions by unanimity instead of qualified majority, in accordance with Art. 218, para. 8, TFEU.

Therefore, Decision 246/2020 was adopted by unanimity instead of QMV because of the inclusion of Art. 37 TEU as a substantive legal basis. However, the decision concerned the rules of procedure of a number of committees which had authority to act beyond the realm of CFSP. Hence, the Commission questioned the compatibility of using a CFSP procedure as well as legal basis with the objective of the committees. The Grand Chamber was asked to determine the appropriateness of said legal basis, which in turn implies the necessity of a broader reasoning on the line of demarcation between external action and CFSP. Art. 40 TEU[19] provides the basis of this distinction, for it traces the most fundamental boundary between external action and CFSP by underlining the distinct character of both procedures. In fact, the article specifies that the implementation of the Union's action under CFSP is to be carried out without

[17] BAERE et al. (2016: 92).

[18] Art. 263, para. 2, TFEU: "[i]t 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".

[19] Art. 40 TEU: "1. 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. 2. 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".

prejudice to its competences in other policy areas, including the capacity to conclude international agreements[20]. Nevertheless, the practical application of this provision is rather complex in the context of international agreements because of the coexistence of multiple legal bases, as it will be analyzed further in detail in the present work.

1.2. The Comprehensive and Enhanced Partnership Agreement with the Republic of Armenia and the Contested Decisions (Decisions 2020/245 and 2020/246)

The Comprehensive and Enhanced Partnership Agreement ('CEPA') with the Republic of Armenia was developed in a complex geopolitical context, one that foresees Armenia as a "swing State" to shift the Eurasian balance of power either in favor of the European Union or of the Russian Federation. According to the taxonomy conceptualized by Barnett and Duval (2005), four categories of power can be isolated: compulsory, institutional, structural, and productive[21]. EU-Russia relations prior to the Ukraine crisis in 2014 have been strongly characterized by non-compulsory forms of power (institutional, structural, and productive)[22], and – arguably – this is a valuable argument nowadays as well, considering the present situation in the region. The two "modern blocs," the Russian Federation and the EU, have rarely, if not never, resorted to outward reciprocal displays of military power in respect of the norms of international law. Therefore, the category that is most suitable for the present analysis is that of institutional power, namely "the control actors exercise indirectly over others through diffuse relations of interaction"[23], for it is reflective of the tendency towards bureaucratization and institutionalization of modern times. As a matter of fact, the struggle for institutional power has taken the form of two parallel processes of integration that have been unfolding in the Eurasian continent since the late 2000s. The two main organizations in the area, the Eastern Partnership ('EaP') promoted by the European Union and the Eurasian Economic Union ('EAEU') sponsored by Russia, were founded in pursuit of economic integration in a macro area with the initially abstract aspiration of eventually achieving political integration. The Republic of Armenia found, and still finds, itself in the middle of the power play between those two sides: on the one hand, it seeks integration with the West; on the other, this aspiration is hindered by hostile neighboring countries that force it to be heavily reliant on Russia for resources and, occasionally, political guidance. Though Armenia's accession to the EAEU in 2015 came as a surprise to the European Union, since the negotiations for the partnership

[20] Art. 3 TFEU.
[21] BARNETT et al. (2005: 43).
[22] CASIER (2018: 102).
[23] BARNETT et al. (2005: 43).

agreement with the EU were almost concluded, political scientist Sergey Minasyan rightly argued that "[u]ltimately, Armenia's decision to join the EAEU was not an economic decision so much as a political decision, based on security considerations"[24]. Considering its adverse neighborhood, Yerevan thought it best to maintain peaceful relations with its main trading partner: as of 2019, Russia was the primary destination for exports (22.0%) and the first contributor to the imports of Armenia (28.7%)[25]. The negotiations for the CEPA between the European Union and Armenia are thus to be analyzed against the backdrop of a country that is still, to a great extent, under the influence of Russia. The commitment of Armenia to simultaneously fulfill EAEU and EU obligations is stated in the very preamble of the CEPA:

> "[r]ecognising the importance of the active participation of the Republic of Armenia in regional cooperation formats, including those supported by the European Union; recognising the importance the Republic of Armenia attaches to its participation in international organisations and cooperation formats and its existing obligations arising therefrom"[26].

With this significant precondition, the CEPA with the Republic of Armenia effectively entered into force in March 2021. Since the Agreement covers a significant number of policy areas, the present document will take into account solely those essential to contextualize the discussion of Case C-180/2020.

Title I discusses the general principles and objectives that primarily concern, as stated in Art. 1, the promotion of mutual interests, peace and stability, and economic development of the country. Matter-of-factly, the focus of the CEPA is "to support the efforts of the Republic of Armenia to develop its economic potential via international cooperation, including through the approximation of its legislation to the EU acquis referred to hereinafter"[27]. This is an evident expression of the willingness of the European Union to include Armenia in its neighborhood system of concentric circles, "with EU member states at the core, followed by candidate countries and then with a friendly neighbourhood to the East and South that would gradually adopt EU norms"[28]. The Union seeks to exercise its normative power where it is still influential, with Eastern Europe and the Southern Caucasus being the perfect areas to do just that. Indeed, the critical geographic position renders the region indispensable for the EU's strategic policy. In fact, the EU is currently involved in the quest for energy resources, and the Southern Caucasus is the natural transit point between a resource-hungry Europe and the raw material-rich States of the Caspian Sea region and the Middle East. To gain the upper hand in the area means to effectively assume control over crucial energetic resources, which would in turn reduce both the EU's reliance on Russia and the

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[24] MINASYAN (2015).
[25] OEC Data.
[26] Preamble, Comprehensive and Enhanced Partnership Agreement between the European Union and the Republic of Armenia, 24 November 2017, Brussels.
[27] *Ibidem*, Art. 1.
[28] POPESCU (2014: 35).

bargaining power of the latter. Therefore, the European Union has great interest in aiding the effort towards peace and stability in the Southern Caucasus for the purpose of acquiring reliable partners in Eurasia. This has brought about the necessity to diffuse European norms and values through institutional channels such as the EaP. Even though, on the part of the EU, it does not necessarily imply that the countries will be considered as perspective members, it is plausible to believe that the possibility of membership, albeit remote, remains rather alluring. The aforementioned Copenhagen criteria for accession to the European Union establish that accession is subordinate to a condition of stability of institutions, an economy that is strong enough to withstand the obligations posed by the Union, and the acceptance of the Union's *acquis*. Similarly, the objectives of the EaP can be resumed in four main policy areas: (1) stronger economy; (2) stronger governance; (3) stronger connectivity; and (4) stronger society[29]. It is therefore clear how the Union's action with respect to its neighbors is motivated by reasons that mirror the criteria for accession, contributing to the charm exercised by the Union on states eager to join.

Title II discusses more in-depth the field of "Political Dialogue and Reform; Cooperation in the field of Foreign and Security Policy". In this sense, the title of the Agreement is centered on the stabilization of the complex geopolitical context of Armenia, for it is necessary to the functioning of the Agreement itself and to the establishment of a foundation for further development of Armenia-EU relations in the future. A strong emphasis is posed on conflict prevention, for the war in the Nagorno-Karabakh region strongly characterizes both the internal and external policies of the country. Art. 24, para. 1(a), TEU provides that

> "[t]he 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"[30].

While the CEPA does cover matters relating to CFSP in Title II, they are essentially incidental when considered in the broader scope of the Agreement. Moreover, the geopolitical context of the Republic of Armenia was found to be insufficient justification for the inclusion of a CFSP substantive legal basis in the adoption of decisions concerning the implementation of the CEPA. In the words of Advocate General Pitruzzella: "the reference in the eleventh paragraph of the preamble to the CEPA to the Nagorno-Karabakh dispute, […], is not sufficient to place the conclusion of the CEPA in a CFSP-specific context"[31], reiterating that the center of gravity test is relative solely to the provisions of the Agreement itself and not to the geopolitical context of the country.

[29] BENTZEN et al. (2020: 4).
[30] Art. 24 TEU.
[31] Opinion of Advocate General Pitruzzella, 17 June 2021, Case C-180/20, *European Commission v. Council*, point 63.

Title VIII is essential to understand the contested decisions, for it refers to the "Institutional, General and Final Provisions". In particular, Chapter 1 provides the institutional framework necessary for the functioning of the CEPA, namely the ensemble of the Partnership Council, the Partnership Committee and the relative sub-committees. These organs are tasked with the supervision and the review of the Agreement when deemed necessary, and they are composed of members of both signatory parties, which is why the Union expressed close concern for the implementation of this title of the Agreement.

The remaining titles lay the ground rules for the functioning of the Agreement and illustrate the provisions regarding the economic cooperation between the country and the Union, highlighting the trade relationship that is established by the document. As previously mentioned, Armenia's reliance on Russia is a consequence of its hostile neighbors. To be an ally of the European Union would reduce both its dependency on Russia and improve its relations with bordering countries. For instance, the role of the GUAM Organization for Democracy and Economic Development (composed of Georgia, Ukraine, Azerbaijan, Moldova) is worth discussing. Per its charter, GUAM cites as one of its main purposes the "deepening [of] European integration for the establishment of common security space, and expansion of cooperation in economic and humanitarian spheres"[32]. This essentially signifies the commitment of its members to participate in European integration, and in particular with the European Union. Matter-of-factly, in a Communique of the Ministers of Foreign Affairs of GUAM issued in Vilnius on November 29, 2013, the States

> "noted with satisfaction the progress achieved by the GUAM Member States in the process of their European integration and welcomed the anticipated concluding by Ukraine, Georgia and Moldova of the Association Agreements with the EU, including DCFTAs"[33].

This points to the existence of friendly relations between the EU and the GUAM, leading to think that an improvement of ties with the EU on the part of Armenia could similarly advance its status with the GUAM members as well. At this moment, the latter does not entertain collective relations with Russia (though the single members do) and leaves Armenia out of projects concerning transportation and energy resources, although it is reasonable to believe that the situation could change following intensifying dialogue with the European Union.

Since international agreements frequently cover a wide spectrum of policy areas, their implementation is not immediate. Oftentimes, the parties deem necessary that certain provisions be prioritized over others, and thus seek their application before the effective entrance into force of the entirety of the agreement. This competence is allocated to the Union in Art. 218, para. 5, TFEU, that provides that "[t]he Council, on a proposal by the negotiator, shall adopt

[32] Art. 1 GUAM Charter.
[33] Communique of the Ministers of Foreign Affairs of GUAM, 29 November 2013, Vilnius.

a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force”[34]. Provisional application was first authorized through Council Decision 2017/1790, followed by additional decisions to implement other parts of the Agreement. More specifically, the question of Case C-180/2020 arose during the implementation of Title VIII of the CEPA. The provisional application of these sections, covering “matters falling within the Union’s competence, including matters falling within the Union’s competence to define and implement a common foreign and security policy”[35], was authorized by the Council in Decision 2018/104, formally including the previously referenced Title VIII. The contested decisions (245/2020 and 246/2020) clarified the position of the Union with regards to the rules of procedure that were to regulate the operations of the Partnership Council and the affiliated committees. The implementation was split into two decisions, one concerning the Agreement as a whole and one specific to its Title II (“Political Dialogue and Reform; Cooperation in the Field of Foreign and Security Policy”) to account for the different procedure to be employed when dealing with matters in the sector of CFSP. Therefore, Decision 246/2020 cited Art. 37 TEU as a substantive legal basis for the implementation of the Agreement, and thus required the Council to act via unanimity under Art. 218, para. 8, TFEU. As previously stated, both the inclusion of Art. 37 TEU and the splitting of the implementation in two decisions were called into question by the Commission, leading to the opening of the case.

1.3. Legal Framework of Reference

In order to fully comprehend the arguments and reasoning of the Court, as well as those of the parties involved, it is pertinent to expand on the legal framework within which the ruling was issued. The legal framework of reference can be divided into two macro areas, namely the European Treaties and the norms of the CEPA itself.

As the case is primarily concerned with the demarcation between CFSP action and external action of the Union, a first distinction needs to be made regarding the relevant provisions for both sides. The crucial provision in this matter is Art. 40 TEU, which clearly traces the borders of CFSP action:

> “1. 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

[34] Art. 218, para. 5, TFEU.

[35] Council Decision, 20 November 2018, 2018/104, *on the signing, on behalf of the Union, and provisional application of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part.*

> Union. 2. 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"[36].

The provision safeguards both the supranational character of external action (para. 1) and the intergovernmental one of CFSP (para. 2), guaranteeing institutional balance. The division is evident in the very positioning of the provisions in the treaties, for CFSP action is regulated by the TEU while external action is instead closely defined in the TFEU.

EU action under CFSP is laid out in Chapter 2 of Title V of the TEU, a clear signal of the previously discussed intention of treaty-makers to provide CFSP with a distinctive character. This chapter contains three fundamental provisions that characterize the judgment: Art. 24, Art. 37, and the aforementioned Art. 40. Art. 24 provides the rules of procedure for the action of the Council under CFSP: "[t]he 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"[37]. Art. 24 clarifies that the Council needs to act by unanimity under CFSP, and this is even clearer in light of Art. 31, which defines those instances in which the Council is not obliged to act by unanimity in CFSP. This is essential to understand the intergovernmental character of CFSP, for the Council is composed by Ministers and Deputies that variate for each policy area and the European Council is formed by the heads of States and governments. Action under CFSP is, therefore, almost exclusively in the hands of the member States rather than the supranational institutions. This caveat is necessary to comprehend the implications of a CFSP legal basis for a legal act. To require the Council to act by unanimity is to demand the agreement of twenty-seven member States at once, therefore severely reducing the possibility for the act to be adopted. This shortcoming became indeed evident in the case of the sanctions on Belarus in the aftermath of the presidential elections of August 9, 2020. The European Union decided to impose sanctions on forty Belarusian officials accused of falsifying the results of the elections, but the motion was vetoed by Cyprus calling for the same sanctions to be imposed on Turkey due to an on-going dispute over maritime rights between the two countries. Though the deadlock was eventually broken in October 2020, when the Union accepted to take action against Turkey as well, it is clear how the necessity for unanimity in the Council when acting on CFSP greatly hinders its ability to act swiftly when needed.

In order to provide said CFSP legal basis, Art. 37 was included by the Council and the High Representative in a joint proposal in 2018, and it simply states that "[t]he Union may conclude agreements with one or more States or

[36] Art. 40 TEU.
[37] Art. 24, para. 1(b), TEU.

international organisations in areas covered by this Chapter"[38]. In the subsequent amended proposal, the Commission removed the reference to Art. 37 TEU on the basis of the Kazakhstan judgment, which in turn led the Council to split the decision into two, as established by previous case law. Matter-of-factly, the Court has ruled that, where there are two main purposes that are reciprocally incidental, the Union can split the legal act in two, one with a CFSP legal basis and the other with a non-CFSP one[39]. This is why the contested decisions, albeit with the same objective, presented different legal bases.

The competences of the Union with regards to external action are briefly mentioned in Chapter 1, Title V TEU, the same as CFSP, but they are furthered in Part V of the TFEU on "The Union's External Action." A reference is made to this connection in the very first Article of Part V, Art. 205:

> "[t]he Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union"[40].

Title V of the TFEU on "International Agreements" discusses the Union's competences with regards to the negotiation and implementation of international agreements, making it a crucial point of the present analysis. Within Title V, particular relevance is to be attributed to Articles 216, 217 and 218. Articles 216 and 217 specifically confer to the Union the power to negotiate international agreements, provided they are in line with the Union's objectives[41] and they involve reciprocal rights and obligations, common action and special procedure[42]. While Articles 216 and 217 provide the basis for the negotiations of international agreements and the general values that need to guide the dialogue, Art. 218 states the rules of procedure. The negotiation of agreements is here defined as a quasi-exclusive competence of the Council, as it is responsible for the opening of negotiations, adoption of negotiating directives, authorization of the signing of and conclusion of the agreements[43]. The Commission and the High Representative are called on to intervene in the case in which the agreement is predominantly or entirely concerned with matters falling within CFSP[44]. The opposite is true for the European Parliament ('EP'), whose consent is necessary in almost all non-CFSP agreements, as the EP represents the Union's citizens, and therefore its contribution to CFSP is not necessary. However, the Parliament is to be informed at all stages of the

[38] Art. 37 TEU.
[39] Judgement of the Court of Justice of the European Union, 14 June 2016, Case C-263/14, *European Parliament v. Council,* as interpreted by SCHÜTZE (2018: 694, footnote 56).
[40] Art. 205 TFEU.
[41] Art. 216, para. 1, TFEU.
[42] Art. 217 TFEU.
[43] Art. 218, para. 2, TFEU.
[44] Art. 218, para. 3, TFEU.

procedure[45]. Paras. 8 and 9 are the most relevant to the present discussion, for they define respectively the voting procedure for the Council and its position with regards to bodies established by an agreement. As mentioned, para. 8 establishes that the Council must adopt decisions via QMV with only few exceptions, including CFSP. It follows that a decision adopted based on Art. 218, para. 9, that finds its center of gravity to be predominantly of a CFSP nature needs to be adopted by unanimity, pursuant to Art. 218, para. 8[46]. Both paras. 8 and 9 constitute part of the substantive legal bases for the contested decisions, though it is important to notice that para. 8 was split with the decisions. Matter-of-factly, Decision 245/2020 cites as substantive legal basis solely the first subparagraph of Art. 218, para. 8, which recites that the decision is to be adopted via QMV, while Decision 246/2020 instead references the second subparagraph, establishing the necessity for the vote by unanimity. The different purposes of both decisions are therefore reflected in their choice of legal basis. Moreover, since Decision 245/2020 is aimed at implementing all provisions regarding the non-CFSP portion of the objective set out for both decisions, it requires an ampler legal basis (Articles 91, 100, para. 2, 207 and 209), that is, however, not relevant to the present discussion.

In order to understand the object of the case, it is necessary to review the relevant provisions within the CEPA negotiated with the Republic of Armenia. In particular, careful attention is to be devoted to the first chapter of Title VIII on the "Institutional, General and Final Provisions" of the Agreement. Chapter 1 is concerned with the institutional framework in which the partnership is inserted. It is crucial to notice that these provisions directly affect the Union, for the institutions created by the CEPA present members from both parties of the Agreement. This is the reason why the Council found pertinent to adopt the decisions clarifying the position of the Union with regards to the Partnership Council, the Partnership Committee, and the relative sub-committees. Art. 362 establishes the Partnership Council, tasked with supervising and reviewing the implementation of the Agreement. Para. 4 establishes that the Partnership Council is to adopt its own rules of procedure, those based on the draft decision of the Partnership Council itself[47]. Art. 363 mirrors the same structure, but refers to the Partnership Committee, composed of representatives at a senior official level instead of a ministerial one as is the case for the Council. This body is responsible for the preparation of the meetings of the Partnership Council, that can also confer to it the power to act on its behalf, including the authority to make binding decisions[48]. The authority to constitute sub-committees is instead granted to the Partnership Council under Art. 364, with the objective to oversee specific policy areas that may arise in the

[45] Art. 218, para. 10, TFEU.
[46] MARTINEZ CAPDEVILA (2019: 167).
[47] Interinstitutional, 6 February 2020, 2018/0395 (NLE), 15226/19 *on the Draft Decision of the EU-Republic of Armenia Partnership Council adopting its Rules of Procedure and those of the Partnership Committee, subcommittees and other bodies set up by the Partnership Council, and establishing the list of Sub-Committees.*
[48] Art. 363, para. 5, CEPA.

future of the Agreement and to aid the Partnership Committee in its duties. The sub-committees created thus far pursuant to Art. 364 include the sub-committee on Economic Cooperation and Other Related Sectors, the one on Justice, Freedom and Security and the one on Geographical Indications.

Chapter 2 – Observations from the Parties and Conclusions of the Advocate General

After an analysis of the CEPA and of the main proceeding, and having constructed the normative framework, it is pertinent to delve deeper into the case. In order to better grasp the reasoning of the Court, a preliminary discussion of the arguments presented by the parties is deemed necessary. In particular, these will be examined separately, mirroring the structure of the Opinion of Advocate General Pitruzzella issued on June 17, 2021. Generally, the role of the Advocate General is defined in Art. 252, para. 2, TFEU, which poses that they are tasked with issuing reasoned remarks on the case that is being discussed with complete impartiality and independence. Essentially, the Advocate General offers their neutral view of the case as to ensure that all statements are properly examined and accounted for.

Therefore, the two pleas in law presented by the Commission will be analyzed as follows. Initially, a first discussion over the correct interpretation and use of Art. 37 as a substantive legal basis for Decision 2020/246 will be made, with particular emphasis on the importance of the center of gravity test and the criteria for its determination. Then, a brief explanation of the conundrum posed by the division of the Council act into two decisions will be provided with reference to Opinion 1/19 of Advocate General Hogan, though mindful of the lesser importance attributed to this point by the Court, the Commission and the Advocate General. Lastly, a closer analysis of the Opinion of the Advocate General will be provided, due to the considerable importance within the present case. Although these types of documents are non-binding, it is nevertheless relevant to notice the centrality of the Opinion in the reasoning of the Court and its broader implications in the resolution of the case.

2.1. First Plea in Law: the correct use of Article 37 TEU as a substantive legal basis for Decision 2020/246

The Committee of the Permanent Representatives of the Governments of the Member States to the European Union, simply known as the Coreper II, is a body of the Council of Ministers tasked with planning the meetings for four Council configurations, namely those of economic and financial affairs, foreign affairs, general affairs, and justice and home affairs. During the meetings of the Coreper II, preliminary remarks are issued regarding discussion topics of the Council's agenda. During the meeting on December 4, 2019, the Commission issued a recorded statement criticizing the inclusion of Art. 37 TEU and the second subparagraph of Art. 218, para. 8, TFEU as substantive legal bases for Decision 246/2020. This inclusion was criticized on the grounds of insufficient ties with the CFSP of the CEPA, and in particular of its Title II.

This was determined via the center of gravity test. The center of gravity of the CEPA was to be assessed, according to the Commission, in compliance with "the scope of the obligations effectively provided for in order to pursue the objectives in question, and the predominance of certain matters covered"[49]. In this specific instance, however, the nine provisions of Title II were not sufficiently extensive to determine the center of gravity of the Agreement, since they can hardly be representative of an agreement that consists of almost four hundred articles. It was thus deemed necessary to perform the test considering the CEPA as a whole. The center of gravity of the CEPA, as argued by the Commission, was rather "trade, development cooperation and trade in transport services"[50] since the majority of the Agreement is concerned with this domain. The provisions of Title II of the CEPA on "Political Dialogue and Reform; Cooperation in the field of Foreign and Security Policy" were regarded as incidental to the broader scope of the Agreement, which essentially implies that the complex geopolitical context in which the CEPA was negotiated was not sufficient to justify a legal basis, and thus a voting procedure in the Council, that is purely of a CFSP nature. The Commission invoked the judgment of the Court in Case C-244/17 as proof of this discrepancy: the articles of Title II of the CEPA are in number and nature comparable to the provisions which gave rise to the question of Case C-244/17, thus sustaining the Commission's view. The center of gravity test was, in this instance, performed by the Commission on a quantitative basis, considering the number of provisions relating to CFSP within the entire Agreement insufficient to justify the inclusion of Art. 37 TEU, rather than a qualitative one that accounted for the relevance attributed to said articles within the broader objectives of the CEPA.

During the aforementioned Coreper II meeting, the Czech Republic expressed itself in favor of the Commission's argument and held its position during the proceeding as well. In particular, the country maintained that the legal basis was inappropriate for the context and abstained when voting on Decision 246/2020. When called upon to elaborate during the proceeding of Case C-180/2020, the Czech Republic found that the ties with CFSP envisioned by the Council could "equally be integrated within the development cooperation policy or commercial policy"[51], as the provisions are primarily focused on the facilitation of political dialogue and the stabilization of regional conflicts that hinder the primary objective of the CEPA, namely the establishment of trade relationships between the EU and the Republic of Armenia. Matter-of-factly, the only explicit citation of the development of a shared foreign and security policy is found in Art. 5, para. 1, CEPA:

> "[t]he Parties shall intensify their dialogue and cooperation in the area of foreign and security policy, including the common security and defence policy,

[49] Judgement of the Court of Justice of the European Union, 2 September 2021, Case C-180/20, *European Commission v. Council*, point 16.
[50] *Ibidem*, point 17.
[51] *Ibidem*, point 20.

> recognising the importance that the Republic of Armenia attaches to its participation in international organisations and cooperation formats and its existing obligations arising therefrom, and shall address in particular issues of conflict prevention and crisis management, risk reduction, cybersecurity, security-sector reform, regional stability, disarmament, non-proliferation, arms control and export control. Cooperation shall be based on common values and mutual interests, and shall aim at increasing its effectiveness, making use of bilateral, international and regional fora, in particular the OSCE"[52].

Here, the parties are called on to intensify political dialogue in order to reach a situation of stabilization of the conflict and future prevention of similar instances. A reference is made, though implicitly, to Armenia's participation in the Eurasian Economic Union ('EAEU')[53], which represents a crucial constraint to the development of its relations with the European Union. This is once again evidence of the strong economic focus of the CEPA: the Union takes into account the obligations posed by Armenia's membership in the EAEU, the very obligations that impede the implementation of Deep and Comprehensive Free Trade Agreements ('DCFTAs'), that would greatly benefit both parties of the CEPA. The single aspects of Art. 5 CEPA are further developed in the following provisions that make up Title II. The emphasis of said title is on stabilization and prevention rather than development of a shared CFSP, because a "peaceful" Armenia would have the double implication of allowing the intensification of economic relations with the European Union and, consequently, of reducing Russian influence in the Southern Caucasus. Hence, a closer analysis of Title II reveals its strong economic underpinning over the alleged CFSP footing attributed to it by the Council.

Indeed, the Council holds that the CFSP character of Title II is not incidental to the broader scope of the Agreement, which should instead be analyzed in light of a preliminary discussion of said title. As summarized in the Opinion of Advocate General Pitruzzella: "[i]n the present case, the Council submits that the analysis of the objectives of the provisions in Title II of the CEPA reveals that those provisions are not secondary and indirect in relation to the other provisions of that agreement"[54]. Mirroring the structure of the arguments proposed by the Commission, the Council argues that the CEPA with Armenia fundamentally differs from the Agreement with Kazakhstan, discussed in Case C-244/17, because of the addition of an ulterior substantial objective defined in the very first article of the Agreement, namely "the enhancement of the comprehensive political partnership"[55] and "the promotion [and] the development of close political relations between the parties"[56]. The Council highlights that Art. 3 CEPA poses precise objectives for the Partnership that

[52] Art. 5, para. 1, CEPA.
[53] Art. 5, para. 1, CEPA: "[…] recognising the importance that the Republic of Armenia attaches to its participation in international organisations and cooperation formats and its existing obligations arising therefrom […]".
[54] Opinion of Advocate General Pitruzzella, 17 June 2021, Case C-180/20, *European Commission v. Council*, point 21.
[55] Judgment *European Commission v. Council*, point 22.
[56] *Ibidem.*

are “pursued specifically by the provisions of Title II on political dialogue, domestic reform and cooperation in the field of the CFSP”[57], essentially arguing that such positioning within the CEPA is a testament to its qualitative significance within the document. In fact, the argument of the Council primarily rests on the fact that the relevance of CFSP within the CEPA should not be evaluated on a quantitative basis, since a qualitative approach is best suited to appreciate this characteristic. A simple quantitative analysis is deemed restrictive, for it neglects to deepen the aim and content of each provision.

As was the case of the Czech Republic for the Commission, France intervened in support of the Council's position. As mentioned, per Art. 24, para. 1, TEU, the CFSP is subject to specific rules of procedure that, according to France, call for closer examination of the content of the measures at hand in light of their aim. Essentially, the French Republic agrees with the Council on the cruciality of a qualitative analysis, particularly when discussing CFSP. The centrality of the CFSP context is reiterated when highlighting the geopolitical environment within which the CEPA was concluded, for the active status of the Nagorno-Karabakh conflict poses an emphasis on security that would have been absent in other instances, as was the case for Kazakhstan. In this sense, the context acquires newfound significance with respect to the conclusion of the CEPA and should therefore be taken into account. Nonetheless, in Case C-180/20, the Court eventually ruled in favor of the Commission, acknowledging the lesser importance attributed to the context, though the reasoning behind it will be deepened in the third chapter of the present document.

2.2. Second Plea in Law: the unlawful division of the act of the Council in two decisions (245 and 246)

The second plea can be best summarized in the words of Advocate General Pitruzzella in his Opinion issued on June 17, 2021:

> “[t]he Commission submits that by so doing, the Council (i) disregarded the case-law of the Court referred to in point 25 above; (ii) infringed the Commission's prerogatives under Article 17(2) TEU by distorting the amended proposal, which envisaged the adoption of a single act; (iii) rendered the decision-making procedure needlessly more burdensome; and (iv) infringed the duty of loyal cooperation among the institutions as provided for in Article 13(1) TEU”[58].

More practically, the Commission accused the Council of overstepping its competences by splitting the decision into two, for the proposal foresaw a single decision. Matter-of-factly, Art. 17 TEU provides the powers that rest in the hands of the European Commission, and its para. 2 clearly states that: “Union legislative acts may only be adopted on the basis of a Commission

[57] *Ibidem*, point 23.
[58] Opinion in *European Commission v. Council*, point 72.

proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide"[59]. While it can do so prompted by an invitation from other institutions, it is important to bear in mind that legislative proposals are a quasi-monopoly of the Commission. Essentially, by adopting the contested decisions as modified by the Council, the latter disregarded this fundamental characteristic of the Union's legal order. The institutional framework of the Union rests on the duty of loyal cooperation between the different organs, a principle set out in Art. 13 TEU. In the present case, the Commission held that the Council neglected to recognize the power of initiative of the Commission by amending the proposal, which was ultimately considered as a mean to elude the issues posed by the different voting procedures attached to each legal basis. The quasi-monopoly was originally granted to the Commission by treaty-makers, who envisioned the body as operating in the name of the interest of the Community as a whole rather than a collection of the willingness of each individual member State. In recent years, we have witnessed a progressive erosion of said prerogative in light of the rise of legitimization of the institution. In fact, the Treaty of Lisbon (2009) introduced further exceptions to the rule, such as in the domain of CFSP (shared with the High Representative and member States) and judicial cooperation in criminal matters and police cooperation (shared with a quarter of the member States), as well as the creation of the so-called citizen initiative (one million citizens can propose a draft for legislation)[60]. However, according to settled case law, the Commission reserves the right to withdraw the proposal when the latter's *raison d'être* is deemed to be irreversibly altered, meaning that the initial objectives set out are not successfully achieved by the amended text[61].

In order to better comprehend the conundrum posed by the division of the decision into two, it is pertinent to review Opinion 1/19 of Advocate General Hogan[62], issued following a request from the European Parliament pursuant to Art. 218, para. 11, TFEU. The Opinion procedure provides that a member State, the European Parliament, the Council, or the Commission may request the CJEU's Opinion on the compatibility of an international agreement with the Treaties. Opinion 1/19 concerned the conclusion of the Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention, 2011). More specifically, the Parliament questioned three main features of the conclusion of such an agreement: firstly, the appropriateness of a legal basis rooted in Art. 82, para. 2, and Art. 84 TFEU; secondly, the lawfulness and necessity of splitting each of the decisions on the

[59] Art. 17, para. 2, TEU.

[60] PONZANO (2012: 8).

[61] Judgment of the Court of Justice of the European Union, 14 April 2015, Case C-409/13, *Council v. European Commission*, point 83.

[62] Opinion of Advocate General Hogan, 14 March 2021, 1/19, request for an Opinion under Art. 218 para. 11 TFEU, *on the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*. The Court has yet to express itself following the issuing of said Opinion.

signing and conclusion of the Convention into two according to the choice of legal basis; lastly, the compatibility of the conclusion of the Convention with the Treaties in the absence of an agreement that stipulates that all member States consent to be bound by the document. Due to its evident relevance, only the second question will be taken into account. The necessity to split the decisions into two arose following the fact that Ireland, pursuant to Protocol 21[63], cannot be committed by the provisions of the Convention that relate to the fields of common policy on asylum, subsidiary protection, and temporary protection. The European Parliament, on its part, put forward the argument according to which Ireland would already "be bound by that conclusion in respect of all the competences exercised by the Union by virtue of that convention"[64]. This argument was rejected by the Advocate General because the significance of Protocol 21 would have been severely undermined if the provisions of the Convention were to be deemed as falling within common rules to which Ireland had already agreed to.

AG Hogan refuted the position put forward by the Parliament in its question based on two accounts. Firstly, the splitting of the decision is considered unlawful, as the case law suggests, solely in the instance in which said split is found to be in "infringement of an essential procedural requirement[65]", which would in turn give rise to the annulment of the contested act on the basis of Art. 263 TFEU. The only requirement set forth by the Treaties and the internal rules of procedure of the Council is the respect of "the prerogatives of the other institutions and of the Members States as well as the applicable voting rules[66]". When this basic standard is respected, the Council may adopt as many decisions as it deems appropriate for the achievement of its objectives. Secondly, it follows from the AG's reasoning that splitting the decisions implies, contrary to the argument put forward by the Commission, upholding Protocol 21 rather than violating it, for its Art. 4(a) establishes that the Protocol applies to provisions "amending an existing measure by which they are bound[67]". By this clause, Ireland could choose not to be bound by a decision within this field even though said act modifies a preexisting one which the country had already adhered to. Therefore, AG Hogan concluded that the splitting into two decisions − in this instance − was not only permitted, but legally necessary to guarantee the integrity of Protocol 21 in light of the special clauses on asylum envisioned for the Republic of Ireland.

The "splitting procedure" was hence found to be an admissible practice in European law to ensure its proper interpretation. The choice of the Council to split the decision into two was, in the instance provided by Case C-180/20, rather questionable in light of the features of the contested decisions. The

[63] Treaty on the Functioning of the European Union, Protocol 21, *on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.*
[64] Opinion *on the Istanbul Convention*.
[65] Art. 263, para. 2, TFEU.
[66] Opinion *on the Istanbul Convention*.
[67] Art. 4(a), Protocol 21.

Commission pointed towards an infringement of the duty of loyal cooperation on the part of the Council, for the decision to apply the splitting procedure was considered to be a way to circumvent the Commission's power of proposal in order to guarantee the inclusion of Art. 37 TEU as a substantive legal basis for Decision 246/2020. AG Pitruzzella found that the loyal cooperation among institutions was not infringed, since the objective of the decision, namely to adopt a position on behalf of the Union with respect to the bodies set up by the CEPA, was achieved, and it was therefore compliant with the original proposal made by the Commission. The only critique that can be advanced in this case is thus the unnecessary burden on the legislative apparatus caused by the procedure. As a matter of fact, the two decisions are almost identical in content, with the exception of their respective legal bases that cite different articles, as to account for the implementation of the entirety of the Agreement. Therefore, by splitting the decisions to provide a CFSP legal basis to Decision 246, the legislative process was lengthened and rendered "needlessly more burdensome"[68]. Nonetheless, as previously stated, the second plea was considered secondary from the beginning and, since the first plea was upheld by the Court, it was eventually dismissed on the grounds that the core request of the Commission, i.e., the annulment of the decisions, had already been achieved with the first plea.

2.3. The Opinion of the Advocate General

The Opinion of the Advocate General is sought by the Court of Justice of the European Union in the oral portion of the proceeding, as to receive an impartial clarification of the subject matter where the case law and other available materials are considered insufficient to issue a proper judgment. However, these Opinions are merely advisory in character, for they express how the AG believes the Court should decide on a particular case[69]. In Case C-180/2020, the Court strongly upheld Advocate General Pitruzzella's Opinion as delivered on June 17, 2021, and thus a closer analysis of the document is deemed necessary to pave the way for an examination of the reasoning of the Court in the following chapter.

Of the five parts of the document, the most crucial is the fifth one, namely the assessment of the facts of the case that constitute the focal point of the Opinion. In the second section of Part V, Pitruzzella focuses on the interpretation of Art. 218 TFEU, for it establishes a single procedure for the negotiation and conclusion of international agreements with few exceptions specified elsewhere in the Treaties. In particular, a simplified procedure for the establishment of the position on the EU's behalf in the context of its participation in the adoption of acts applying or implementing that agreement in a decision-

[68] Opinion in *European Commission v.* Council, point 72.
[69] GUTMAN (2014: 23).

making body set up by the agreement concerned is specified in para. 9, which states that:

> "[t]he Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement"[70].

However, it is important to notice that no voting procedure is laid out in para. 9, which has led the Court to establish that "the applicable voting rule must be determined in each individual case by reference to Article 218(8) TFEU"[71]. Furthermore, the Court has held that when the decision falls beyond those special instances specified in para. 8, the Council is to act by qualified majority by reading both paras. 8 and 9 together, as seen in Case C-687/15[72] and in the Kazakhstan judgment[73]. Case C-687/15 concerned Council Conclusions of October 25, 2015, on the position to be adopted on behalf of the Union with regards to the revision of radio regulations enacted at the World Radiocommunication Conference in 2015 ('WRC-15') in Geneva. While the Commission had proposed to adopt a decision pursuant to Art. 218, para. 9, TFEU[74], the Council adopted the conclusions instead, which led the Commission to initiate a proceeding before the Court of Justice. It was found that the Council had infringed essential procedural requirements by not respecting the division of powers among EU institutions and not including an appropriate legal basis to support its conclusions. More specifically, the Court held that the legal basis had constitutional significance not simply in terms of the correct distribution of powers among EU institutions, but also with regards to the determination of the voting procedure to be carried out within the organs, as specified in para. 51 of the judgment:

> "[i]n particular, since the contested act does not correspond to any of the situations mentioned in the second subparagraph of Article 218(8) TFEU, the Council must, in principle, in accordance with the provisions, read together, of the first subparagraph of Article 218(8) and Article 218(9) TFEU, act by qualified majority when adopting that act (see, to that effect, judgment of 18 December 2014, United Kingdom v Council, C-81/13, EU:C:2014:2449, paragraph 66)"[75].

Eventually, the conclusions were annulled due to the infringement of this essential procedural requirement, and it was established that paras. 8 and 9 of

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[70] Art. 218, para. 9, TFEU.
[71] Opinion in *European Commission v. Council*, point 22.
[72] Judgment of the Court of Justice of the European Union, 25 October 2017, Case C-687/15, *European Commission v. Council.*
[73] Judgment of the Court of Justice of the European Union, 4 September 2018, Case C-244/17, *European Commission v. Council.* See section 3.1.
[74] Proposal of the European Commission for a Council Decision, 29 May 2015, (COM(2015) 234 final), *on the position to be adopted, on behalf of the European Union at WRC-15.*
[75] Judgement *European Commission v. Council*, point 51.

Art. 218 TFEU are to be read together when the case under examination does not suit the special instances of para. 8.

Nonetheless, in Case C-180/20, the Council acted by unanimity pursuant to Art. 218, para. 8, TFEU claiming a CFSP legal basis for the contested decisions, as CFSP is a field which requires unanimity per the first subparagraph of Art. 31, para. 1, TEU. The voting procedure is determined in accordance with the substantive legal basis of an act, which is in turn established by the aims pursued by the act itself. As previously mentioned, "the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure"[76]. However, the act may pursue multiple purposes simultaneously and, when it is impossible to effectively isolate a single aim to be the predominant one, an issue arises as to how to appropriately determine the provisions on which to base the act. A dual legal basis is possible under EU law, as provided by the case law[77], though it is required that the procedures established for each legal basis be reciprocally compatible[78]. The Court has ruled extensively on the choice of legal basis, finding the employment of the center of gravity test to be the most appropriate means to determine the ultimate objective of a document. AG Pitruzzella deemed the clarification of the key elements of the center of gravity test necessary to the resolution of the case, for a discrepancy was found on the contesting sides with respect to the determination of the focus. As we have seen, the Commission attached greater importance to the substantive matter of the CEPA, rather than to its ultimate purpose, while the Council held that the content was to be analyzed merely in a second step when determining the appropriate legal basis. The latter argued that the primary aim of the CEPA was the stabilization of the Republic of Armenia, above all in terms of the on-going conflict with neighboring Azerbaijan, contrary to what the Commission had determined to be the predominant focus (e.g., the economic aspects of the Agreement, such as the crucial trade relationships established with the country). This notwithstanding, AG Pitruzzella held that the purpose and the content of the act should enjoy the same degree of importance when analyzing the objective factors amenable to judicial review and on which the choice of its legal basis should be grounded. While it is apparent from previous case law that in some instance the Court has held that the objective supersedes the individual clauses[79], it is crucial to remember that the focus on the purpose and

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[76] Opinion in *European Commission v. Council*, point 25, reinterpreting Judgement of the Court of Justice of the European Union, 14 June 2014, Case C-263/14, *European Parliament v. Council.*

[77] *Inter alia*, Judgments *European Parliament v. Council* and *European Commission v. Council.*

[78] Opinion in *European Commission v. Council*, point 25, note 24, citing Judgment of the Court of Justice of the European Union, 6 November 2008, Case C-155/07, *European Parliament v. Council*: "the Court limits cases where dual (or multiple) legal bases are not possible to cases where procedures are incompatible, to the exclusion of cases in which only the voting rule differs".

[79] Judgments of the Court of Justice of the European Union, 3 December 1996, Case C-268/94, *Portugal v. Council,* and 11 June 2014, Case C-377/12, *European Commission v. Council.*

that on the content are not mutually exclusive, for they can coexist, as seen in Case C-377/12 (Philippines Judgment)[80].

Case C-377/12 concerned an action for annulment initiated by the Commission against a Council Decision on grounds of the unlawful inclusion of a number of articles in the legal basis concerning the readmission of third-country nationals and the environment. The Commission held that the articles specified by the Council were in relation to mere incidental portions of the broader Cooperation Agreement that found its center of gravity to be primarily rooted in trade and development rather than specifically immigration issues and the environment. Therefore, the legal basis was to be entirely covered by Articles 207 and 209 TFEU, respectively on the Common Commercial Policy and on the implementation of the development cooperation policy. A reference is now to be made to the Opinion delivered by Advocate General Mengozzi in the framework of the Philippines Judgment, who sustained that the case law on this matter is but a specific application of broader general precepts to be observed when determining the legal basis of an act[81].

Against this backdrop, Pitruzzella calls for an examination of the context beyond the purpose and objective of the CEPA, for the circumstances in which the Agreement was concluded may be, in this case, an essential part of the Court's assessment. Contrary to this, the inherent subjectivity of elements such as the intentions of the author of the act and of the parties involved render them superfluous to the choice of legal basis.

The coexistence of several components does not imply that of multiple legal bases, as foreseen in both the Philippines and Portugal judgments[82], because the center of gravity test demands:

> "first of all, a determination [of] whether the provisions of the agreement which may relate to EU policies other than that identified as predominant may also fall within that policy or whether they go beyond the framework of that policy and therefore require that decision to be founded on such additional legal bases(37) and, next, a verification whether those provisions contain such extensive obligations that they constitute objectives distinct from those relating to the EU policy identified as predominant"[83],

which in turn implies that the subsistence of multiple legal bases is to be considered an exceptional instance and not normal practice, as seen in point 33 of the Opinion and in the work of the Court of Justice[84]. Though it is possible, due to the clear border traced by Art. 40 TEU between CFSP and external action competences of the Union (specified in the TFEU), it is still considered a rare practice. The distinctive character of CFSP is disregarded in relation to

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[80] Judgment *European Commission v. Council*.
[81] Opinion of Advocate General Mengozzi, 23 January 2014, Case C-377/12, *European Commission v. Council*.
[82] Judgments *Portugal v. Council* and *European Commission v. Council*.
[83] Opinion in *European Commission v. Council*, point 32.
[84] *Ibidem*, point 33, footnote 40 lists some examples.

the choice of legal basis, as implicitly accepted by the Court in the Kazakhstan judgment, since "the Court confirmed once more that the centre of gravity test – used in its classic case-law on the choice of legal basis – also applies where that choice must be made, in the context of the Union's external action, between CFSP and non-CFSP legal bases"[85]. The Kazakhstan judgment is here used in order to clarify that the Court admits the center of gravity test even in matters concerning CFSP, confirming the trend in the case law towards the normalization of the CFSP in European law. Pitruzzella holds, as Advocate General Kokott did in her Opinion on the Kazakhstan judgment, that the clauses in both paragraphs of Art. 40 TEU have been formulated symmetrically and, hence, there is no primacy of CFSP over external action and vice versa. Therefore, a CFSP legal basis warrants no special treatment in this instance, rendering the application of the neutral center of gravity test suitable. The test is applied in order to determine the focus of the document that establishes the appropriate legal basis, which in turn clarifies the voting procedure. As mentioned earlier, the *iter* for the adoption of Council Decisions on the position to adopt on behalf of the EU with regards to bodies created by an agreement is generally set pursuant to Art. 218, para. 9, TFEU, while the voting procedure is determined according to para. 8 of the same article. In particular, the second subparagraph distinguishes those cases in which the Council is to act by unanimity, including CFSP, instead of qualified majority. Pitruzzella holds that in the case in which a number of objectives coexist, the legal basis, and therefore the voting rule, should be determined in accordance with the predominant purpose or component of the document. In the Kazakhstan judgment, the center of gravity of the act was established in compliance with two criteria: a qualitative and a quantitative one. This "mixed" approach revealed the center of gravity of Council Decision (EU) 2017/477 to be beyond simple CFSP, thus resulting in its annulment. It was found that the position to be adopted on behalf of the Union with regards to bodies set up by an agreement is transcendental in nature to the agreement as a whole, and the center of gravity test was therefore to be applied to the document in its entirety rather than to a few clauses. A further clarification of the relevance of this case will be given in the following section (3.1) of the present document.

Nonetheless, it is crucial to remember that Case C-180/2020 actually refers to the annulment of two decisions with distinct purposes, for Decision 245/2020 refers to the implementation of the CEPA as a whole, while Decision 246/2020 focuses solely on its Title II. Despite this division, the contesting parties agreed to a center of gravity test to be performed considering the entire CEPA, thus leading the AG to make three observations in order to assess the fields covered by the contested decisions. Firstly, he separates the Kazakhstan case from the Armenia one in light of preceding jurisprudence, since "the Court has consistently held that the legal basis used for the adoption of other EU measures which might, in certain cases, display similar characteristics or

[85] *Ibidem*, point 35.

be closely related to the measure at issue is irrelevant to the choice of legal basis for that measure"[86]. The analysis of the content and purpose of the CEPA should not be prejudiced by that carried out within the framework of the Kazakhstan Agreement. A second distinction from the Kazakhstan case is made in light of the inclusion of Art. 37 TEU as a substantive legal basis in both the contested decisions and the one which gave rise to Case C-244/17. In the former instance, the Commission did not object to the inclusion of Art. 37 TEU, effectively enabling the Council to include it in the legal basis of Decision 246/2020. However, for Pitruzzella, this is not a sufficient justification for the citation of Art. 37 in the decision, since the Court previously found that the mere existence of a precedent in the jurisprudence which has similar characteristics does not necessarily imply that the same legal basis can be used in both instances[87].

Furthermore, he deems a closer analysis of the Agreement necessary to the resolution of the case. The AG identifies two main themes which guide the CEPA:

> "[f]irst, the will of the parties to further develop regular political dialogue on bilateral issues of mutual interest is affirmed, as is their commitment to promoting international peace and security, [...]. Secondly, the determination of the parties to deepen economic cooperation, including in trade-related areas, with a view to the future development of trade and investment, while respecting the principles of sustainable development and ensuring the protection of the environment and human health, is affirmed"[88].

Though the links of the CEPA with the realm of CFSP are undeniable, as it can be appreciated when examining the preamble and Art. 1 as well as its Title II, it is apparent that these ties are insufficient to justify a CFSP legal basis. The CFSP aspect of the CEPA negotiated with the Republic of Armenia cannot be considered as a distinct component of the Agreement, rendering the CFSP legal basis superfluous. This holds true regardless of the test applied to determine its distinctiveness. A reference to the analysis employed in the Philippines judgment[89] must be made to further this claim, since it was then that the Court argued that it is necessary to first determine whether the provisions under scrutiny "may relate to EU policies other than that identified as predominant may also fall within that policy or whether they go beyond the framework of that policy"[90]. The development cooperation, one of the most crucial components of the CEPA, is to be analyzed against this backdrop, as it simultaneously pursues the objectives laid down in both Art. 21 TEU (falling within Title V of the TEU on CFSP) and Art. 208 TFEU (residing in Part V of the TFEU on the external action competences). The interdependence relationship between the general objectives of the Union's external action and those

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[86] *Ibidem*, point 45.
[87] Judgment *European Parliament v. Council*.
[88] Opinion in *European Commission v. Council*, point 47.
[89] Judgment *European Commission v. Council*.
[90] Opinion in *European Commission v. Council*, point 56.

specific to development cooperation is evident in light of Art. 209, para. 2, TFEU, which states that "[t]he Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty"[91]. The development cooperation policy therefore acquires a rather broad spectrum of interpretation, since it can be argued that it may include any objective from the eradication of poverty to the campaign against the proliferation of small arms and light weapons. The new European Consensus on Development, signed on 7 June 2017 and referenced in point 59 of the Opinion, reflects this ampler understanding of cooperation in the field of development which

> "contributes, *inter alia*, to supporting democracy, the rule of law and human rights, preserving peace and preventing conflict, improving the quality of the environment and the sustainable management of global natural resources, assisting populations, countries and regions confronting natural or man-made disasters, and promoting an international system based on stronger multilateral cooperation and good global governance"[92].

It is precisely within this framework that the Union's instruments to pursue external action between the years 2014 and 2020 were developed, and in particular those in the fields of conflict prevention and peacebuilding, pursuant to the first paragraph of Art. 212 TFEU:

> "[w]ithout prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211, the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its external action. The Union's operations and those of the Member States shall complement and reinforce each other"[93].

These devices include the Neighborhood, Development and International Cooperation Instrument, a multi-annual program designed to distribute development aid to the partners involved. This notwithstanding, it is important to recall that the Court has ruled that "even if a measure contributes to the economic and social development of developing countries, it does not fall within development cooperation policy if it has as its main purpose the implementation of another policy"[94]. AG Pitruzzella, on the contrary, sustains that this is not the case for the CEPA, since it is, as elaborated from the preamble,

> "above all an instrument designed to strengthen economic and trade cooperation between the parties, with a view to promoting sustainable development, which incorporates environmental (67) and social constraints, respect for human rights

[91] Art. 209, para. 2, TFEU.
[92] Joint statement by the Council and the representatives of the governments of the member States meeting within the Council, the European Parliament and the European Commission, 7 June 2017, *on the new European Consensus on Development*.
[93] Art. 212, para. 1, TFEU.
[94] Judgment *European Commission v. Council*, point 44.

> and fundamental freedoms (68) as well as human health (69) into the economy"[95].

Therefore, within the ample spectrum of policies covered by the CEPA, Title II on the "Political Dialogue and Reform; Cooperation in the field of Foreign and Security Policy" appears as incidental to broader development objectives of the Agreement, and hence does not require a separate decision based on Art. 37 TEU to specify the EU's position with regards to the Councils and Committees set up by the CEPA. Moreover, this is evident even when shining a light on the context in which the Agreement was concluded, as the reference to the Nagorno-Karabakh conflict is insufficient to insert the CEPA in a CFSP-specific discourse.

Mirroring the structure of the test applied in the Philippines judgment, the AG gauges, through quantitative and qualitative criteria, the extent to which the objectives set out in Title II may constitute an independent component of the Agreement or whether they might fall within the broader development cooperation aim. The provisions of this title are found to be declaratory in nature, as they do not lay out obligations and policies to be specifically implemented within the realm of CFSP. It is clear from an analysis of Title II in light of the objectives set out in the second paragraph of Art. 3 CEPA that no concrete measures have been established by the document to specifically implement CFSP policies. The emphasis is placed on political dialogue to strengthen co-operation, on peacebuilding and conflict prevention in the same way these aims are pursued by other multilateral instruments, such are the Charter of the United Nations and OSCE Helsinki Final Act. The CFSP character of the CEPA is thus incidental and considered as a "prospect" rather than a fundamental cornerstone of the Agreement, as testified by a reading of its Art. 7:

> "[t]he Parties shall enhance practical cooperation in conflict prevention and crisis management, in particular with a view to the *possible participation* of the Republic of Armenia in EU-led civilian and military crisis-management operations as well as relevant exercises and training, *on a case-by-case basis*"[96].

Indeed, the obligations set out in this article are to be seen as possible and potential rather than immediate.

Therefore, in light of the two-step test applied by the Court in the Philippines judgment, where the first phase is an analysis of content of the provisions and the second is an examination of the objectives of said provisions, both carried out in order to determine whether or not the policies at hand may relate to portions other than the predominant component of the document, the inclusion by the Council of Art. 37 TEU as a substantive legal basis for Decision 246/2020 was unjustified and superfluous. This is confirmed by a closer analysis of the test applied to the Kazakhstan judgment, which will be discussed in the following section.

[95] Opinion in *European Commission v. Council*, point 62.
[96] Art. 7 CEPA.

The second plea, though comparatively marginal, is discussed by Pitruzzella in paras. 72 to 76. As previously mentioned, the Commission took issue with the division of the implementation of the CEPA into two separate decisions. The AG and the Commission convene that in the event in which the first plea is upheld, the contested decisions are to be annulled, whereas − if not − the second plea is to remain autonomous. This is because

> "[b]y adopting two separate but related decisions, the second of which is based on an incorrect legal basis, requiring the adoption of a voting rule other than that laid down for the adoption of the first, the Council has attempted to circumvent the rules which apply to the choice of legal basis for an EU act"[97].

However, the main concern of the AG with regards to the splitting of the act into two decisions is the fact that it is a clear indicator of the Council's intention to justify the inclusion of Art. 37 TEU as a legal basis, since the contested decisions are essentially identical in content. Moreover, they reference the same document drafted by the Partnership Council[98], and, if that were not the case, the division would have simply had the effect of "rendering the decision-making procedure more burdensome[99]". This notwithstanding, we can isolate a discrepancy in Opinion between the AG and the Commission, for he is not convinced that the actions of the Council effectively breached the duty of loyal cooperation, in this case embodied in the exclusive power of proposal granted to the Commission under Art. 17, para. 2, TEU. Matter-of-factly, the objective of the decisions was achieved, since the position of the Union with regards to the Councils and Committees was established, without the Council altering the very *raison d'etre* of the proposal[100]. Though some may argue that the core of the decisions was altered by their division, this argument is refuted on the basis of their almost identical content.

Advocate General Pitruzzella maintained that the contested decisions should be annulled based on the arguments proposed, and that their effects should be maintained as to not upset the correct implementation of the CEPA, pursuant to the second paragraph of Art. 264 TFEU: "[h]owever, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive[101]".

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[97] Opinion in *European Commission v. Council*, point 73.
[98] Draft Decision of the EU-Republic of Armenia Partnership Council, 6 February 2020, ST 15226/19, *adopting its Rules of Procedure and those of the Partnership Committee and the subcommittees and other bodies set up by the Partnership Council, and establishing the list of subcommittees*.
[99] Opinion in *European Commission v. Council*, point 76.
[100] Judgment of the Court of Justice of the European Union, 14 April 2015, C-409/13, *Council v. European Commission*.
[101] Art. 264, para. 2, TFEU.

Chapter 3 – Reasoning of the Court

After careful consideration of the arguments of the Commission and the Council, as well as of the Opinion of Advocate General Pitruzzella, the Court finally issued its judgment. Considering its centrality within the Court's reasoning, the first section of the present chapter will be devoted to a deeper analysis of Case C-244/17 *Commission v. Council* (Agreement with Kazakhstan), the quasi-perfect mirror of Case C-180/20. Then, the reasons behind the rarity that is intrinsic to a dual or multiple legal basis will be presented, with reference to other similar instances within the CJEU's jurisprudence, in particular Cases C-300/89, C-263/14 and C-155/07. Lastly, an examination of the specific objectives of the CEPA will be provided, to ultimately reach the conclusion that the Agreement goes beyond simple CFSP. Indeed, it is to be inserted in the category of broad framework agreements which do not necessarily entail the necessity for a CFSP legal basis in their implementation.

3.1. *Commission v. Council* (Agreement with Kazakhstan), C-244/17

For the analysis at hand to be understood in its fullest, it is pertinent to discuss the instance posed by Case C-244/17[102], for it was arguably the first time in which the Court was explicitly asked to "clarify the delimitation between CFSP and non-CFSP competences with respect to the implementation of an international agreement"[103]. This action for annulment concerned Council Decision 2017/477 on the EU's position for the adoption of working arrangements in the joint bodies established on the basis of the Enhanced Partnership and Cooperation Agreement ('EPCA') with the Republic of Kazakhstan. The critique advanced by the Commission was that the addition of Art. 31, para. 1, TEU, as a substantive legal basis violated both treaties and established case law. The issue arose because Art. 31, para. 1, falls within Chapter 2 of the TEU on the "Specific Provisions on the Common Foreign and Security Policy", thus requiring a vote by unanimity in the Council. This precisely mirrors the issue posed in Case C-180/20, highlighting the centrality of Case C-244/17 within the reasoning of the Court. The relevance of this case lies precisely in its implications for "the position of the CFSP in the EU legal order and the institutional balance in the framework of Article 218 TFEU"[104].

The Republic of Kazakhstan was the first central Asian country to ever agree to such a partnership with the European Union. The EPCA between the European Union and Kazakhstan was signed on December 21, 2015, in Astana,

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[102] Judgment of the Court of Justice of the European Union, 4 September 2018, Case C-244/17, *European Commission v. Council.*
[103] VAN ELSUWEGE et al. (2021: 1745).
[104] VAN ELSUWEGE et al. (2019: 1334).

and its provisional application, provided for in Art. 281, para. 3, EPCA, began on May 1, 2016. Since the signing of the Agreement, the European Union has become the most important trading partner and foreign investor in the country, paving the way for other central Asian countries to follow in the Republic's footsteps. The aim of the EPCA, as specified in its Art. 2, is primarily to contribute "to international and regional peace and stability and to economic development"[105]. Title VIII of the Agreement, in particular, concerns the institutional framework established by the document, one that foresees the creation of a Cooperation Council[106], a Cooperation Committee[107], and the possibility of forming auxiliary sub-committees[108]. These bodies, much like the ones established in the first chapter of Title VIII of the CEPA, are tasked with overseeing the implementation of the EPCA and are composed of members of both parties to the Agreement, warranting the need for the EU to take a position in their respect. Said stance was taken by the Council in Decision 2017/477, which was contested by the Commission on the grounds of having an incorrect legal basis (namely Art. 31, para. 1, TEU, that forced the Council to adopt the decision by unanimity). Martinez-Capdevila identified in 2019 three aspects on which the Court pronounced itself:

> "[l]os criterios para la determinación de la regla de votación en el Consejo cuando actúa en este marco (1), la aplicación de esta disposición a la PESC (2) y la determinación de la base jurídica sustantiva o material de las decisiones cuya base jurídica procedimental o formal descansa en el artículo 218.9 TFUE (3)"[109].

These points will now be separately analyzed to construct the reasoning of the Court with regards to this matter.

Firstly, in the view of the Court, the criteria for determining the voting rule in the Council with respect to a decision establishing the EU's position in a body set up by an agreement, when the latter is to adopt acts having legal effects, consist in an evaluation of the wording, the objectives and the context[110] in which the provision came to be. Within the framework of the negotiation and conclusion of international agreements, the European Union can act on the basis of the general procedure provided by Art. 218 TFEU, except when the Treaties provide otherwise. Considering the broad nature of Art. 218, the Court holds that the provision is in itself reflective of institutional balance, particularly between the Council and the Parliament, through the establishment of "symmetry between the procedure for adopting EU measures internally and the procedure for adopting international agreements"[111]. It follows

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[105] Enhanced Partnership and Cooperation Agreement ('EPCA') between the European Union and its member States and the Republic of Kazakhstan, 21 December 2015, Astana, Art. 2.
[106] Art. 268 EPCA.
[107] Art. 269, para. 1, EPCA.
[108] Art. 269, para. 2, EPCA.
[109] MARTINEZ-CAPDEVILA (2019: 6).
[110] Judgment of the Court of Justice of the European Union, 24 June 2014, Case C-658/11, *European Parliament v. Council.*
[111] Judgment *European Commission v. Council*, point 22.

that the Article already factors the specific features of each EU activity, including CFSP. This is even more evident in light of the link established between the substantive legal basis and the applicable voting procedure as per Art. 218, paras. 8 and 9. As previously stated, a simplified procedure for the adoption of the position on behalf of the EU within bodies set up by an agreement is laid out in Art. 218, para. 9, provided that the acts adopted by said bodies do not supplement or amend the institutional framework of the agreement. The unanimity clause, as established under the second subparagraph of para. 8, ensures that institutional balance, as well as symmetry between internal and external action of the Union, is preserved when combined with the procedure of para. 9. The Court hence rejected the interpretation of the Commission of the judgment in Case C-81/13[112], according to which

> "any decision establishing a position to be adopted on behalf of the European Union in a body set up by an agreement, under Article 218(9) TFEU, must be adopted by qualified majority provided that the act which that body is called upon to adopt does not supplement or amend the institutional framework of that agreement"[113],

on the grounds that, in such an instance, the Court did not refer to the second subparagraph of para. 8, despite the fact that the decision concerned was adopted within the context of an association agreement and thus fell within the scope of said subparagraph[114]. However, the decision did not supplement or amend the institutional framework, but merely ensured its proper implementation, namely "by qualified majority and without the consent of the Parliament"[115]. The peculiarity of this action lies precisely in its nature: matter-of-factly, a decision taken to implement an association agreement cannot be equated to one amending or supplementing its institutional framework, since the latter presents more similarities in scope to a decision concluding an agreement that amends the association agreement and, therefore, calls for the application of the second subparagraph of Art. 218, para. 8, TFEU. In simpler terms, the Court rejected the vote by unanimity on grounds of lack of equivalence between a decision implementing an association agreement and the conclusion of such an agreement[116]. In accordance with the Opinion of the Advocate General, it was found that the simplification provided for by Art. 218, para. 9, TFEU referred to a limitation of the participation of the Parliament rather than establishing the voting rule of the Council, which remains to be assessed on a case-by-case basis[117].

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[112] Judgment of the Court of Justice of the European Union, 18 December 2014, Case C-81/13, *United Kingdom v. Council.*

[113] Judgment *European Commission v. Council*, point 31.

[114] Art. 218, para. 8, subpara. 2, TFEU: "[h]owever, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. [...]".

[115] Judgment *European Commission v. Council*, point 32.

[116] MARTINEZ-CAPDEVILA (2019: 10).

[117] VAN ELSUWEGE et al. (2019: 1338).

Secondly, the relationship between the voting rule and the content of the provisions is to be taken into consideration in light of Art. 218 TFEU. In principle, a decision which concerns exclusively the CFSP is to be adopted unanimously pursuant to Art. 218, para. 8. When there are multiple elements to the provision, the voting rule must be settled on the basis of its predominant purpose or component, as is the case for the substantive legal basis. Though the Council advocated for the presence of a relevant link of the EPCA with CFSP, the Court found that these ties were insufficient to justify a proper CFSP legal basis, in accordance with the Opinion of Advocate General Kokott. This evaluation was conducted both on a quantitative and qualitative basis. Firstly, it was noted that the ten provisions of Title II of the EPCA are rather marginal in number when compared to the entirety of the Agreement, which is made up of 287 Articles total. Secondly, it was pointed out that the predominant scope of the EPCA falls within the common commercial and development cooperation policies of the Union, and that the CFSP provisions of Title II simply define the aims of the cooperation rather than laying out substantial ways in which said collaboration can be implemented. They are hence negligible considering the broader objective of the Agreement.

Lastly, in order to establish the appropriate procedure under Art. 218 TFEU, a closer examination of the provision's substantive legal basis is necessary. Said legal basis is chosen in accordance with objective factors amenable to judicial review, as provided by the case law, including the aim and content of the document. As previously stated, if the measure is found to pursue two purposes or to be constituted by two components, the situation can be solved in one of two ways. On the one hand, if one of the factors is found to be more important and the other is instead incidental to the first, the substantive legal basis is a single one chosen with reference to the main component of the measure. On the other, if the two features are "inextricably linked without one being incidental to the other"[118], then the substantive legal basis is to reflect this "plural" nature. It is crucial to remember that the plurality of legal bases is to be considered, however, as an exception, a practice allowed only in rare instances, as held by Advocate General Kokott in her Opinion[119]. This notwithstanding, we can still derive that the choice of legal basis and the establishment of the voting rule in the Council are both rooted in and reflective of the purpose and content of the measure and are therefore to be determined on the basis of a center of gravity test.

In conclusion, the Court found that the Agreement had insufficient ties with CFSP to justify the use of a unanimity vote, considering that it would have been employed to decide on matters normally regulated via qualified majority

[118] Judgment *European Commission v. Council*, point 37.

[119] Opinion of Advocate General Kokott, 31 May 2018, Case C-244/17, *European Commission v. Council*, point 63: "[i]n this respect, I would like to say at once that such a cumulation of legal bases — sometimes simplistically also referred to as 'dual legal basis' — according to the case-law of the Court constitutes the absolute exception (29) and has hitherto very rarely been accepted".

voting ('QMV'). The Court's judgment with respect to the Kazakhstan case has been regarded as a turning point for the CJEU's jurisprudence concerning this type of agreements, considering the previous "– sometimes inconsistent – practice of adding a CFSP legal basis to broad framework agreements"[120] that present occasional CFSP features. Consequently, the procedural standards must follow the same reasoning. As a matter of fact, the most relevant implication of the Kazakhstan case in relation to Case C-180/2020 is the rejection by the Court of the possibility of a unanimity vote within the framework of agreements such as the EPCA and the CEPA, and in particular with regards to the bodies set up by said documents. The actions of these assemblies are, in fact, not comparable in entity to the agreements themselves, and thus the unanimity clause, applicable to the conclusion of other international agreements such as association agreements, has no grounds to be applied to decisions setting up the bodies that are to oversee the implementation of the agreements.

It is, nonetheless, important to highlight that the number and content of the CFSP provisions of the CEPA differ greatly from those of the EPCA. In fact, the provisions of the EPCA are less far-reaching in CFSP terms than those of the CEPA. Van Elsuwege[121] suggests as an example the comparison between Art. 3 of the CEPA and Art. 5 of the EPCA. While the former states that

> "[p]olitical dialogue on all areas of mutual interest, including foreign policy and security matters as well as domestic reform, shall be further developed and strengthened between the Parties. Such dialogue will increase the effectiveness of political cooperation on foreign policy and security matters, recognising the importance the Republic of Armenia attaches to its participation in international organisations and cooperation formats and its existing obligations arising therefrom"[122],

and goes on to list the aims of said political dialogue in its second paragraph, the latter instead provides that

> "1. The Parties agree to cooperate in the promotion and effective protection of human rights and the rule of law, including through the relevant international human rights instruments. 2.Such cooperation shall be achieved through activities mutually agreed upon by the Parties, including by strengthening respect for the rule of law, further enhancing the existing human rights dialogue, further developing democratic institutions, promoting human rights awareness, and enhancing cooperation within the human rights bodies of the UN and the OSCE"[123].

It is clear that the CEPA has an adjusted focus to accommodate for the hardships presented by the context of the Republic of Armenia, which posit stabilization and conflict prevention as primary objectives of the partnership and thus require the addition of a more extensive CFSP component. The EPCA, on the contrary, needs no such inclusion, for the situation of the Republic of

[120] VAN ELSUWEGE et al. (2019: 1351).
[121] VAN ELSUWEGE et al. (2021: 1746).
[122] Art. 3, para. 1, CEPA.
[123] Art. 5 EPCA.

Kazakhstan does not present challenges comparable to those of the Nagorno-Karabakh conflict. In spite of these discrepancies, the Court ruled against the CFSP legal basis in the CEPA case, reflective of the ampler trend towards the normalization[124] of the CFSP into the Union's legal order. As seen in the previous section, Advocate General Pitruzzella followed the same reasoning as AG Kokott did in the Kazakhstan case, finding that the provisions of the CEPA relating to CFSP were negligible quantitatively, but most importantly qualitatively. In his words:

> "[the provisions relating to CFSP,] apart from being few in number in comparison with the agreement's provisions as a whole, are, as is clear from the considerations set out in points 64 to 67 above, limited to declarations of the contracting parties concerning the aims that their cooperation must pursue and the subjects to which that cooperation will have to relate, without determining in concrete terms the manner in which the cooperation will be implemented"[125].

3.2. The Two-Fold Purpose: the rarity of a dual or multiple legal basis

By looking at what has been examined this far, we can conclude that the choice of legal basis has three important consequences: firstly, it allows the EU to exercise its legal competence in a specific realm, including the legislative action itself and the type of act to be adopted; secondly, it determines which institution is to take said action; lastly, it establishes the procedure to be followed for the adoption of the act[126]. The choice of legal basis has, therefore, "constitutional significance"[127] in the EU legal order, which in turn establishes both the decision-making procedures to be followed and the competence of the EU to act on a certain matter[128]. As previously mentioned, said legal basis is to be determined in accordance with an examination of the content, the context, and the objective pursued by the act. One of the issues that is at the very core of Case C-180/20 is the allegation proposed by the Council that the CEPA pursues a two-fold purpose and, as such, requires the use of a dual or multiple legal basis. In the case law of the European Union, however, the recourse to such a basis has been granted solely in exceptional cases, provided they fulfilled certain requirements. The present section will be devoted to a discussion of said cases, in order to highlight the inherent rarity that is specific of a dual or multiple legal basis. Therefore, three cases will be examined, namely: Case C-300/89, the first instance where the Court ruled that a dual legal basis can only be employed when the procedures laid out for each provision are compatible, in the interest of the protection of institutional

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[124] WESSEL (2018: 339).

[125] Opinion of Advocate General Pitruzzella, 17 June 2021, Case C-180/20, *European Commission v. Council*, point 70.

[126] DE SADELEER (2012: 376).

[127] Opinion of the Court of Justice of the European Union, 6 December 2001, 2/00, *on the Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, point 5.

[128] VAN ELSUWEGE et al. (2019: 1333).

balance; Case C-263/14, which serves as a reminder of the centrality of the duty of loyal cooperation among institutions in the EU as well as setting an additional standard for the use of a dual or multiple legal basis; and Case C-155/07, which posits that a mere precedent in the jurisprudence is not sufficient to warrant the use of a dual legal basis. This section will serve to pave the way for the broader discussion over the objectives of the CEPA, which go beyond mere CFSP, as it will be explained in the following section.

Given the Council's preeminence in the negotiation and conclusion of international agreements and the procedural impasse that is at the very core of the action in Case C-180/20, a review of the role of the Council along with its technical proceedings is deemed necessary to understand the rarity of the use of two legal bases. The Treaties foresee that the Council is to express its vote according to three procedures: QMV, whose quotas are defined in Art. 16, para. 4[129] TEU; unanimity, only when provided by the Treaties; and simple majority, the rarest of the three. As stated in Art. 218, para. 8, TFEU, the Council is to act by qualified majority throughout the negotiation and conclusion of international agreements except in four instances defined in the second subparagraph of para. 8, namely

> "when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements"[130].

We have concluded that a different legal basis consequently implies a different voting procedure, and that, exceptionally, some acts can be granted a dual or multiple legal basis on the grounds of them pursuing objectives that are inextricably linked in such a way that a predominant component cannot be identified. This raises the question of how the Council is to behave in the instance in which the legal bases chosen require different voting procedures. The institution was first confronted with this conundrum in 1991 during the proceedings for the judgment of June 11, 1991, in Case C-300/89 on the directive on waste from the titanium dioxide industry. The action for annulment concerned Council Directive 89/428/EEC on the procedures for harmonizing the programs for the reduction and eventual elimination of pollution caused by the waste produced by the titanium dioxide industry. During the proceeding, it was held that the recourse to a dual legal basis was not possible in the presence of different procedures that were considered reciprocally incompatible. Matter-of-factly, when examining the Articles that constituted the legal basis for

[129] Art. 16, para. 4, TEU: "[a]s from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union".
[130] Art. 218, para. 8, TFEU.

the directive, we find that whereas Art. 100a called for a cooperation procedure[131], Art. 130s required instead a unanimous vote after a consultation of the European Parliament. The distinguishing feature of the cooperation procedure was essentially the fact that the Council was to act unanimously in two instances, namely when its position had been rejected by Parliament and when modifying, if necessary, the Commission's reexamined proposal. The Court held that "[t]hat essential element of the cooperation procedure would [have been] undermined if, as a result of simultaneous reference to Articles. 100a and 130s, the Council were required, in any event, to act unanimously"[132]. The cooperation procedure was thus introduced precisely to guarantee an increased involvement of the European Parliament in the legislative process, which would have been undermined if the Court had allowed for a dual legal basis constituted of Articles 100a and 130s. The directive was consequently annulled in the interest of the protection of institutional balance. Though the provision establishing the cooperation procedure was eventually repealed by the Treaty of Lisbon in 2009, the effects of Case C-300/89 were maintained in the case law. Truth be told, in Case C-180/20, the institutional balance would have been endangered had the Court ruled in favor of the Council, since the institution would have been granted the possibility to escape parliamentary consent and bypass the proposal of the Commission.

Another important precedent to discuss within this domain is Case C-263/14 *Parliament v. Council*. The aforementioned instance concerned an action for annulment of a Council decision signing an agreement with Tanzania regarding the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania. The Agreement was drafted in light of growing threats posed by pirates off the coast of Somalia. The United Nations had previously expressed concern over the situation, as the acts of piracy were harming for vessels conducting regular trading activities, as well as for local fishermen and ships delivering humanitarian aid to intervene in the already exacerbated context of the Federal Republic of Somalia. Building on this, the EU adopted Joint Action 2008/851[133] creating Operation Atalanta, in order to help combating pirates off the Somali coast. Within said context, the Council found pertinent to negotiate agreements with third states neighboring Somalia for the detained pirates to be transferred there. These third states, in compliance with international law and the conditions of said agreements, would then exercise their jurisdiction over the people and seized properties. The EU-Tanzania Transfer Agreement was then negotiated and concluded by the Council with Decision

[131] Art. 149, para 2, EEC Treaty: "[a]s long as the Council has not so acted, the Commission may amend its original proposal, particularly in cases where the Assembly has been consulted on the proposal concerned".
[132] Judgment of the Court of Justice of the of European Union, 11 June 1991, Case C-300/89, *European Commission v. Council*, point 19.
[133] Council Joint Action, 10 November 2008, 2008/851/CFSP, *on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast*.

2014/198/CFSP of March 10, 2014. However, the decision was contested by the Parliament on the grounds of an incorrect legal basis, for it was rooted in Art. 37 TEU and thus, as CFSP, required the Council to act by unanimity. While the Council held that the Agreement related exclusively to the CFSP, and as such it followed the clause specified in Art. 216, para. 6 TFEU[134], the European Parliament claimed instead that the document should have been adopted according to the procedure laid down in the same article in its para. 6, point a(v)[135]. Similarly to Case C-180/20, the Parliament called the decision into question because of the implications of a CFSP legal basis: firstly, requiring unanimity in the Council potentially hinders its capability to act due to the risk of being vetoed by any member State who finds it appropriate; secondly, pursuant to Art. 216, para. 6, removing the requirement of parliamentary consent can be considered as the Council overstepping its conferred powers and infringing the duty of loyal cooperation specified in Art. 13, para. 1, TEU. This instance has two important implications with regards to Case C-180/20, namely the importance of loyal cooperation and the exceptionality of a dual or multiple legal basis. Indeed, although the first plea concerning the incorrect legal basis claimed by the Parliament was rejected, on the grounds that the Agreement did fall predominantly within the CFSP, the relevance of this case relies in its ability to highlight the centrality of loyal cooperation between European institutions, an important requirement for the well-functioning of the Union as a whole. Concerning the more restricted view of Case C-180/20, Case C-263/14 emphasizes the exceptionality that the Court attributes the admissibility of a multiple legal basis. In the words of the Court itself:

> "[a]dmittedly, as stated by the Advocate General in point 60 of her Opinion, some of the obligations laid down by the EU-Tanzania Agreement appear, at first sight, to relate to the field of cross-border judicial cooperation in criminal matters and police cooperation, when they are considered individually. However, as also observed by the Advocate General, the fact that certain provisions of such an agreement, taken individually, have an affinity with rules that might be adopted within a European Union policy area is not, in itself, sufficient to determine the appropriate legal basis of the contested decision"[136].

This point adds another requirement to the appropriate choice for a legal basis. The evaluation of whether or not an agreement pursues a two-fold purpose, thus warranting a dual legal basis, is to be made with respect to the entirety of

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[134] Art. 218, para. 6, TFEU, the second subparagraph specifies the instances in which the Parliament shall give its consent (point a) and be consulted (point b). The introductory clause to said points states: "[t]he Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement". Therefore, by this subparagraph, the Council shall not seek the consent nor a consultation from Parliament where the agreement relates exclusively to the CFSP.

[135] Art. 218, para. 6, point (a) and (v), TFEU: "agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required".

[136] Judgment of the Court of Justice of the European Union, 14 June 2016, Case C-263/14, *European Parliament v. Council*, point 47.

the document and not to its individual clauses. Therefore, this refutes the position of the Council in Case C-180/20 requesting to evaluate the connections of the single provisions of Title II with the CFSP.

The crucial procedural impasse posited by the existence of a two-fold purpose needs to be further deepened through a discussion of Case C-155/07 on the Community guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Community. This action for annulment was brought before the Court by the European Parliament in 2008 due to the incorrect choice of legal basis by the Council for Decision 2006/1016/EC. The act at hand was contested in light of it pursuing, according to the Parliament, development cooperation goals, which fell exclusively under Title XX of EC Treaty and therefore needed to be applied by including Art. 179 TEC, instead of solely Art. 181 TEC. On the one hand, Art. 179 was formerly part of Title XX, specifically that on “Development Cooperation”, and entrusted the European Community to pursue the objectives of development cooperation laid out in Art. 177. On the other, Art. 181a, formerly part of Title XXI on “Economic, Financial and Technical Cooperation with Third Countries”, conferred to the Community the power to adopt measure in the realm of economic, financial, and technical cooperation. The centrality of the judgment lies in its contribution to setting part of the standards for the existence of a dual or multiple legal basis. Indeed, it was found that the procedures under Art. 179 and Art. 181 TEC were compatible, as they both required QMV, and therefore fulfilled the aforementioned criterion discussed in the Titanium Dioxide Judgment. However, the Court found that

> “[a]ccording to settled case-law, the choice of the legal basis for a Community measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure (see, to that effect, inter alia, Case C-300/89 Commission v Council(‘Titanium dioxide’) [1991] ECR I-2867, paragraph 10, and Case C-338/01 Commission v Council [2004] ECR I-4829, paragraph 54), and not on the legal basis used for the adoption of other Community measures which might, in certain cases, display similar characteristics (see, to that effect, Case 131/86 United Kingdom v Council [1988] ECR 905, paragraph 29, and Case C-91/05 Commission v Council [2008] ECR I-0000, paragraph 106)”[137].

The mere fact that two measures have compatible procedures and have already been used together as substantial legal basis for another Union act having similar features does not necessarily imply that the measures should always work in pair. Though in the instance posed by Case C-155/07 the Court eventually ruled that the Council should have included Art. 179 as well, in light of the “quasi-interdependence”[138] of the two Articles, yet another threshold for the choice of legal basis was set, further emphasizing the rarity of the use of a dual or multiple legal basis. With respect to Case C-180/20, the case at hand served

[137] Judgment of the Court of Justice of the European Union, 6 November 2008, Case C-155/07, *European Parliament v. Council*, point 34.
[138] *Ibidem*, point 83.

to highlight the procedural impasse posed by the coexistence of a dual legal basis in the establishment of a position on behalf of the Union with regards to the bodies set up by an agreement. Even if the procedures foreseen by the Articles included in the substantial legal basis had all been reciprocally compatible (although we have seen that they are not) the existence of a precedent would have been irrelevant to the analysis.

Now that the requirements for the choice of an appropriate legal basis have been established through the analysis of Cases C-300/89, C-263/14 and C-155/07, the next section will be devoted to a closer evaluation of the objectives of the CEPA in order to arrive at the concluding remarks of the Court, which held that the aim of the Agreement goes beyond simple CFSP.

3.3. The Objective of the Agreement: beyond CFSP

In the preamble of the Comprehensive Enhanced Partnership Agreement with the Republic of Armenia, the parties defined themselves as

> "[c]ommitted to further promoting the political, socio-economic and institutional development of the Republic of Armenia through, for example, the development of civil society, institution building, public-administration and civil-service reform, the fight against corruption, and enhanced trade and economic cooperation, including good governance in the area of tax, the reduction of poverty, and wide-ranging cooperation in a broad spectrum of areas of common interest, including in the field of justice, freedom and security"[139].

The objective of the cooperation can be derived from this very sentence: the parties declared themselves to be committed to the development of the Republic of Armenia with the help of the European Union, to some extent paving the way towards accession in the future. As previously stated, the contested decisions which gave rise to Case C-180/20 were adopted in order to establish the position of the Union with respect to the rules of procedure to be followed within the institutional apparatus tasked with overseeing the functioning of the CEPA. The Court found, in accordance with the Opinion formulated by Advocate General Pitruzzella, that the adoption of two separate decisions based on different legal basis would have been lawful only in the instance in which the agreement as a whole contained distinct components that could be tied to the various corresponding legal bases. Though an evaluation of the aim pursued by each individual clause was demanded by the Council, the Court recalled from the case law, in particular Case C-263/14, that the characterization of an agreement as falling within development cooperation objectives is to be made with regards to the entirety of its object and not to its individual clauses, provided that said clauses do not pose specific obligations falling beyond development cooperation. The provisions of Title II, relating to "Political

[139] Preamble, CEPA.

Dialogue and Reform; Cooperation in the field of Foreign and Security Policy", were thus dismissed from the quantitative point of view, for they are considerably few compared to the vastity of the CEPA, and from the qualitative one as well, since they were found to be

> "limited to declarations by the contracting parties of a programmatic nature, which merely describe the relationship between them and their common future intentions, without establishing a programme of action or determining the concrete terms governing their cooperation"[140].

A closer analysis of the CEPA thus revealed that the Agreement was made in pursuit of objectives predominantly concerned with the establishment of the framework for a cooperation between Armenia and the EU, particularly in the areas of trade, transport and development.

Development cooperation has historically been a rather broad field in European law. Within the meaning of Art. 208 TFEU, the primary long-term objective of said cooperation is the eradication of poverty, to be realized "within the framework of the principles and objectives of the Union's external action"[141]. However, one should also be mindful of the more general objectives for the Union's external action set out in Art. 21, para. 2, points c and d, TEU:

> "(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"[142].

When contextualized, the development cooperation possesses an inherently broad character that allows it to encompass a considerable number of objectives. In this framework, it is evident how the CEPA acquires a more general scope. Furthermore, the aforesaid distinctive feature of development cooperation is necessary to guarantee that the measures adopted against said backdrop be able to cover various specific areas. This is clear in light of Case C-268/94 on the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development. The case concerned an action for annulment initiated against a Council Decision on the conclusion of the Cooperation Agreement, pursued by the Republic of Portugal on the grounds of incorrect choice of legal basis. In fact, the inclusion of Art. 130y TEEC[143] was called into question because, in the opinion of the Portuguese government, the Union did not have a specific

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[140] Judgement *European Commission v. Council*, point 46.
[141] Art. 208, para. 1, TFEU.
[142] Art. 21, para. 2, points (c) and (d), TEU.
[143] Article 130y, TEEC: "[w]ithin their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organizations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 228".

competence to conclude the Agreement, and it therefore had to exercise the general competence granted to the organization under Art. 235 TEEC[144]. Instead, the Court found the Agreement to be falling within the scope of development cooperation, thus warranting the inclusion of Art. 130y TEEC as a substantive legal basis. The threshold for an agreement to be within the domain of development cooperation was established to be in the instance in which said document was found to be in pursuit of the objectives set out in Art. 130u TEEC, including the consolidation of democracy and of the rule of law. The CEPA is aimed at achieving similar objectives, as seen in the preamble, justifying the necessity for a broad development cooperation legal basis rather than one specifically tailored to the aims of the individual clauses. Moreover, the CFSP clauses of the CEPA set out general objectives, without specifying concrete manners in which these can be achieved. The abstract character given to Title II of the CEPA renders it unable to constitute a component distinct from the broader development cooperation objective. In fact, the Court observed that the predominant topics of the Agreement, namely the Common Commercial Policy, trade in transport services and development cooperation, effectively encompass the CFSP objectives, which then become reliant on this larger apparatus, annihilating their supposed independency.

One of the arguments put forward by the Council for the distinctive CFSP character of the CEPA was the specific context in which it was concluded. The Nagorno-Karabakh conflict is, to some extent, a defining feature of the Armenian political landscape, and the Court has held in previous cases that the context of a measure can be taken into account when determining the appropriate legal basis. In fact, a reference to Case C-81/13 is made to clarify the stance. The instance at hand referred to an action for annulment initiated by the United Kingdom against Council Decision 2012/776/EU on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the EEC and Turkey, with regards to the adoption of provisions on the coordination of social security systems. The decision was contested due to the inclusion of Art. 48 TFEU as a legal basis which, according to the United Kingdom, denied the country the possibility to exercise its rights under Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, since the UK sought not to be bound by the decision. In this case, the Court found that, although the context of a measure is relevant to the choice of legal basis, this caveat is only valid "where the measure seeks to amend the rules adopted in the context of an existing agreement"[145]. As was for Case C-81/13, the Court found in Case C-180/20 that the context was

[144] Art. 235, TEEC: "[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".

[145] Judgment *United Kingdom v. Council*, point 38.

irrelevant to the choice of legal basis. With regards to the Armenia case, the reasoning was rooted in the mere fact that the CEPA does not foresee any concrete measures to resolve the conflict, but simply acknowledges "the importance of the commitment of the Republic of Armenia to the peaceful and lasting settlement of the Nagorno-Karabakh conflict, and the need to achieve that settlement as early as possible"[146], while delegating the responsibility for the negotiations to the OSCE Minsk Group co-chairs. Furthermore, the same conclusion can be reached by recalling that the contested decisions are aimed at establishing an institutional framework that is relevant to the CEPA. Therefore they, likewise, do not envision any concrete measures for the resolution of the conflict.

Consequently, the Court upheld the first plea in law and finally ruled that the components of the CEPA possibly be linked to the CFSP are, qualitatively and quantitatively, insufficient to constitute an independent portion of the Agreement. Hence, they do not warrant a legal basis tailored to their pursuit.

As previously mentioned, the second plea in law was dismissed since the first was sufficient to annul the contested decisions. However, the Council, the Commission, and the Czech Republic agreed in demanding that the effects of the annulled decisions be maintained, pursuant to Art. 264, para. 2, TFEU, which provides that "[h]owever, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive"[147]. This specific competence was granted to avoid endangering the aims achieved by Union acts, in this case the proper implementation of the Partnership Agreement. The Court found the request to be acceptable, as the annulment of the contested decisions without their effects being maintained could have resulted in a disruption of the function of the bodies set up by the CEPA as well as put into question the commitment of the European Union with respect to the legal measures adopted by said bodies. The effects of the decisions were hence maintained, awaiting a Council Decision in compliance with the judgment issued by the Court.

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[146] Preamble, CEPA.
[147] Art. 264, TFEU.

Conclusions

As testified by the present analysis of Case C-180/20, international agreements and their ties with CFSP are still a subject for debate within the Union's legal order. While, on the one hand, treaty-makers wished to assert the peculiarity of the CFSP, the Court's case law is more reflective of a trend towards the normalization of the latter. Art. 24 TEU, provides that the Common Foreign and Security Policy of the Union is defined and implemented by the European Council and the Council acting unanimously, while the adoption of legislative acts is an exclusive competence of the High Representative of the Union for Foreign Affairs and Security Policy as well as of the member States. The only contribution the Court of Justice can make in this field, as of now, is specified at the end of the second subparagraph of para. 1 of the same article, which states that:

> "[t]he 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"[148].

This competence has been broadly interpreted by the Court itself, for it has sought to play a gap-filling role to guarantee coherency in terms of judicial protection within the Union's legal order[149]. This, however, poses some issues with respect to the autonomy and the more rigorous regime of judicial review foreseen by the Treaties for the CFSP. Member States are, to some extent, still reticent to delegate said competence to the European Union, but this is not necessarily reflected in the actions of the Court of Justice. Academics suggest that the CJEU has jurisdiction on CFSP matters solely in two instances: a procedural context, primarily relating to the conclusion and implementation of international agreements, and a substantive one, concerning specific measures adopted by EU bodies within the framework of Common Security and Defense Policy ('CSDP') operations and missions[150]. Case C-180/20 evidently falls within the first category. The Court's rationale in the Armenia judgment is reflective of a trend in case law towards a more integrationist approach to CFSP, one that interprets strictly the exclusion of the latter from the jurisdiction of the Court in narrow terms, but broadly conceives of the exceptions laid down in Articles 24, para. 1, TEU, and 275 TFEU[151], dealing respectively with the compliance with Art. 40 TEU, on the demarcation line between external competence and CFSP, and with the review of the legality of certain decisions. In this sense, the parameters established by Case C-180/20 serve as a blueprint for future jurisprudence concerning international agreements, in that their

[148] Art. 24, para. 1, TEU.
[149] VAN ELSUWEGE et al. (2021: 1758).
[150] KOUTRAKOS (2017: 8).
[151] *Ibidem* (2017: 35).

ample scope calls for a broader reasoning over the position of the CFSP within the Union's legal order.

Each act adopted by the European Union is to be justified by an appropriate legal basis, rooted in the Treaties, as derived from the principle of conferral[152]. The choice of legal basis has three relevant consequences that render its role crucial within the Union's legal order. In fact, it allows the Union to exercise its legislative competence, it determines which Union institution is to take action, and it lays out the procedure to be followed. In the context of the steps taken in order to conclude and implement international agreements, the multifaceted character of said documents renders the determination of the legal basis a considerably more complex endeavor. Having ascertained the center of gravity of the agreement, when the latter falls within the scope of the CFSP, the act is to be adopted via unanimity. The procedure for the negotiation and conclusion of international agreements is laid out in Art. 218, TFEU. Nonetheless, since no precise voting rule is established by said Article, the Court found that the voting arrangement is to be assessed on a case-by-case basis with reference to Art. 218, para. 8, TFEU[153]. Decision 246/2020 was passed by the Council with a unanimous vote, for the individual clauses of Title II of the CEPA with the Republic of Armenia were found to be relating primarily to the CFSP, predominantly due to the particular geopolitical context that characterizes the country. However, this action was contested by the Commission, finding the ties with the CFSP to be insufficient to justify such a legal basis. The very parameters of the center of gravity test were thus called into question. First and foremost, it was argued that the provisions of Title II were too few with respect to the CEPA as a whole and could not possibly be representative of the entirety of the Agreement. Therefore, the test was to be performed considering the full document and not merely its Title II. Quantitatively speaking, the provisions were found to be negligible with regards to the broader scope of the CEPA, which was instead concerned with the establishment of a development cooperation framework with the Republic of Armenia. When the Council called for a qualitative evaluation of the relevance of the CFSP character, it was likewise dismissed on the grounds that, as mentioned, the provisions of Title II set out a general will of the parties to work towards the stabilization of the situation, without providing the partnership with specific objectives and means to reach them.

Exceptionally, the legal basis of an act can be widened to account for the fact that said provision pursues multiple aims at once. This notwithstanding, the admissibility of a dual or multiple legal basis has been extremely rare in the case law. It was argued by the Council that CEPA could pursue a two-fold

[152]Art. 5, para.2, TEU: "[u]nder 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".

[153] Opinion of Advocate General Pitruzzella, 17 June 2021, Case C-180/20, *European Commission v. Council*.

purpose, meaning that the CFSP character of the document was not incidental to the broader development cooperation objective of the Partnership, but constituted an independent component, warranting the necessity for the inclusion of a legal basis that accounted for such a situation. While a "traditional" single legal basis "must rest on objective factors that are amenable to judicial review"[154], including the aim and content of the measure under examination, a dual or multiple one must fulfill other criteria, in turn contributing to its rarity. In fact, based on an analysis of Case C-300/89, Case C-263/14 and Case C-155/07, we can conclude that the Court has set three main standards for compliance. Firstly, the procedures laid out for each provision that constitutes the legal basis must be reciprocally compatible, as to avoid jeopardizing institutional balance. Secondly, the Union's institutions must remain within their domains to guarantee the respect of the duty of loyal cooperation provided for in Art. 13, para. 1, TEU. Thirdly, the fact that the Articles that form the legal basis have been employed together in other instances does not necessarily imply that they should consistently be used concurrently. In accordance with these precepts, it can be concluded that Decision 246/2020 should not have been based on Art. 37 TEU, for an evaluation of the objectives pursued by the CEPA highlighted its ties with the areas of trade, transportation, and development rather than being influenced by the geopolitical context in which the Agreement was negotiated.

The broadness of development cooperation in European law allows it to encompass different areas of competence to ensure that the document under scrutiny is upheld in its fullest and that all its aims are properly achieved. In this framework, a reference must be made to the aforementioned Philippines Judgment[155], for it arguably redefined the policy of the European Union with regards to development cooperation after the Lisbon Treaty[156]. The partnerships established under this area of competence are to be guided by the principles referred to in Art. 21, TEU, pursuant to Art. 209, para. 2, TFEU, which provides that "[t]he Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 of the Treaty on European Union and in Article 208 of this Treaty"[157]. In the instance provided by the Philippines Judgment, the Court submitted that development cooperation is inherently multifaceted and, as such, can be employed to adopt acts encompassing a wider range of policy areas. This approach, however, poses some issues with respect to the determination of the appropriate legal basis, for its status as constitutionally significant calls for a careful vigilance. In this respect, Advocate General Mengozzi expressed himself against the Court's broad interpretation of development cooperation, since the evolution of the latter throughout time makes it "more

[154] *Ibidem.*
[155] Judgment of the Court of Justice of the European Union, 11 June 2014, Case C-377/12, *European Commission v. Council.*
[156] BROBERG (2015: 547).
[157] Art. 209, para. 2, TFEU.

difficult to regard the legal basis for development cooperation alone as sufficient when so many and varied areas are covered by the same agreement"[158]. The Court then traced the border of development cooperation considering the character of the provisions of the partnership under examination, establishing that, when the agreement provided for concrete means to achieve the objectives of the collaboration, the document should be based on a development cooperation legal basis. In this optics, the judgment allowed for a generous interpretation of the development cooperation, one that could potentially pose some problems in future jurisprudence. With respect to Case C-180/20, the Philippines Judgment set the standards according to which the center of gravity of the CEPA was to be evaluated, in particular whether or not the Agreement could fall within the scope of the development cooperation competence of the Union. Though we have seen that the CEPA was indeed found to be within said domain, it is undeniable that the Partnership with Armenia is, to an extent, defined by its geopolitical landscape. Art. 21, para. 1 TEU states that:

> "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations"[159].

Against this backdrop, it is clear how the eventual resolution of the Nagorno-Karabakh conflict is to shape EU-Armenia relations. The European Union has for long sought to establish itself as a peace-promoter on the international scene, and the clash between Armenia and Azerbaijan is the perfect occasion to demonstrate the efficacy of EU diplomacy. As a matter of fact, EU Council President Charles Michel hosted in Brussels peace talks between Armenian Prime Minister Nikol Pashinyan and Azerbaijani President Ilham Aliyev on April 6, 2022, an evident signal of EU commitment to the peaceful resolution of the situation. The outcome of the dialogue is yet to be assessed, as well as the implications of increased EU involvement in an area that has been, for the majority of the conflict, dominated by Russian forces.

In this light, it becomes increasingly necessary to assess the position that the CFSP occupies in the Treaties, for the willingness of the Union to assert its power on the international scene should be reflected in its allocation of competences. Indeed, the more the member States delegate power to the Union, the more they are taking steps toward the creation of a stronger international

[158] Opinion of Advocate General Mengozzi, 23 January 2014, Case C-377/12, *European Commission v. Council*.
[159] Art. 21, para. 1, TEU.

entity. Looking at the principles and the procedures that have characterized the evolution of the EU, namely the spill-over effect and the core values, such as respect for the rule of law and democracy, it is evident that a centralized, united Europe reveals its aspirations of becoming an increasingly influential international actor. Nevertheless, the fact that the gradual integration of more and more domains within the competences of the supranational institution has yet to touch the area of defense and foreign policy, which remains quasi-exclusively under the jurisdiction of member States, casts a shadow of doubt on the real dispositions of the latter. While, on the one hand, recent instances, such as the Ukrainian crisis and the involvement in the Nagorno-Karabakh peace talks, paint the picture of a Union that is involved in foreign policy and wishes to become a major actor on the international scene, the continuous presence of the Normandy format in instances of international crises testifies, on the other hand, the greater relevance that certain states (namely Germany and France) arguably have with respect to other members. The very idea that inspired the creation of the European Union was to foster peace following the world wars through the integration of economic domains; yet, to pursue the exact same aim nowadays, a further cooperation is needed. Though at first it was just coal and steel, the benefits reaped from the partnership have always proved to exceed the loss of some sovereignty, whether that be in the domain of agriculture, finance, or transport. It is thus imperative for the Union to continue its peculiar process of spill-over in the domain of security to guarantee an enduring peace not simply in Europe, but in its neighboring regions as well. The tendency towards the normalization of the CFSP within the normative apparatus of the Union on the part of the Court, as testified by Case C-180/20, could contribute to this overall integration trend and likewise prove to be a strength for the Union. A strong Union on the international scene could be pivotal in expanding all the core ideas and values that inspired its creation in the first place.

This notwithstanding, the demarcation between external action and CFSP in the case law of the Court of Justice remains rather hazy, for the time being, primarily due to the observed discrepancy between the provisions of the Treaties and the actions of the Court of Justice. It will be up to future case law to trace a definitive border between the two domains, or perhaps participate in its explicit erasure.

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Riassunto

L'obiettivo finale del presente documento è quello di evidenziare la linea di demarcazione tra azione esterna e la Politica estera e di sicurezza comune ('PESC') attraverso la discussione della sentenza C-180/2020 *(Commissione contro Consiglio).*

L'espansione dell'UE, a partire dalla caduta dell'Unione Sovietica, ha evidenziato l'incompatibilità dell'ordinamento giuridico dei paesi ex-URSS con quello dell'Unione e la conseguente necessità di concepire nuovi meccanismi con l'obiettivo di preparare tali Stati alla via dell'adesione all'Unione stessa. È proprio in questo quadro che sono state create iniziative come la Politica Europea di Vicinato ('PEV'). Con il tempo, tale partenariato si è evoluto per tener conto dei nuovi sviluppi storici, sociali ed economici, portando alla creazione di nuove alleanze come il Partenariato orientale ('PO'). Quest'ultimo è considerato una risposta alla volontà dei paesi dell'Europa orientale e del Caucaso meridionale di intensificare le relazioni con l'Unione europea, per ottenere maggiore stabilità e sviluppo economico. Dopo la sua creazione, sono stati sviluppati singoli partenariati nel quadro del PO e in aree adiacenti, come il Kazakistan e l'Iraq, non senza controversie sulla base giuridica di tali accordi. L'UE ha la competenza di concludere questi ultimi, ma, al fine di comprendere meglio la portata di questa capacità, è importante ricordare che l'azione esterna dell'Unione si trova in due siti costituzionali distinti: il titolo V del TUE, che regola la politica estera e di sicurezza comune ('PESC'), e la parte V del TFUE, che invece riguarda politiche esterne più generali. Questa divisione è fondamentale, poiché i redattori dei trattati hanno voluto evidenziare la peculiarità della PESC, essendo di carattere intergovernativo e non sovranazionale, come lo sono normalmente le competenze esterne dell'Unione. Tale status implica la presenza di una procedura diversa per l'adozione di atti giuridici su base PESC. Tuttavia, questa peculiarità non si è tradotta nell'azione della Corte di giustizia europea, poiché si può sostenere che essa abbia minimizzato lo status speciale previsto per la PESC all'interno dei trattati. Ciò è evidente nei casi in cui alla Corte è stato chiesto di pronunciarsi nel quadro degli Accordi di Partenariato e Cooperazione Rafforzata ('APCR'). Il caso più rilevante in questo contesto è la sentenza C-244/17, la prima istanza in cui alla Corte è stato chiesto di chiarire la delimitazione tra le competenze PESC e non nell'ambito dell'attuazione di un accordo internazionale. Alla Corte è stato domandato di spiegare il significato del rapporto tra l'accordo e la PESC e se questo fosse sufficiente a giustificare una base procedurale di tale natura. Si è infine constatato che questi legami fossero insufficienti.

Un caso simile a quello del Kazakistan è stato portato davanti alla Corte nel 2020, nel quadro dell'Accordo di Partenariato Globale e Rafforzato ('APGR') con l'Armenia. Il paese mediorientale ha familiarizzato per la prima volta con i valori europei quando ha firmato l'Accordo di Partenariato e Cooperazione ('APC') nel 1996 e poi di nuovo quando è entrato nella PEV nel 2004. Nonostante l'Armenia sia diventata membro del PO nel 2009, la sua adesione all'Unione economica eurasiatica ('UEE') l'ha allontanata dall'UE, causando una ricalibratura delle reciproche relazioni bilaterali. In risposta all'adesione all'UEE, l'UE ha deciso di intensificare le relazioni con l'Armenia, avviando i negoziati per l'APGR nel 2015. Questi si sono conclusi nel 2017, conservando la gran parte delle caratteristiche del precedente APC. L'APGR è entrato in vigore nel 2021, non senza problemi. Nel 2020, la Commissione ha chiesto l'annullamento di due decisioni del Consiglio (rispettivamente 2020/245 e 2020/246) sulla posizione da prendere a nome dell'Unione europea nel Consiglio di partenariato istituito dall'APGR con l'Armenia.

L'obiezione della Commissione può essere divisa in due parti principali: in primo luogo, l'inclusione dell'art. 37 TUE come base giuridica sostanziale nella decisione 246/2020; in secondo luogo, l'illegittima divisione dell'atto che adotta il regolamento interno nelle decisioni impugnate. La base giuridica di un documento deve rispettare due requisiti principali: da un lato deve basarsi su elementi oggettivi che possano essere sottoposti a controllo giurisdizionale, compresi lo scopo e il contenuto dell'atto; dall'altro, la sua adeguatezza è determinata attraverso il cosiddetto "test del centro di gravità". Nel contesto degli accordi internazionali, è frequente che la scelta della base giuridica sia controversa, a causa del carattere poliedrico di tali documenti. Il test del centro di gravità ha lo scopo di isolare il campo o i campi più rilevanti del documento al fine di determinare la base giuridica pertinente. Una volta accertato ciò, i requisiti procedurali per l'adozione dell'atto sono stabiliti secondo l'art. 218 TFUE. Quest'ultimo prescrive che, se l'accordo rientra prevalentemente nell'ambito della PESC, la disposizione deve essere adottata all'unanimità. In caso contrario, il Consiglio vota a maggioranza qualificata ('MQ').

Nel caso C-180/20, è stato chiesto alla Corte di determinare l'adeguatezza di una base giuridica PESC, che, a sua volta, implica la necessità di un ragionamento più ampio sulla linea di demarcazione tra azione esterna e PESC. L'art. 40 TUE fornisce la base di tale distinzione. Infatti, esso specifica che l'attuazione della PESC non pregiudichi le competenze dell'UE in altri settori, compresa la capacità di concludere accordi internazionali. In questo contesto, tuttavia, l'applicazione pratica di questa disposizione è piuttosto complessa, a causa della coesistenza di molteplici basi giuridiche, come analizzato nel presente lavoro. Il centro di gravità dell'APGR doveva essere valutato, secondo

la Commissione, in conformità con la significatività degli obblighi previsti per perseguire gli obiettivi in questione e le materie coperte dall'accordo stesso. In questo caso, le nove disposizioni del titolo II dell'APGR non erano sufficientemente ampie per determinarne il centro di gravità, poiché difficilmente potevano essere rappresentative di un documento composto da quasi quattrocento articoli. Si è quindi ritenuto necessario eseguire il test considerando l'APGR nel suo insieme. Il centro di gravità dell'APGR, come sostenuto dalla Commissione, è costituito da commercio, cooperazione allo sviluppo e servizi di trasporto, dato che gran parte dell'accordo riguarda questi settori. Le disposizioni del titolo II dell'APGR sono state considerate accessorie all'obiettivo ultimo dell'accordo; ciò implica che il complesso contesto geopolitico in cui l'APGR è stato negoziato non sia sufficiente a giustificare una base giuridica e una procedura di voto nel Consiglio che sia di natura PESC.

Al contrario, il Consiglio riteneva che il carattere PESC del titolo II non fosse meno rilevante rispetto alla portata più ampia dell'accordo. Inoltre, lo stesso sosteneva che l'APGR con l'Armenia differisse dall'accordo con il Kazakistan, discusso nella sentenza C-244/17, a causa dell'aggiunta di un ulteriore obiettivo sostanziale definito nel primissimo articolo dell'accordo, ossia il rafforzamento del partenariato politico globale e la promozione e sviluppo di strette relazioni politiche tra le parti. Il Consiglio sottolineava che l'art. 3 APGR ponesse obiettivi precisi per il partenariato perseguiti dal suo titolo II, sostenendo che tale posizionamento nell'APGR fosse una prova della sua importanza qualitativa all'interno del documento. L'argomentazione del Consiglio si basava principalmente sul fatto che la rilevanza della PESC all'interno dell'APGR non dovesse essere valutata su base quantitativa, poiché un approccio qualitativo era più adatto per apprezzarne questa caratteristica. Inoltre, lo stato attivo del conflitto del Nagorno-Karabakh poneva un accento sulla sicurezza che sarebbe stato assente in altri casi. Ciononostante, nella causa C-180/20, la Corte si è infine pronunciata a favore della Commissione, riconoscendo la minore importanza attribuita al contesto.

Per quanto riguarda il secondo motivo di ricorso, la Commissione ha accusato il Consiglio di aver oltrepassato le sue competenze dividendo l'atto in due decisioni, poiché la proposta ne prevedeva una unica. In effetti, l'art. 17 TUE chiarisce i poteri della Commissione europea, e il comma 2 afferma che le proposte legislative sono una prerogativa della Commissione. In sostanza, adottando le decisioni impugnate modificate dal Consiglio, quest'ultimo ha disatteso questa caratteristica fondamentale dell'ordinamento giuridico dell'Unione.

Per comprendere meglio l'enigma posto dalla suddivisione della decisione, è pertinente rivedere le conclusioni 1/19 dell'avvocato generale Hogan. In questo caso, la necessità di scindere la decisione è sorta in seguito al fatto che

l'Irlanda, ai sensi del protocollo 21, non è tenuta a rispettare le disposizioni della Convenzione che riguardano i settori della politica comune in materia di asilo, protezione sussidiaria e protezione temporanea. Il Parlamento europeo, da parte sua, ha sostenuto la posizione secondo la quale l'Irlanda sarebbe già stata vincolata da tale convenzione, in base alle competenze esercitate dall'UE in virtù della stessa. Questa argomentazione è stata respinta, dato che il significato del protocollo 21 sarebbe stato compromesso se le disposizioni della convenzione fossero state considerate come rientranti in norme comuni alle quali l'Irlanda aveva già aderito. L'AG Hogan ha confutato la posizione avanzata dal Parlamento sulla base di due considerazioni: in primo luogo, il frazionamento della decisione è considerato illegale solo nel caso in cui tale divisione violi un requisito procedurale essenziale, fatto che non si è verificato in questa istanza; in secondo luogo, dal ragionamento dell'AG risulta che la scissione delle decisioni implichi, contrariamente all'argomentazione presentata dalla Commissione, il mantenimento del protocollo 21 piuttosto che la sua violazione, poiché l'art. 4(a) stabilisce che il protocollo si applichi alle disposizioni che modificano una misura esistente da cui sono vincolati. Con questa clausola, l'Irlanda potrebbe scegliere di non essere vincolata da una decisione in questo campo, anche se tale atto modifica uno preesistente a cui il paese aveva già aderito. Pertanto, l'AG Hogan ha concluso che la scissione - in questo caso - non solo fosse legittima, ma necessaria per garantire l'integrità del protocollo 21, alla luce delle clausole speciali sull'asilo previste per l'Irlanda.

Dalla sentenza C-180/20 è emerso che la scelta del Consiglio di dividere l'atto fosse discutibile in base alle caratteristiche delle decisioni impugnate. La Commissione ha evidenziato una violazione del dovere di leale collaborazione da parte del Consiglio, in quanto la scelta di dividerle è stata considerata un modo per aggirare il potere di proposta della Commissione, al fine di garantire l'inclusione dell'art. 37 TUE come base giuridica sostanziale della decisione 246/2020. L'AG Pitruzzella ha ritenuto che la leale cooperazione tra le istituzioni non fosse stata violata, in quanto l'obiettivo della decisione, ossia adottare una posizione a nome dell'UE nei confronti degli organismi istituiti dall'APGR, è stato raggiunto ed è quindi conforme alla proposta originaria della Commissione. L'unica critica che si può avanzare in questo caso è l'inutile appesantimento dell'apparato legislativo causato dalla procedura. In effetti, le due decisioni hanno un contenuto quasi identico, ad eccezione delle rispettive basi giuridiche che citano articoli diversi, per rendere conto dell'attuazione della totalità dell'accordo.

Nella seconda sezione della parte V della sua opinione, l'AG Pitruzzella si concentra sull'interpretazione dell'art. 218 TFUE, poiché esso stabilisce una procedura unica per la negoziazione e la conclusione di accordi internazionali con poche eccezioni specificate altrove nei trattati. In particolare, il comma 9

delinea una procedura semplificata per la definizione della posizione dell'UE nell'adozione di atti di applicazione o di attuazione di un accordo in un organo decisionale istituito da quest'ultimo. Tuttavia, nessuna procedura di voto è prevista dal comma 9; ciò ha portato la Corte a stabilire che la regola di voto applicabile debba essere determinata volta per volta con riferimento all'articolo 218, comma 8 TFUE. Di conseguenza, la procedura viene definita in funzione della base giuridica sostanziale di un atto, a sua volta stabilita dagli obiettivi perseguiti dall'atto stesso. In alcuni casi, però, l'atto può perseguire più obiettivi contemporaneamente, rendendo necessaria una base giuridica detta doppia o molteplice. Quest'ultima è prevista dal diritto dell'UE, sebbene sia necessario che le procedure stabilite per ciascuna base giuridica siano reciprocamente compatibili. Inoltre, l'AG Pitruzzella ha sostenuto che lo scopo e il contenuto dell'atto debbano godere dello stesso grado di importanza quando si analizzano i fattori oggettivi suscettibili a sindacato giurisdizionale e sui quali la scelta della base giuridica dovrebbe essere fondata. Nonostante risulti dalla giurisprudenza che l'obiettivo ultimo sostituisce le singole clausole, è fondamentale ricordare che l'attenzione allo scopo e quella al contenuto non si escludono a vicenda e possono coesistere, come visto nella sentenza C-377/12 (Filippine). In questo caso, la Commissione ha ritenuto che gli articoli specificati dal Consiglio fossero relativi a componenti accessorie del più ampio accordo di cooperazione, il cui centro di gravità era sito nel commercio e nello sviluppo piuttosto che nelle questioni specifiche dell'immigrazione e dell'ambiente. Pertanto, la base giuridica doveva essere costituita dagli articoli 207 e 209 del TFUE, rispettivamente sulla politica commerciale comune e sull'attuazione della politica di cooperazione allo sviluppo.

Nella sentenza C-180/20, l'AG Pitruzzella ha richiesto un esame del contesto al di là dello scopo e dell'obiettivo dell'APGR, dato che le circostanze in cui l'accordo è stato concluso potevano essere una parte essenziale della valutazione della Corte. La coesistenza di più componenti non implica quella di più basi giuridiche, in quanto quest'ultima è concessa solamente in via eccezionale. Tuttavia, la causa C-180/2020 si riferisce in realtà all'annullamento di due decisioni con scopi distinti, poiché la decisione 245/2020 riguarda l'attuazione dell'APGR nel suo complesso mentre la decisione 246/2020 si concentra esclusivamente sul suo titolo II. Nonostante questa divisione, le parti in causa hanno concordato di eseguire un test del centro di gravità considerando l'intero APGR, portando così l'AG a fare tre osservazioni sulle decisioni impugnate. In primo luogo, egli ha separato il caso del Kazakistan da quello dell'Armenia, poiché la Corte ha affermato a più riprese che la sussistenza di casi simili non implica la possibilità di risolverli nello stesso modo. In secondo luogo, ha ritenuto necessaria alla risoluzione del caso un'analisi più approfondita dell'accordo, sostenendo che il suo fulcro fosse la cooperazione in materia di sviluppo. Pertanto, il titolo II dell'APGR appariva come accessorio rispetto

ai più ampi obiettivi di sviluppo dell'accordo stesso e, quindi, non richiedeva una decisione separata. Ciò era evidente anche quando si è fatta luce sul contesto in cui l'accordo è stato concluso, poiché il riferimento al conflitto del Nagorno-Karabakh era insufficiente per inserire l'APGR in un'ottica specificamente PESC. In conclusione, l'avvocato generale Pitruzzella ha sostenuto che le decisioni impugnate nella sentenza C-180/20 dovessero essere annullate e che i loro effetti dovessero essere mantenuti per non turbare la corretta attuazione dell'APGR, ai sensi del secondo comma dell'art. 264 TFUE.

Per chiarire il ragionamento della Corte a seguito dell'opinione dell'AG, si ritiene necessario un riferimento alla causa C-244/17. Questo ricorso di annullamento riguardava la decisione del Consiglio 2017/477 sulla posizione dell'UE per l'adozione delle modalità di lavoro negli organismi congiunti istituiti sulla base dell'accordo di partenariato e cooperazione rafforzato ('APCR') con il Kazakistan. La critica avanzata dalla Commissione era che l'aggiunta dell'art. 31, comma 1, TUE come base giuridica sostanziale violasse i trattati e la giurisprudenza. In primo luogo, la Corte ha respinto il voto all'unanimità previsto dal Consiglio per mancanza di equivalenza tra una decisione di attuazione di un accordo di associazione e la conclusione di quest'ultimo. Conformemente alle conclusioni dell'avvocato generale, si è constatato che la semplificazione prevista dall'art. 218, comma 9, fosse in riferimento ad una limitazione della partecipazione del Parlamento piuttosto che a una determinazione della regola di voto del Consiglio, che rimane da valutare caso per caso. In secondo luogo, la relazione tra la regola di voto e il contenuto delle disposizioni doveva essere presa in considerazione alla luce dell'art. 218 TFUE. In linea di principio, una decisione che riguarda esclusivamente la PESC deve essere adottata all'unanimità ai sensi dell'art. 218, comma 8. Quando ci sono più elementi nella disposizione, la regola di voto deve essere risolta sulla base dello scopo o della componente predominante. In questo caso, la valutazione del centro di gravità è stata condotta sia su base quantitativa che qualitativa. Inizialmente, si è notato che le dieci disposizioni del titolo II dell'APCR erano piuttosto marginali in numero rispetto all'intero accordo, composto in totale da 287 articoli. Infine, è stato sottolineato che la portata predominante dell'APCR rientrava nelle politiche comuni di cooperazione commerciale e allo sviluppo dell'Unione e che le disposizioni del titolo II della PESC definivano gli obiettivi della cooperazione anziché stabilirne le modalità sostanziali di attuazione. In conclusione, la Corte ha ritenuto che l'APCR non avesse legami sufficienti con la PESC per giustificare il ricorso al voto all'unanimità, considerando che sarebbe stato impiegato per decidere su questioni normalmente regolate attraverso il voto a maggioranza qualificata ('MQ').

A differenza dell'APCR, è chiaro che l'APGR ha un focus adattato alle difficoltà presentate dal contesto dell'Armenia, il quale pone la stabilizzazione e la prevenzione dei conflitti come obiettivi primari del partenariato e quindi richiede l'aggiunta di una componente PESC più ampia. L'APCR, al contrario, non ha bisogno di tale inclusione, perché la situazione del Kazakistan non presenta sfide paragonabili a quelle del conflitto del Nagorno-Karabakh. Nonostante queste discrepanze, la Corte si è pronunciata contro la base giuridica PESC nel caso APGR, evidenziando la tendenza verso la normalizzazione della PESC nell'ordinamento giuridico dell'Unione.

Pertanto, la scelta della base giuridica ha tre conseguenze importanti: in primo luogo, permette all'UE di esercitare la sua competenza in un ambito specifico, compresi l'azione legislativa stessa e il tipo di atto da adottare; in secondo luogo, determina quale istituzione debba intraprendere tale azione; infine, stabilisce la procedura da seguire per l'adozione dell'atto. La scelta della base giuridica ha quindi un significato costituzionale nel quadro normativo dell'UE che, a sua volta, stabilisce sia le procedure decisionali che la competenza dell'UE di agire su una certa materia. Una delle questioni che è al centro della causa C-180/20 è l'affermazione proposta dal Consiglio che l'APGR richieda l'uso di una doppia o multipla base giuridica. Nella giurisprudenza dell'Unione europea, tuttavia, il ricorso a tale base è stato concesso solo in casi eccezionali. I tre requisiti principali sono stati definiti dalla Corte nelle seguenti sentenze: la sentenza C-300/89, la prima in cui la Corte ha stabilito che una doppia base giuridica può essere utilizzata solo quando le procedure previste per ciascuna disposizione sono compatibili, nell'interesse della protezione dell'equilibrio istituzionale; il caso C-263/14, che serve a evidenziare la centralità del dovere di cooperazione leale tra le istituzioni dell'UE; il caso C-155/07, che afferma che un precedente nella giurisprudenza non è sufficiente a giustificare l'uso di una doppia base giuridica.

La Corte ha infine constatato che l'obiettivo ultimo del partenariato tra l'UE e l'Armenia è lo sviluppo di quest'ultima, preparando la strada ad una potenziale futura adesione. Essa ha infatti osservato che i temi predominanti dell'APGR – vale a dire la politica commerciale comune, gli scambi di servizi di trasporto e la cooperazione allo sviluppo – inglobano gli obiettivi della PESC, annientando la loro presunta indipendenza. Come già discusso, uno degli argomenti addotti dal Consiglio per il carattere PESC dell'APGR è stato il contesto specifico in cui è stato concluso. Il conflitto del Nagorno-Karabakh è una caratteristica distintiva del panorama politico armeno e la Corte ha affermato in casi precedenti che il contesto di una misura può essere preso in considerazione nel determinare la base giuridica appropriata. Tuttavia, quest'ultimo non è stato reputato una giustificazione sufficiente per una base giuridica di natura puramente PESC.

Pertanto, la Corte ha accolto il primo motivo di ricorso e ha stabilito che le componenti dell'APGR collegate alla PESC sono qualitativamente e quantitativamente insufficienti a costituire una parte indipendente dell'accordo. Come già detto, il secondo motivo di ricorso è stato respinto poiché il primo era sufficiente per annullare le decisioni impugnate. Gli effetti delle decisioni sono stati mantenuti per evitare un'interruzione della funzione degli organismi istituiti dall'APGR e per non mettere in discussione l'impegno dell'Unione europea rispetto alle misure giuridiche adottate da tali organismi.

Come testimonia la presente analisi della causa C-180/20, gli accordi internazionali e i loro legami con la PESC sono ancora oggetto di dibattito nell'ordinamento giuridico dell'Unione. Se, da un lato, i redattori del trattato hanno voluto affermare la peculiarità della PESC, la giurisprudenza della Corte riflette piuttosto una tendenza alla normalizzazione di quest'ultima. L'unico contributo che la Corte di giustizia può dare in questo campo al momento è specificato alla fine dell'art. 24, comma 1, TUE, il quale stabilisce che essa può intervenire solo per garantire il rispetto dell'art. 40 TUE. Questa competenza è stata ampiamente interpretata dalla Corte stessa, poiché essa ha cercato di svolgere un ruolo "tappabuchi" per garantire la coerenza in termini di tutela giurisdizionale nell'ordinamento giuridico dell'Unione. La tendenza alla normalizzazione della PESC all'interno dell'apparato normativo dell'Unione da parte della Corte, come testimoniato dalla causa C-180/20, potrebbe contribuire al generale trend verso l'integrazione e rivelarsi un punto di forza per l'Unione. Ciononostante, la demarcazione tra azione esterna e PESC nella giurisprudenza della Corte di giustizia rimane piuttosto vaga, per il momento, principalmente a causa della discrepanza osservata tra le disposizioni dei trattati e le azioni della Corte di giustizia. Spetterà alla giurisprudenza futura tracciare un confine definitivo tra i due ambiti o, forse, partecipare alla sua esplicita cancellazione.

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