

The construction of a Common Foreign, Security,
and Defence Policy in the EU and the issue of
unanimity

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“Europe will be forged in crises, and will be the sum of the solutions adopted for those crises”
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Introduction

Back in 1953, questioning himself on the efficiency of unanimous decision-making in the framework of the European Defence Community (EDC)¹, Walton wrote “will an EDC structure which requires unanimous approval by the Ministers before certain vital decisions are reached prove too cumbersome for the rapid and effective action which crisis demands?”².

Since then, some changes occurred in the framework of EU decision-making. Indeed, if from 1986 a mechanism of qualified majority voting has been introduced under the Single European Act³ and later extended to many areas of Union’s action, to date unanimity is still the rule in the adoption of certain decisions concerning taxation, social security, the accession of new EU Member States, operational police cooperation between Member States, and Common Foreign and Security Policy (CFSP), including its Common Security and Defence Policy (CSDP)⁴. Therefore, seventy years later, the debate is still open. This particularly concerns CFSP and CSDP.

It will be argued that from 1993⁵ to date, the need to reach unanimous agreement among an increasingly high number of Member States⁶ in matters falling under the scope of CFSP, and later, CSDP, has prevented the EU from unfolding its full potential in foreign policy. In general, if in international politics time is essential and credibility is imperative, the unanimity rule has increasingly impaired the speed and ability of the EU to act on a regional and global scale. This has proved to be true following the many crises that the Union has witnessed to this day. By latest, Russia’s full-scale invasion of Ukraine occurred on 24 February 2022.

This study aims at analyzing how the requirement for unanimity within the European Council and the Council of the European Union in CFSP/CSDP matters has often slowed down the

¹ *Treaty establishing the European Defence Community*, signed in Paris on 27 May 1952, ratified by Belgium, Germany, Luxembourg, and the Netherlands, never entered into force. The Treaty never entered into force due to non-ratification in the French National Assembly on 30 August 1954.

² WALTON, C.C., “Background for the European Defense Community”, in *Political Science Quarterly*, Volume 68, Issue 1, March 1953, p. 69.

³ *Single European Act*, signed in Luxembourg on 17 February 1986 and in the Hague on 28 February 1986, ratified by Belgium, the Federal Republic of Germany, France, Ireland, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom, entered into force on 1 July 1987.

⁴ Under Article 42(1) TEU, the Common Security and Defence Policy shall be an integral part of the Common Foreign and Security Policy. *Treaty on the European Union*, signed at Maastricht on 7 February 1992, ratified by Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom, entered into force on 1 November 1993.

⁵ That is, from when the CFSP entered into the institutional structure of the EU under the Maastricht Treaty. *Treaty on the European Union*, 1992.

⁶ From its initial six Member States, namely Germany, France, Italy, the Netherlands, Belgium, and Luxembourg, the Union extended: in 1973 to Denmark, Ireland and United Kingdom; in 1981 to Greece; in 1986 to Portugal and Spain; in 1995 to Austria, Finland, and Sweden; in 2004 to Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Czech Republic, Slovakia, Slovenia and Hungary; in 2007 to Bulgaria and Romania; in 2013 to Croatia.

European external action in the course of its history and prevented the EU to act as a real global actor and power. To do so, the analysis is organized as follows.

The first chapter will carefully analyze the historical development of the EU's foreign, security and defence policy and its evolution in an institutionally recognized policy under CFSP, and later under CSDP, by looking back at the historical stages that contributed to its construction. It will be seen that the European integration process finds its roots in Cold War years and was deeply influenced by the defensive necessities of those years. Moreover, attention will be paid to the fact that for more than two decades politics, foreign policy, and the issue of security and defence were kept outside from the legal framework of the Union. Therefore, while greater economic cooperation was achieved under the mechanisms granted by the European Economic Community⁷, foreign policy grew in the framework of an intergovernmental method⁸ which dragged to our days and is well reflected in the use of unanimity for the adoption of certain particular decisions.

The second chapter will be devoted to a thorough analysis of the legal evolution of CFSP and CSDP under the treaties that succeeded over the years, with a particular attention to the evolution of unanimous decision-making under those treaties. Moreover, attention will be paid to some elements of flexibility that were introduced in the legal framework of the Union and that allows to derogate from unanimity to QMV under specific conditions. These will be analysed both with regard to their evolution, that is, to their progressive occurrence in the treaties, and to their functioning under the current framework.

The third chapter will explore a very recent praxis through the analysis of EU CFSP instrument of sanctions in the framework of the Russian invasion towards Ukraine, occurred on 24 February 2022. In particular, the chapter will delineate an overview of the challenges that the EU is confronted with following the breakout of the war, namely the necessity to build a common defence policy and common defence as foreseen under Title V TEU⁹. Moreover, the cohesiveness shown by the 27 Member States in the framework of the Union's response toward Russia will be analysed, paying attention to the sanctions packages adopted against Russia in this last year of war. Lastly, the chapter will explore the repercussions of those sanctions on the EU and the breakout of the energetic crisis in the Union. In that context, the initiative to establish a price cap on gas prices to fight the crisis will be addressed with a focus on Member States' cohesiveness to adopt it.

⁷ *Treaty establishing the European Economic Community*, signed in Rome on 25 March 1957, ratified by Italy, France, The Federal Republic of Germany, Belgium, the Netherlands, Luxembourg, entered into force on 1 January 1958.

⁸ Between 1970 and 1980, the so called "European Political Community" (EPC) was a forum for politics and foreign policy discussions among the Head of State and Government of the EEC Member States.

⁹ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed in Lisbon on 13 December 2007, ratified by Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden, entered into force on 1 December 2009.

The fourth and final chapter will give an overview of the state of the debate concerning the extension of QMV in matters falling under the scope of CFSP/CSDP. It will then explore the possible legal avenues to achieve a similar extension. Furthermore, it will take into account the positions and proposals of European actors on the matters. In particular, the position and proposals of European citizens following the Conference on the Future of Europe¹⁰ will be explored, as well as those of the European Parliament, Commission, and Council, and of the Member States.

Some conclusions will follow including some viable paths for an extension of QMV to CFSP/CSDP for the immediate, short, medium and long term.

¹⁰ Please refer to Chapter IV.

CHAPTER I

Historical development of the CFSP/CSDP

1. Historical premises: Cold War roots, the Treaty of Dunkirk

It can be stated that the logic behind the construction of the European project ultimately stemmed from a primarily defensive necessity¹, one that is deeply rooted in the triggering dynamics of the Cold War. Indeed, several factors contributed to the signing of the military treaties among western European countries in the years that followed the events of World War II, among which the Anglo-French Treaty of Alliance and Mutual Assistance signed in Dunkirk on 4 March 1947 is the first relevant one to the scope of this analysis². In the first place, a strong threat came from the spread of the Communist ideology in western European societies during the final years of the Second World War. In Europe, the desire for a lasting peace, a rapid reconstruction and a fair, efficient and economically successful future which prevailed among the populations met with the uncertainty on the path to walk to achieve it.

Indeed, for the majority of western Europeans both Capitalism and Communism offered valid ways out of the desolation of the post-war period and provided valid, although different, models of development for the future³. Communism's reputation, on its part, profited greatly from the years of cruelties perpetuated by National Socialism and Fascism throughout Europe and gained prestige due to the spread recognition of the Red Army's central role in defeating Nazi Germany⁴. Overall, in the immediate post war years communism was directly associated with the values of antifascism and liberation, and in countries like Italy and France communists had indeed often been at the forefront of the resistance against Nazi occupation. Ultimately, if in western Europe the hope was for better, the Communists – with their blend of antifascism, social justice and reflected glory from the Soviet war effort – “carried high the banners of hope”⁵. Moreover, as Westad noted, many people had easily forgiven or forgotten Stalin's pact with Hitler, to the point that collectivism and anticapitalism communism represented the only viable option for the future.

¹ Indeed the main purpose behind European cooperation after World War II was defensive, rather than economic. Therefore, the underlying theme for economic cooperation that eventually occurred was that close economic ties would render it difficult to rekindle military tensions and go to war with one another. Cfr. MCLAREN, J.G., “Europe's Efforts to Develop an Autonomous Defense Capability, a Constitution for Europe, and the Implications for NATO”, *Columbia Journal of European Law*, Volume 11, Issue 3, 2005, pp. 525.

² *Treaty of Alliance and Mutual Assistance*, signed between United Kingdom of Great Britain and Northern Ireland and France at Dunkirk on 4 March 1947, and entered into force on 8 September 1947. For primary sources concerning the Treaty of Dunkirk, see CHAUVEL, J., *Commentaire: D'Alger à Berne (1944-1952)*, Librairie Arthème Fayard, 1972, pp. 190-193; See Documentation française, “Communiqué des gouvernements français et anglais (Dunkerque, 4 mars 1947)”, p. 2.

³ WESTAD, O.A, *The Cold War. A World History*, Basic Books, 2017, p. 72.

⁴ *ibid.*, p. 73.

⁵ *ibid.*

For all these reasons, in what was taking shape as the “Western bloc”, governments’ leaders and non-communists feared greatly the prospect of Soviet expansionism. Even more so because that was not a mere prospect. Indeed, communism was by far the biggest party organization in France and in Italy⁶, and in the first post-war western European elections communist parties managed to made inroads everywhere⁷. In the eyes of Soviets, this framework – combined with the impellent economic crisis brought to western-European societies from the rubble of war – made the spread of revolutionary feelings within European societies very likely to occur. Indeed, no one in western Europe could have tried to hold back waves of social upheaval that deprivation and degradation contributed to spread across the old continent.

Accordingly, Americans feared the consequences of an economic collapse and lasting poverty in Europe and the revolutionary prospects that came with it⁸. Great concern was particularly devoted to the eastern part of the continent. Indeed, following the final years of the Second World War, and in particular after Potsdam⁹, “many Europeans and most US policy-makers had become fixated on a seemingly relentless pattern of Soviet expansionism in eastern Europe”¹⁰. In Poland – part of which URSS occupied as per agreements – and elsewhere in the East, the Soviets were not living up to their commitments, proceeding with killings of political opposers and perpetuating unspeakable cruelties at the expense of the occupied populations, which countries as Britain and the United States repeatedly protested¹¹.

In the West, many quickly noticed similarities with Nazi expansionism, as Soviet control seemed to be imposing itself over half of Europe, carrying with it uncontrolled use of violence. On 12 May 1945 such a situation led Winston Churchill to mint the infamous expression “iron curtain”¹², in a letter addressed to US President Harry Truman. However, in the reality of facts, Stalin had no concrete intentions on starting a war against the West¹³, as his focus was on avoiding the creation of a common front of imperialist countries against the Soviet Union. The initial post-

⁶ With 900.000 members and 1.8 million members, respectively. Cfr. *ibid.*

⁷ In Norway they got 12% of the vote, in Belgium 13%, in Italy 19%, in Finland 23.5%, and in France almost 29%. Cfr. *ibid.*

⁸ *ibid.*, p. 65.

⁹ The Potsdam conference was the last of the three big post war conferences – Tehran, Yalta, and Potsdam itself – and took place between 17 July and 2 August 1945. The conference accorded URSS the legit occupation of Polish areas as were conquered by Stalin in 1939.

¹⁰ Cfr. WESTAD, p. 88

¹¹ *ibid.*

¹² The expression will be then used publicly in a March 1946 speech at Westminster College in Fulton, Missouri, by the then British Prime Minister Winston Churchill, who on that occasion pronounced the infamous words: “From Stettin in the Baltic to Trieste in the Adriatic, an iron curtain has descended across the Continent”. Cfr. WESTAD, O.A., *op.cit.*, pp. 62-89.

¹³ In particular, due to the lack of resources and internal challenges, as well as the unreadiness to carry out a communist revolution outside URSS, as the Greek case showed. In Greece, the civil war served as a warning to the Soviets and European Communists of what could happen if they acted too soon. That event led Stalin to demand that other powerful communist parties outside the URSS, from China to Italy, would not act prematurely. Cfr WESTAD, *op.cit.*, p. 75-76.

war soviet policy on western Europe was therefore designed to avoid such a coming together of its enemies.

On the other side, following the abortive offer of a Franco-British Union¹⁴ in the dark days of June 1940, discussion about post war relations with France and the establishment of Western European security arrangements took place almost continuously within official circles in Britain, from the Autumn of 1942 onwards¹⁵. Such discussions intensified when Ernest Bevin succeeded Anthony Eden at the British Foreign Office. Mr Bevin inherited from the latter the scheme for a Western European Group characterized by extensive political, economic and military co-operation throughout Western Europe¹⁶, and which had to have an Anglo-French alliance as its foundation¹⁷.

On 4 March 1947, in a room in the subprefecture of the French city of Dunkirk, the Treaty of Alliance and Mutual Assistance was signed¹⁸ For French and British, if preventing the resurgence of Germany was the primary objective, much more attention had to be given to 'the real military problem' which would have arisen from the collapse of the world organisation¹⁹, namely Soviet containment.

Indeed, in the predominant – yet accurately hidden – western European view, as early as 1945 the German threat was seen as nothing more than a useful “pretext” for the signing of an Anglo-French security treaty. In French’s views, an Anglo-French treaty, even if formally directed at Germany, was without saying to be understood mainly in anti-Soviet terms²⁰. Concerning the British, their military authorities had been arguing along those lines even during the war, with the Chiefs of Staff²¹ acknowledging already in 1944 that Russia was likely to be the real problem after the war, and that it was important not to antagonize it “by giving the appearance of building up the Western European block against her”²². For that very reason the immediate object of a Western European group must have been the keeping down of Germany. Indeed, in the predominant view,

¹⁴ To deepen the topic, see SHLAIM, A., “Prelude to Downfall: The British Offer of Union to France, June 1940”, *Journal of Contemporary History*, Volume 9, Issue 3, July 1974, pp. 27-63.

¹⁵ Cfr. BAYLIS, J., “Britain and the Dunkirk Treaty: The origins of NATO”, *Journal of Strategic Studies*, Volume 5, n. 2, 1982, pp. 236-247. See also ZEEMAN, B., “Britain and the Cold War: An Alternative Approach. The Treaty of Dunkirk Example”, *European History Quarterly*, Volume 16, n. 3, 1986, p. 343-367; GREENWOOD, S., “Return to Dunkirk: The Origins of the Anglo-French Treaty of March 1947”, *Journal of Strategic Studies*, Volume 6, 1989.

¹⁶ Such a plan was outlined by the British Foreign Minister during talks with members of the Western Department on 13 August 1945. Cfr. BAYLIS, *op.cit.*, p. 50.

¹⁷ However, De Gaulle had made it clear that no progress could be made towards an Anglo-French treaty until the Levant and German frontier problems had been resolved. Cfr. *ibid.*, p. 49.

¹⁸ *Treaty of Alliance and Mutual Assistance*.

¹⁹ Cfr. BAYLIS, J, *The Diplomacy of Pragmatism. Britain and the Formation of NATO, 1942-49*, Palgrave Macmillan, London, 1993.p. 21.

²⁰ Indeed, as early as September 1945, in a meeting with Bevin, Bidault referred to the German threat as a “convenient myth”. Cfr. Appendix Two (Chapter Three, Note 74), “The German Threat as a Pretext for Defense against Russia”.

²¹ The Chiefs of Staff Committee was composed of the most senior military personnel in the British Armed Forces.

²² Cfr. “The German Threat as a Pretext for Defense against Russia”, *op.cit.*

the “Western Group” was to be created while it could still have been presented as a defence system directed against Germany²³. Accordingly, the Dunkirk treaty, in its preamble, reads

[His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, and The President of the French Republic] (...) Determined to collaborate in measures of mutual assistance in the event of any renewal of German aggression, while considering most desirable the conclusion of a treaty between all the Powers having responsibility for action in relation to Germany with the object of preventing Germany from becoming again menace to peace (...)²⁴.

Between 1944 and 1947, Soviet policies in western Europe gave rise to much conflict with the United States and Britain²⁵, as both British and American interests were seriously to be put at stake by the civil war in Greece and new Soviet demands on Turkey in late 1946. In particular, Truman was increasingly concerned that the Soviets were planning to take control of the Black Sea Straits and help the Communists win in Greece, an event which would have put the Soviet Union in control of the Eastern Mediterranean. That would have represented a serious blow to Britain, too, the traditional predominant power in the area, particularly at a time when the British domestic economic situation seemed to be going from bad to worse²⁶.

Stemming from this shared necessity, as well as from the considerable insistence exerted by the British, the Truman doctrine and the Marshall plan came into being. As a first step, in an address to a joint session of US Congress on 12 March 1947, President Truman asked for up to \$400 million in immediate US economic and military assistance to Greece and Turkey, the motivation for which had to be found in the United States’ willingness “to help free peoples to maintain their free institutions and their national integrity against aggressive movements that seek to impose upon them totalitarian regimes”²⁷. Along with the political reasons, as in May 1947 millions of people in western European cities continued to starve as a consequence of the destruction that the war brought upon European economies, some high ranks personalities within the American government soon realized that without immediate and more substantial aid from the United States, economic, social and political disintegration would have overwhelmed Europe, with

²³ In the British Foreign Office view, if a treaty among European countries was not officially directed against Germany it might have offended the Russians and created unnecessary problems with communists in western Europe, namely the French Communist Party. Cfr. ROTHWELL, V., *Britain and the Cold War. 1941-1947*, London: Jonathan Cape, 1982, p. 412.

²⁴ *Treaty of Alliance and Mutual Assistance*.

²⁵ But American and British policies – in part in response to Moscow’s behaviour in the east – also helped convince Stalin that only through Communist regimes Soviet control of eastern Europe could be made secure. This view is shared by Westad.

²⁶ WESTAD, *op.cit.*, p. 91.

²⁷ Cfr. “Special Message to the Congress on Greece and Turkey, 12 March 1947”, in *Public Papers of the Presidents Truman*, 1947, p. 179. On the role of London in demanding an American economic intervention in Greece and Turkey, see BAYLIS, *The Diplomacy of Pragmatism, op. cit.*, p. 63.

immediate disastrous effects on American domestic economy²⁸. Something had to be done, and on 5 June 1947 a massive economic plan was presented by Secretary of State George C. Marshall, which allocated 12 billion over four years to European countries that would have signed up to receive it²⁹, under the condition that the recipient countries would have cooperated with each other, open up their economies for outside reporting, and accept American envoys who would help decide where the aids should be allocated.

If the main western European countries immediately took the opportunity, with France and Britain inviting other countries to reassemble in Paris that same month to discuss a European response to the offer, the Soviet Union hesitated: accepting the plan, as Molotov³⁰ declared in Paris, would have led to an American hegemony in Europe and a divided continent. Indeed, in September 1947 the recently-created Cominform took a fiercely critical stance towards the aid provided by the American European Recovery Program for the rebuilding of Europe. Cominform officials condemned what they saw as the subservience of Europe to America, leading both the URSS and its satellite countries to refuse aid under the fund³¹.

On 22 January 1948, Ernest Bevin, British Foreign Secretary, delivered a speech to the House of Commons in which he condemned the Soviet threat and urged that “free nations of Western Europe must now draw together”, asserting his determination to further the United Kingdom’s cooperation with France and the Benelux countries through a Western Union that would expand the Dunkirk Treaty³². Slightly later, on 25 February 1948, the communists forces in Czechoslovakia³³ overthrew the government in Prague by carrying out a *coup d’état* in the country.

2. From the establishment of the Western Union to NATO

The lesser or greater role the Czechoslovakian *coup* played in the path for the creation of the Treaty of Brussels has been studied and analysed by many authors, to whom reference is made³⁴. However, already in December 1947, talking to Bidault, Bevin argued that “the time had come to

²⁸ In a note to his superior, Secretary General Marshall, the undersecretary of State for economic affairs, William Clayton, on May 1947 wrote “It is now obvious that we grossly underestimated the destruction to the European economy by the war. We understood the physical destruction, but we failed to take fully into account the effect of economic dislocation on production... Europe is steadily deteriorating”. Cfr. “Memorandum by the Under Secretary of State for Economic Affairs (Clayton), 27 May 1947”, FRUS 1947, 3:230, p. 32; BAYLIS, *The Diplomacy of Pragmatism, op.cit.*, p. 64.

²⁹ Russia and Eastern countries were offered the plan’s funds, too.

³⁰ Vyacheslav Molotov was the then URSS Minister of Foreign Affairs.

³¹ WESTAD, *op.cit.*, p. 97

³² Cfr. BAYLIS, *The Diplomacy of Pragmatism, op. cit.*, p. 67-69.

³³ In July 1947 the Czechoslovak government, with the approval of the KSČ, had accepted the Anglo-French invitation for preliminary discussions of the Marshall Plan. However, Gottwald was immediately summoned to Moscow by Stalin and, on his return to Prague, KSČ changed its decision on accepting the plan.

³⁴ In particular, see SVIK, P., “The Czechoslovak Factor in Western Alliance Building. 1945–1948”, *Journal of Cold War Studies*, Volume 18, Issue 1, Winter 2016, pp. 133-160.

create “some sort of federation in Western Europe”³⁵. On this point, it should be noted how several difficulties emerged concerning the birth of such an entity. As Baylis underlines, “even if in the United States the Foreign Secretary's initiative was 'warmly applauded', (...) it soon became clear to Bevin that the American position was somewhat more cautious than Marshall's comments suggested”³⁶. In fact, within the US State Department everyone regarded the idea of a military alliance with Western Europe as premature, and only “when there was evidence of unity with a firm determination to effect an arrangement under which the various European countries were prepared to act in concert to defend themselves, the United States would 'carefully consider the part it might appropriately play in support of such a western European union’”³⁷.

Indeed, divergences emerged concerning the nature, the actors, and the territorial scope of the pact the countries should have come to agree on. If on one side the United Kingdom and France remained committed to the Dunkirk model, with the UK believing that a regional pact meant moving too fast, and France being very sensitive over the question of Germany, on the other side the US and the Benelux were not keen on the Anglo-French proposal and believed that what was needed was a multilateral defence pact among West European states based on the model of the Inter-American Treaty of Rio de Janeiro³⁸, as foreseen under Article 52 of the United Nations Charter³⁹.

Germany represented a topic of discussion, as well. If the Benelux countries and the UK were favourable to make reference within the new treaty to the possibility of a regenerated Germany entering the European community of nations, the French were very much opposed to any reference to the possibility of eventual collaboration with Germany and urged that the threat still posed by a potential German aggression should have been accurately included in the treaty. Passed over other relevant divergences of thought⁴⁰, shortly after the time really was ripe for “an epoch-making event

³⁵ The Canadian Foreign Secretary, Louis St Laurent, made an important speech on 18 September arguing that the time was ripe for the creation of some form of Western security association. St Laurent's speech was the first public suggestion by a member of a Western government that such an association should have been taken into consideration. Bevin's however, was the first major initiative. Cfr. BAYLIS, *The Diplomacy of Pragmatism, op. cit.*, p. 65.

³⁶ Cfr. BAYLIS, *The Diplomacy of Pragmatism, op. cit.*, p. 68.

³⁷ *ibid.*

³⁸ Inter-American Treaty of Reciprocal Assistance (Rio Treaty), adopted At Rio De Janeiro on 2 February 1947, entered into force on 12 March 1948, Inter-American Conference For The Maintenance Of Continental Peace And Security, Depository: Ministry Of Foreign Affairs Of Brazil. See. BAYLIS, *The Diplomacy of Pragmatism, op. cit.*, p. 68-70.

³⁹ *Charter of the United Nations*, signed in San Francisco on 26 June 1945, entered into force on 24 October 1945, UNCIO. Art 52(1) of the UN Charter reads “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations”.

⁴⁰ The other disagreement concerned the future expansion of the pact. Although not hostile to the idea of the pact forming the nucleus of a wider organisation of Western Europe, at that stage the Benelux countries saw the pact primarily as a mean of tightening up the relations between the five powers. On the other hand, Bevin's position was that the pact should have been interpreted as being 'very much wider in scope than a defensive military agreement between the Five Powers. Cfr. BAYLIS, *op.cit.*, p. 70-73.

of major political and historical importance⁴¹, that is, for the United Kingdom, France, the Netherlands, Belgium, and Luxembourg to conclude the Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defense⁴², which had among its objectives to prove to the US that the free states of Western Europe were indeed resolved and able to stand on their own feet, in order to secure themselves the American assistance⁴³.

Signed in Brussels on 17 March 1948, with this Treaty the parties aimed at promoting the economic recovery of Europe through “the elimination of conflict in their economic policies, the coordination of production and the development of commercial exchange”⁴⁴. Moreover, they committed themselves “to carry out every effort in common to lead their peoples towards a better understanding of the principles which form the basis of their common civilization and to promote cultural exchanges (...)”⁴⁵. Significantly, the Treaty represented the first attempt to translate into practical arrangements some of the ideals of the European movement. Yet, more importantly, its main feature was the commitment to mutual defence should any of the signatories have been the victim of an armed attack in Europe. As Article IV reads:

“if any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations^[46], afford the Party so attacked all the military and other aid and assistance in their power”.

Accordingly, and in order to consult each other reciprocally on the questions dealt with in the Treaty, a Consultative Council was created, one “to be able to exercise its functions continuously”, and that “at the request of any of the High Contracting Parties (...) [should have been] immediately convened in order to permit [the parties] to consult with regard to any situation which may constitute a threat to peace, in whatever area this threat should arise”⁴⁷. The meaning of that treaty can be summed up in what Bidault’s said on the day of its signing: “what we do today is the cornerstone of the European construction... in economic and security matters”⁴⁸. Indeed, as will be recalled some

⁴¹ In the words of Paul-Henri Spaak, the Belgian Prime Minister. Cfr. BAYLIS p. 70.

⁴² *The Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence*, signed in Brussels on 17 March 1948 by Belgium, France, Luxembourg, the Netherlands and the United Kingdom, and entered into force on 25 August 1948.

⁴³ This was in particular the position of the United Kingdom. Cfr. BAYLIS, *The Diplomacy of Pragmatism*, *op. cit.*, p.72.

⁴⁴ Article I. Cfr. Archives nationales du Luxembourg, Ministère des Affaires étrangères, Traités et Conventions, «Traité entre la Belgique, la France, le Luxembourg, les Pays-Bas et le Royaume Uni de Grande-Bretagne et d'Irlande du Nord - s. à Bruxelles le 17 mars 1948».

⁴⁵ *ibid.*, Article III.

⁴⁶ Which reads, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security (...)”.

⁴⁷ Art. VII of the Brussels Treaty.

⁴⁸ Cfr. BIDAULT, G., «D'une Résistance à l'autre», Paris: Les Presses du Siècle, 1965. pp. 161-162. In the document, Bidault recalls how on the occasion of the signing of the Treaty of Brussels «Je m'efforçai de définir en cette occasion le sens de notre contrat: «Ce que nous faisons aujourd'hui est la pierre angulaire de la construction européenne... En matière économique comme en matière de sécurité».

years later by the French President in his *mémoires*: “Thus, modestly but resolutely and without delay in the necessary initiative, the construction of Europe and the Atlantic Pact were simultaneously initiated”⁴⁹.

The Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence was ratified in August 1948, and in September 1948 military cooperation was initiated in the framework of the Brussels Treaty Organization (BTO). A Western Union Defence Organisation was established, with the adoption of a plan for common defence, involving the integration of air defences and a joint command organization, the Military High Command of Western Union⁵⁰. Significantly, the negotiations on the Brussels Treaty brought out the differences in attitudes and interests between the European partners regarding the nature of the future organisation and the way the initiative was seen by its promoters: on one hand, as an effort by Europeans to prove the Americans their willingness to defend themselves and to secure their support⁵¹; on the other hand, as the first stage in European integration, one that would have developed not just militarily but also economically, culturally and socially⁵².

Indeed, an urgent need to get the United States to undersign the pact still existed on the British side, and accordingly how to gain the American assistance for Europe was the main issue after the Brussels Pact had been signed⁵³. The *coup* in Czechoslovakia on 25 February⁵⁴ was once again instrumental, this time in encouraging the desired greater American involvement in the defence of Western Europe. From 22 March to 1 April highly secret talks took place in Washington between the United Kingdom, the United States and Canada⁵⁵, during which the countries discussed the terms and conditions of an American and Canadian involvement in the Western defence project. Since the beginning, a fixed point had emerged and was shared between the parties on the fact that

⁴⁹ Cfr. *ibid.*

⁵⁰ For a more detailed description concerning the structure of the WU please refer to Field Marshal The Viscount Montgomery of Alamein, “The Western Union & its Defence Organization,” Lecture, The Royal United Service Institution (RUSI), London, October 12, 1949, Chaired by Marshal of the Royal Air Force Lord Newal, *The RUSI Journal*, Volume 138, Issue 4, 1993, pp. 52–59; and to *Memorandum by the Joint Chiefs of Staff to the Secretary of Defense (Forrestal)*, Department of State, United States of America, Washington, 24 November 1948, available online. Likewise, for a detailed history of the Brussels Treaty, see KRIGGER, W., “Foundation and History of the treaty of Brussels”, in WIGGERSHAUS, Norbert, FOERSTER, Roland G., SCHULZ, Birgit and HEINEMANN, Winfried (eds), *The Western security community, 1948-1950: common problems and conflicting national interests during the foundation phase of the North Atlantic Alliance*, Oxford, Berg, 1993.

⁵¹ Western Union was seen as a precursor to an Atlantic defence system. This was in particular the position taken by George Bidault, at the time French Minister of Foreign Affairs, and Ernest Bevin, British Foreign Secretary.

⁵² This was the view of Paul-Henri Spaak, Belgian Prime Minister.

⁵³ Cfr. BAYLIS, *The Diplomacy of Pragmatism*, *op. cit.*, p. 91.

⁵⁴ And Soviet pressure on Norway in early March. Cfr. *ibid.*, p. 92.

⁵⁵ The so called Pentagon Talks. The main negotiators for the countries were Gladwyn Jebb (UK), Lester Pearson (Canada), and John Hickerson and Theodore Achilles (USA). Cfr. BAYLIS, *The Diplomacy of Pragmatism*, *op. cit.*, p. 92-97. For a detailed description of those events, please refer to WIEBES, C., and ZEEMAN, B., “The Pentagon negotiations. March 1948: the launching of the North Atlantic Treaty”, *International Affairs*, Volume 59, Issue 3, Summer 1983.

negotiations should be undertaken on a new scheme of Atlantic security⁵⁶. By contrast, other differences emerged, concerning issues such as the nature of a mutual pledge of assistance, the question of indirect aggression, the issue of the territorial scope of the treaty, and that of the prospective membership of the new alliance. Concerning the last two ones, a solution was found respectively in the indication that the mutual pledge of assistance within the alliance should have covered “the continental territory in Europe and North America of any Party and the islands in the North Atlantic, whether sovereign or belonging to any Party”⁵⁷, and that countries as Norway, Sweden, Denmark, Iceland and Ireland, along with Portugal and Italy – these latter, with reserves – could have entered the group of signatory countries.

After the Pentagon talks, a truly decisive shift in American policy towards European security only occurred with the imposition of the Berlin blockade by the Soviet Union on 24 June 1948⁵⁸. In that historical occasion, the decision by the British and American governments to stay in Berlin and to undertake a massive airlift to supply the city represented a significant turning-point in the history of the formation of the Atlantic alliance⁵⁹. On 6 July 1948 the Washington Exploratory Talks on Security⁶⁰ began between the Western Union Treaty signatories, on the one hand, and the US and Canada, on the other. The negotiations lasted eight months and encountered several impasses, the explanation of which seems relevant in the framework of this analysis. In the first place, there were the issues of whether the mutual pledge of assistance should have stated explicitly that each ally had the right to decide for itself whether an armed attack had occurred, and whether the pledge should have made explicit reference to the provision of military assistance in the event an ally witnessed an attacked.

Secondly, a further impasse concerned the proposed Article 2, with its provision on economic, social and cultural cooperation, which was strongly supported by Canadians and contested by British. Thirdly, throughout the negotiations differences emerged over which countries should have been invited to join the Pact, and the area covered by it. On top of this dispute, the French suddenly demanded Italian membership⁶¹, imposing it as a necessary condition for their own participation in the alliance. Portugal was happy to accept the invitation to join after obtaining the blessing of the Franco regime in Spain, and Denmark decided to follow Norway into the alliance rather than to opt

⁵⁶ *ibid.* p. 94. This option was chosen among a list of proposals. In the first round of the negotiations, which took place between 22 and 25 March, the delegations discussed four options which might have been pursued: a world-wide treaty; the extension of the Brussels Treaty to include the United States and Canada; a unilateral US presidential guarantee to the Brussels Pact countries; and a new Atlantic alliance.

⁵⁷ Cfr. *Foreign Relations of the United States (FRUS)*, Volume III, 1948, p. 74.

⁵⁸ Cfr. BAYLIS, *The Diplomacy of Pragmatism, op. cit.*, p. 101.

⁵⁹ *ibid.*

⁶⁰ Preparatory talks that eventually led to the signing of the North Atlantic Treaty..

⁶¹ See VARSORI, A., *Italy in the International System from Détente to the End of the Cold War. The Underrated Ally*, Palgrave MacMillan, 2018.

for neutrality. Despite left-wing criticisms, Iceland also felt that its security was more likely to be assured inside the alliance than outside. On 4 April 1949 the North Atlantic Treaty⁶² was signed in Washington. In order to avoid duplication of missions, the Brussels Treaty Powers decided to amalgamate their military organisation into NATO, which had become a centralising element for West European and North Atlantic defence and security.

3. The European Defence Community and its failure

Until before 1950 the idea of a German rearmament had appeared only theoretically and had never been seen as a viable nor imminent measure. However, further deterioration in East-West relations demanded something else, and gradually resulted in a changed attitude toward the issue, ultimately leading to the abandonment of the policy of “complete disarmament and demilitarization of Germany and the elimination of all German industry that could be used for military production” which was agreed upon by the former Allies at Potsdam⁶³.

A symbol of the maturation of such political progress had already occurred in the *salon de l'horloge* at the *Quai d'Orsay*, on 9 May 1950, when the French Foreign Minister Robert Schuman proposed “to place Franco-German production of coal and steel as a whole under a common higher authority, within the framework of an organisation open to the participation of the other countries of Europe”⁶⁴. As it will be widely argued by European historians, that declaration undoubtedly marked the decisive starting point for European integration. Indeed, such a “pooling of coal and steel production”, the declaration read, “should immediately provide for the setting up of common foundations for economic development as a first step in the *federation* of Europe”⁶⁵.

More importantly, even though its focus was purely economic, the plan had a clear security underpinning, since the solidarity in productivity intrinsic to a similar project made it “plain that any war between France and Germany [became] not merely unthinkable, but materially impossible”⁶⁶. The 9 May declaration⁶⁷ opened the door for a revolutionary project that materialized

⁶² *North Atlantic Treaty*, signed in Washington, D.C., on 4 April 1949 and entered into force on 24 August 1949.

⁶³ Cfr. BEBR, G., “The European Defence Community and the Western European Union: An Agonizing Dilemma”, in *Stanford Law Review*, 7(2), 1955, p 171.

⁶⁴ Cfr. “The Schuman Declaration”, Paris, 9 May 1950, available online.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ As it is well known, the mind behind the declaration was Jean Monnet, who at the time was responsible for the French modernisation plan and was appointed by Charles de Gaulle in 1945 to put the country back on its economic feet. To deepen the history behind the Schuman Declaration, see FONTAINE, P., “A New Idea For Europe. The Schuman Declaration: 1950-2000”, *European Commission, Directorate General for Education and Culture, Publications Unit*, Brussels, 2000, pp. 5-43; HITCHCOCK, W.I., “France, the Western Alliance, and the Origins of the Schuman Plan, 1948-1950”, *Diplomatic History*, Volume 21, Issue 4, 1997, pp. 603-630; COSTA, A., “9th May 1950. Jean Monnet: The Revolution of European Sovereignty”, *The Federalist Political Review*.

in the European Coal and Steel Community (ECSC). The constituent treaty⁶⁸ was signed on 18 April 1951, and entered into force after ratification by all the adherents members – Belgium, France, Federal Republic of Germany (FRG), Italy, Luxemburg and Netherlands – in July 1952.

The outbreak of the Korean War in June 1950, just a few months after the Schuman speech proposing the establishment of the ECSC at the *Quai*, made the need for a German rearmament ever more urgent as the menace of a war at the “gates” of western Europe⁶⁹ obliged for a reorganization of the FRG’s army. Indeed, such a measure could not be reached through NATO, which did guarantee the defence of Europe in an Atlantic context thanks to massive American support but did not have the FRG among its signatories.

As West German participation in European defence was not a commitment to be postponed on the agenda of Western countries, arrangements had to be started, and widely differing opinions emerged as to how such a commitment should have been brought about. Discussions on the matter were held by the delegates to the Consultative Assembly of the Council of Europe at Strasbourg in August 1950⁷⁰. On that occasion, the first eloquent pleas for a European army as such came from members of the French delegation⁷¹. In particular, the French Socialist Andre Philip believed that the solution no longer rested in juxtaposing all the national armies, but in “creating a European army financed by a European fund fed by European taxes”⁷². Indeed, the French firstly wanted to keep Germany’s military potential under strict and secured control.

As the re-establishment of a German army was not to be favoured, the shared nature of such an entity would have imposed it by nature the defence of the whole territory of Europe, therefore eradicating any problems of a national character. On the French side, two views delineated, carried forward by Francois de Menthon and Paul Reynaud respectively. If de Menthon called for the creation of a European High Commissioner for Defense to be responsible to the Council of Europe and who would have duties similar to national ministers of defence, Reynaud's was more visionary in standing up for the “immediate creation, among the free peoples of Europe, of an effective European Authority having at its disposal a single European Army subject to European democratic control, cooperating with the United States and Canada”⁷³.

⁶⁸ *Treaty establishing the European Coal and Steel Community*, signed in Paris on 18 April 1951 and entered into force on 23 July 1952.

⁶⁹ The threat of a war on European soil was given by the fact that URSS supported communist North Korea, while South Korea was a strict ally of the United States.

⁷⁰ Cfr. WALTON, *op.cit.*, p. 42. For a detailed analysis of the negotiations in the framework of the EDC, see FLEISCHER, B., “Negotiating the European Defence Community”, *European Political Science, Volume 12*, 2013, pp. 64–74; BOERGER-DE SMEDT, A., “Negotiating the Foundations of European Law, 1950—57: The Legal History of the Treaties of Paris and Rome”, *Contemporary European History*, Volume 21, Issue 3, 2012, pp. 339-356.

⁷¹ Cfr. WALTON, *op.cit.*, p. 47.

⁷² *Ibid.*

⁷³ *ibid.* p. 48.

The proposal saw strong opposition from Norway, Scandinavia, Ireland and British Labourists, while it was just as strongly backed from Winston Churchill. On 11 August speaking to the Consultative Assembly, the latter argued the need for Europe to take the calculated risk to rearm, and outlined a resolution which was very similar in contents to Reynaud's; according to said resolution the Assembly, in order to express its devotion to the maintenance of peace and its willingness to sustain the action of the Security Council of the United Nations in defence of peaceful peoples against aggression, should have called for the immediate creation of a unified European Army subject to proper European democratic control and acting in full co-operation with the United States and Canada. This proposals was enriched with the provision that the European Army was to be subject to proper democratic control under the authority of a European Minister of Defence⁷⁴. Following pressing American request for a definitive action to rearm Germany to let her join the forces of European security, on September 19, 1950, France, England and the United States declared to guarantee to "treat any attack against the Federal Republic or Berlin from any quarter as an attack upon themselves"⁷⁵, as part of a plan that aimed at finally allowing FRG into the community of free nations yet without the risk of reviving a German national army⁷⁶.

As Walton reports, for the West to aid and abet the rearmament of Germany "without surrounding it with proper safeguards caused a wave of apprehension among the nations which had fallen victim to German aggression"⁷⁷. France felt the weight of responsibility to act on her shoulders, as foreign press and public opinion commented on the fact that the country – previously very much against a policy of German rearmament - had undertaken rearmament in a "mood of polite despair"⁷⁸. The government's program presented to the French National Assembly on October 24, 1950, by Rene Pleven aimed at clarifying some points of French intransigence⁷⁹. In particular, although France acknowledged the necessity of German participation in Western defence, a united European army made up of forces from the various European nations had as far as possible to pool all of its human and material components under a single political and military European authority, thereby implying a somehow complete fusion of such elements at the level of the smallest possible unit⁸⁰.

⁷⁴ *ibid.*

⁷⁵ Cfr. BEBR, *op.cit.*, p. 172.

⁷⁶ In their *Communiqué Outlining Steps for Liberalization of Relations with Federal Republic of Germany*, US, UK and France Foreign ministers agreed "that the re-creation of a German *national* army would not serve the best interests of Germany or Europ". Cfr. "Communiqué by the Western Foreign Ministers Outlining Steps for Liberalization of Relations With Federal Republic of Germany, Issued at New York and Washington, September 19, 1950", *Documents on Germany, 1944-1970, United States. Department of State, Historical Office*, 1971, p. 184.

⁷⁷ Cfr. WALTON, *op.cit.*, p. 53.

⁷⁸ *ibid.*

⁷⁹ Cfr. Journal officiel de la République française. Débats Parlementaires. Assemblée nationale, Octobre 1950, Paris: Imprimerie nationale, « Déclaration du Gouverneur français René Pleven le 24 octobre 1950 », p. 7118- 7119.

⁸⁰ WALTON, *op.cit.*, p. 3.

Secondly, a European army had to be linked to the political institutions of a united Europe. This had to be done through the appointment by Governments of the Member States of a Minister for Defence who would have been somehow accountable to those appointing him, and to a European Assembly. Moreover, the Minister for Defence would have to be responsible in particular for implementing some general directives he might have received from a Council made up of Ministers from the participant countries⁸¹. Significantly, the army had to be financed through a common budget, and in regard to both strategy and organizational requirements it was to be used in accordance with obligations assumed under the Atlantic Pact.

In France, the Pleven Plan was received with mixed feelings, but it was strongly opposed by the Communists and the De Gaullists only. Abroad, Italy welcomed it, while Germany demanded to be granted full equality and Washington saw it as the umpteenth postponement in building the defensive body that was deemed necessary. Britain, on its side, simply rejected the plan as in the government's belief the establishment of entities as those proposed by the French would have only resulted in "duplication, confusion and divided responsibility"⁸², as they were already covered in the Atlantic framework. The United Kingdom changed its mind only when granted by French Foreign Minister Schuman that the French government did not have any plan for a political structure of Europe, which, as Schuman reassured, perhaps represented a matter "for later".

With no clear foreign opposition, the French government decided to call a conference to meet in Paris on February 15, 1951. The Conference began its work on the basis of a memorandum sent to it by the Council of Europe, which suggested the creation of the European army by firstly placing it under a European Commander operating through a Council of Defence, and ultimately under a Political Assembly, a European Minister of Defence, and other permanent institutions with control prerogatives.

Despite strong opposition by UK government and Gaullists⁸³, the five members of the European Defence Group managed to approve an Interim Report, which, among other things, recognized: equality among all members of the organization, shared armed forces under a supranational authority, and the financing of such integrated forces through a common fund. Furthermore, the European army had to be at the disposition of the Atlantic Command. Significantly, the body's organization was similar to the ECSC delineated by the Schuman Plan in more than a way, as it was to be made of a European Defence Authority, a Council of Ministers, a Parliamentary

⁸¹ *ibid.*

⁸² *ibid.*, p. 56.

⁸³ General de Gaulle referred to the European Defence Organization as a project for a "stateless army which is nothing but a wild chimera". Cfr. *ibid.*, p. 61.

Assembly, and a Court of Justice. Following the drafting of the interim report, France, the US and UK foreign ministers reiterated their intent to establish a contractual relationship with Western Germany, and welcomed the “Paris plan” as an important step towards such a relation within the framework of a European defence.

On the other hand, French and British public opinions and political factions strengthened their tireless opposition to the cause. Such resistance clearly manifested in De Gaullists behaviours, and ultimately came out from a speech by the British David Maxwell-Fyfe, who once and for all stated the impossibility for Britain to join a Defence Community built on federalist principles. Nevertheless, the PMs of Belgium, Italy and Germany and France's Foreign Minister decided to meet in a special session at Strasbourg in early December to process the details in view of the Lisbon Conference which was scheduled to meet in February 1952. Still at that stage, sharp differences of opinion persisted among the Ministers. For instance, France kept believing that the community that was to be built implied by nature the constitution of a supranational political authority, while the Benelux countries remained unconvinced on the point.

In addition, Italy, France and Germany favoured decisions in the Council of Ministers to be taken by majority, on the grounds that unanimity meant a veto for each nation, whereas the Benelux representatives advocated unanimity, especially on decisions deemed to be “vital” by the states. It can be stated that on that occasion internal divisions between federalists, supranational functionalists, and staunch supporters of inviolable national sovereignty paralyzed the effectiveness of the session⁸⁴. Therefore, when the Council of Lisbon reunited for the review of the final draft of the European Defence Project, important bottlenecks still remained, namely concerning France and Germany.

A common ground was ultimately found between the signatories countries⁸⁵ as France got her guarantees on the deployment of American troops within the territory of continental western Europe as a guarantee against potential German withdrawal from EDC once she had gained armed units of her own; and Germany was given something less than full membership in NATO. The actual signing of the EDC treaty occurred in Paris on 27 May 1952⁸⁶. As finally approved the Treaty was composed of 132 articles, which among other things accepted the principle of equality for all Member States (Article 6), stressed the Community defensive intent and supranational nature (Article 2 and 7) and asserted the doctrine that an attack on one member state would have

⁸⁴ Cfr. *ibid*, p. 67.

⁸⁵ Belgium, France, FRG, Italy, Luxembourg and Netherlands.

⁸⁶ Treaty establishing the European Defence Community, signed in Paris on 27 May 1952, never entered into force.

constituted an attack against all Member States (mutual defence clause)⁸⁷. Moreover, Article 5 enunciated close cooperation with the North Atlantic Treaty Organization. Common institutions were established through Article 8, namely a Commissariat, a Council of Ministers, an Assembly and a Court of Justice. The Commissariat (Articles 10-32) was intended as the supranational executive body made of nine members elected once every six years and a president appointed for a period of four years. Decisions of the Commissariat were to be taken by a majority of members present, with no decision to be taken by fewer than four affirmative votes. The quorum consisted of no fewer than five members.

The creation of a board made of more representatives rather than a single man impersonating a defence commissioner represented a victory for the Italo-German view, which felt that the role of a commissioner would have been covered by a Frenchman⁸⁸. The Assembly (Articles. 33-38) of the European Defence Community had to be composed of the same delegates who constituted the Assembly of the Coal and Steel Community⁸⁹. The Assembly would have had to monitor the Commissariat activities and was conferred the power to remove the latter through a motion of censure adopted by two-thirds of the members present and voting, representing a majority of the total membership (Article 36(2)). The Council of Ministers (Articles 39-50) reflected national interests, having the task to harmonize the actions of the Commissariat with the policies of the Governments of the member States (Article 39).

Its voting procedure, which will be analysed separately in the next chapter, included the use of absolute majority, qualified majority, and unanimous vote. Directives had to be taken always by unanimous vote, this reflecting the fact that Belgium's had consistently insisted on unanimity vote where vital decisions were concerned⁹⁰. Lastly, the Court of Justice (Articles 51-67), was made of the personnel of the ECSC judiciary, and had to be empowered to determine all legal disputes arising under the Treaty.

Concerning military provisions, the Defence Community anticipated the creation of 43 "groupments", that is, small basic units of homogeneous nationality, each composed of approximately 13,000 men. The basic unit of the European army had to be a corps of 80,000 soldiers, while the largest national unit in the air branch would have to be 75 planes. Naval forces were also included within the Community and all services operated under integrated command.

⁸⁷ The EDC Treaty included a Jurisdictional Protocol and a Convention Relative to the Status of European Defence Forces and the Tax and Commercial Regime of the European Defence Community. Cfr. WALTON, *op.cit.* p. 67.

⁸⁸ Cfr. *ibid.*, p. 66.

⁸⁹ The ECSC Assembly is delineated by Articles 20 and 21 of the Treaty of April 18, 1951 establishing the European Coal and Steel Community.

⁹⁰ Such as mobilization and allocation of money.

The Treaty establishing a European Defence Community would have had to enter into force “on the date of the deposit of the instrument of ratification of the last signatory nation to accomplish that formality”⁹¹. As several problems still remained on the French side, namely dissatisfaction on how the German issue was dealt with, as well as the French vision of the EDC as an instrument fostering US ambitions in Europe, and with the Korean Armistice and the death of Stalin having changed the nature of the Russian external threat, the EDC treaty never entered into effect⁹². In particular, France’s government rejected its ratification on August 1954⁹³ and Italy never ratified it.

4. The WEU and the European dependence from NATO

If the EDC treaty pursued ambitious objectives of a political and federal nature, providing for a common army and a common armament program financed by a common defence budget, its predecessor, the Brussels Treaty, pursued far less ambitious aims, as its nature was limited in the provision for “traditional” integration of independent national armed forces, and for supervised armament production, both financed almost exclusively from national budgets. As the failure of the EDC project meant that an alternative way had to be found to integrate the Federal Republic of Germany into the Western security system, the Brussels Treaty powers, together with the United States, Canada, the Federal Republic of Germany and Italy met in London in September 1954, where the latter two countries were invited to join the Brussels Treaty⁹⁴. On account of the enlargement, the Treaty was amended and a new agreement was formalized by the Paris Protocol to the Brussels Treaty— signed on 23 October 1954 – establishing the Western European Union (WEU)⁹⁵. Within the framework of the new-born international organization, the integrationist model firmly included by Pleven in its 1950 plan was replaced by a more intergovernmental model. This is true concerning the entity’s objectives, powers, institutions’ functioning and composition.

Concerning the objectives, contrarily to the EDC project, the WEU preserves the Members' national armed forces and accordingly proposes a higher integration of the Members' forces, particularly at the level of an army group comprising 200,000 men. Secondly, whether the EDC Treaty proposed a unified recruiting policy applicable throughout the Community and based on a uniform census and classification of citizens of military age, other than the organization of military schools for common instruction and training and the prevision of a single military regulation

⁹¹ Art. 132. Cfr. Treaty Constituting the European Defence Community, *op.cit.*

⁹² As Bebr argues, unquestionably Britain's unwillingness to participate directly in the Defence Community was an important factor in the defeat of the Treaty, as France feared greatly that alone it might have been unable to prevent possible German domination of the Community. Cfr. BEBR, *op. cit.* p. 173.

⁹³ To deepen the topic, see C.N.J., “The European Defence Community: Problems of Ratification”, *The World Today*, Volume 10, Issue 8, 1954, pp. 326-339.

⁹⁴ FRG would have joined NATO in 1955.

⁹⁵ *Brussels Treaty as amended by the Protocol modifying and completing the Brussels Treaty, signed in Paris on 23 October, 1954, and entered into force on 25 August 1948.* The so called Modified Brussels Treaty (MBT).

applicable to the territory of the whole Community, no similar provisions are included in the NATO-WEU arrangements, as it follows the more traditional lines of international co-operation.

Furthermore, under the Modified Brussels Treaty the maximum military contribution that each Member could have made to the Union's national armed forces was to be agreed jointly by the governments, and required NATO and WEU countries to place those of their forces stationed in Europe under the command of SACEUR. Concerning military powers, the EDC Treaty provided that ultimately the power to recruit candidates for the Defence Forces was to be eventually transferred to the Community, which would have been empowered to recruit commissioned and non-commissioned officers and to determine their rank, while the Western European Union has none of these powers as member state kept their traditional powers. Moreover, if the EDC had the power to station components of the common forces within the borders of the Community, and those of the area defined by the North Atlantic Treaty, under the WEU-NATO arrangement national armies remain intact and the power to control deployment devolves on the individual member-states and the Supreme Commander of NATO. The exact same goes for the mobilization of economic and defence resources.

Significantly, concerning the mutual assistance clause, if the 1952 EDC draft treaty declared an armed attack against one to constitute an attack against all, under WEU in case of an aggression a member will assist the party attacked by taking, alone or jointly with other states, "such action as it deems necessary, including the use of armed force", so that "each party remains free to exercise its honest judgment in deciding upon the measures it will take to help restore and maintain the security of the North Atlantic area"⁹⁶. Other aspects of discrepancy are the fact that under WEU defence production is to be carried out through NATO, with the unanimous approval of MS, and that WEU leave the responsibility for fulfilling the defence programs to each Member. With regard to financial powers, the WEU-NATO arrangement involves nothing similar to the common budget theorized in the ECD; on the contrary, it only provides for national defence programs to be agreed upon and coordinated by NATO Council.

Looking to institutions, the differences between ECD and WEU are so abyssal that they cannot be really compared. The ill-integrated and traditional character of the Western European Union is once again reflected in the fact that its supreme institution is represented by a Council, similar in its features to the Community's one. As these features may show, from its very inception, and after the shock that came with the failure of the European Defence Community, the Modified Brussels

⁹⁶ Cfr. BEBR, *op.cit.* p. 183.

treaty and the Western European Union it established left the operative work of defence to NATO⁹⁷. Western European Union (WEU), which allowed Germany to accede to the Brussels Treaty in October 1954, would never have been able to compensate for the failure of the EDC and European military integration.

As previously stated, the main purpose behind European cooperation after World War II was defensive, rather than economic. However, given the failure of the defensive plans and the search for other forms of cooperation, economic agreements were installed between the western European countries. With some degree of certainty, it can indeed be stated that the underlying theme for economic cooperation was that close economic ties would have rendered it difficult to go to war with one another⁹⁸. By this logic, in 1958 the Treaty of Rome established the European Economic Community⁹⁹ (EEC) as a narrow economic union that did not entertain foreign policy nor defence ambitions, and EURATOM¹⁰⁰. Even if such an entity will not be the object of this analysis, in that it does not include defensive aims or provisions, it is very useful to understand the dominant intergovernmental logic which permeated the European reality in those years. Indeed, the European countries integration continued to evolve in an economic framework, rather than a political one, based on national, rather than supranational, control, hence confirming the prevalence of the functionalist model over the federalist one. As a matter of fact, within the EEC the Council of Ministers was the engine of the economic union of the European Member states, which put the fundamental decisions concerning the citizens' lives in the hands of the Heads of States and Governments, rather than in those, for example, of a supranational and European assembly.

5. The "Plan Fouchet"

Six years after the EDC failure, in 1961, defence policy became the subject matter of another initiative gone down in history as "Fouchet Plan", one of a very different kind and whose history is particularly important in the understanding of the common security and defence policy in the EU. In 1960, the discussion on political integration opened again to second French strategic plans¹⁰¹. On

⁹⁷ Indeed, if the 1954 WEU was instrumental in cementing the post-war order, it then outlived its usefulness approximately until the mid-1980s. For a detailed outlook on WEU's legacy please refer to BAILES, A.JK., MESSERVY-WHITING, G., "Death of an institution. The end for Western European Union, a future for European defence?", *Egmont, The Royal Institute for International Relations*, Issue 46, 2011.

⁹⁸ Cfr. MCLAREN, *op.cit.*, p. 525.

⁹⁹ *Treaty establishing the European Economic Community*, 1958.

¹⁰⁰ *Treaty establishing the European Atomic Energy Community*, signed in Rome on 25 March 1957, entered into force on 1 January 1958.

¹⁰¹ Charles De Gaulle resumed his role as President in 1958 and from the start of his presidency gave high priority to establishing a more confident role for France in foreign affairs. He tried to do so in more than one way. His first try in pursuing that aim was the construction of strong bilateral diplomacy with the United States, in particular targeted to secure Washington's help for French development of nuclear weapons and with it the creation of an inner group endowed with nuclear powers within NATO. His second attempt foresaw the creation of a political entity made of the three largest nations in Europe, except for the United Kingdom, as a vehicle for uncover French power. As these attempts in bringing France back to its leadership position within Europe failed, De Gaulle thought about creating a union of states between

31 May 1960 French President de Gaulle expressed his idea of forging a political union within western European borders, a “union of states” that would have been at once “political, economic, cultural and human, organised for action, progress and self-defence”, as he described it on that occasion¹⁰².

In General de Gaulle’s view, such a cooperation was to be based on “regular organised concertation between governments”¹⁰³, to be achieved through a new intergovernmental structure made through meetings at the level of heads of government and foreign ministers. The work of such a structure had to answer to the periodic deliberation of an assembly formed by the delegates of the national parliaments and should have included a solemn European referendum, in order to provide the European initiative with the character of popular adherence and support which was deemed indispensable for the French President¹⁰⁴. According to De Gaulle, the structure that would have been delineated would have had to operate separately but in parallel with the newly-born European Economic Community.

Several encounters with European leaders followed or preceded the Élysée speech, and the EC heads of government in Paris to discuss a ‘political Europe’. The first summit of heads of state and government of the European Communities gathered in Paris, at the Quai d’Orsay, on 10 and 11 February 1961. Although no agreement was reached on the “union”, the attendees positively welcomed De Gaulle’s proposal for the creation of a special committee¹⁰⁵ composed by representatives from the six governments, to be chaired by France and responsible for drawing up some concrete proposals – suggesting institutional means to them – concerning regular meetings of heads of states and governments and foreign ministers, and for exploring the avenues through which closer political cooperation between the six countries could have been arranged¹⁰⁶.

The Intergovernmental Committee on Political Union met between March 1961 and April 1962 under the chairmanship (for all but the last four weeks of its thirteen-month life) of Christian Fouchet, French ambassador to Denmark. On those occasion, the institutional and political

European countries among which France could have still played her role as a leader. Da dove ricavi queste considerazioni? Sono necessarie? Se ritieni di tenerle, inserire citazione su fonti utilizzate.

¹⁰² Cfr. TEASDALE, A., “The Fouchet Plan: De Gaulle’s Intergovernmental Design for Europe”, *London School of Economics*, ‘Europe in Question’ Discussion Paper Series (LEQS), No. 117, 2016, p. 11.

¹⁰³ De Gaulle continued: «Cela [the regular cooperation] comporte un concert organisé régulier des Gouvernements responsables et puis, aussi, le travail d’organismes spécialisés dans chacun des domaines communs, organismes subordonnés aux Gouvernements; cela comporte la délibération périodique d’une assemblée qui soit formée par les délégués des parlements nationaux et, à mon sens, cela doit comporter, le plus tôt possible, un solennel référendum européen, de manière à donner à ce départ de l’Europe le caractère d’adhésion et de conviction populaires qui lui est indispensable ». Cfr. Conférence de presse de Charles de Gaulle (5 septembre 1960), *op.cit.*

¹⁰⁴ A strong executive which emanated from direct mandate from the electorate was one of the most important features of De Gaulle’s thought. Cfr. TEASDALE, *op.cit.*, p.11.

¹⁰⁵ Known as the Intergovernmental Committee on Political Union.

¹⁰⁶ Cfr. *Press release issued by the Paris Summit (10 and 11 February 1961)*.

divergences between the countries often emerged, and can be resumed in Italy, Germany, and overall the Benelux opposition to the creation of a body external to the existing EC and rooted in intergovernmental premises. Moreover, according to these countries a potential Union was to be linked to the historical Atlantic tradition and therefore underpinned by a clear and unequivocal commitment to the NATO.

On the occasion of the meeting of the foreign ministers in Bonn on 5 May 1961 the Fouchet committee had to report no agreement had been reached, so that the gathering of heads of government scheduled to take place in the same city on 19 May was postponed to July. At the Bad Godesberg summit, eventually held on 18 July 1961, some margins for compromise were found¹⁰⁷. In the first place, consensus was found on regular meeting to be held between the Six's heads of government on a regular basis. Moreover, it was decided that the intergovernmental committee could have discussed any matter during the meetings, namely defence and EC matters, and that the project was aimed at deepening future political cooperation between the states towards the establishment of a union with proper institutions responsible for foreign policy matters. On the other side, the desire to root political union in a strong Atlantic Alliance was strongly expressed during the Bad Godesberg summit, along with the decision to proceed to EC enlargement to other European states, and the agreement on studying possible institutional reforms of the European Parliament, namely its direct election, and the creation of a single figure to constitute the executive lead of the three existing European communities¹⁰⁸. After the July summit, the Fouchet committee was commissioned by the Six to draw up and finalize to them "proposals on the means which will as soon as possible enable a statutory character to be given to the union of their peoples"¹⁰⁹. Negotiations within the Fouchet committee therefore resumed in fall 1961.

In accordance with the task conferred upon it by the Conference of Heads of State or Government of the Six in Bonn, the Fouchet Committee submitted, on 2 November 1961, a first Draft Treaty on European Political Union¹¹⁰. In its 18 articles, the draft treaty for the establishment of a political union envisaged the creation of a "Union"¹¹¹ of states responsible "to bring about the adoption of a common foreign policy in matters that are of [their] common interest", "to ensure, through close co-operation between [them] in the scientific and cultural field, the continued

¹⁰⁷ Indeed, the Bad Godesberg communiqué was to be the only text on political union agreed by the Six during the remaining eight years of de Gaulle's presidency of France. Cfr. TEASDALE, *op.cit.*, p. 26.

¹⁰⁸ The European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community.

¹⁰⁹ Cfr. "Statement issued by the heads of State or Government (Bonn, 18 July 1961)", Bulletin of the European Economic Communities, n° 7/8, Luxembourg: Office for official publications of the European Communities, July/August 1961, p. 35-36.

¹¹⁰ Also known as the First Fouchet Plan.

¹¹¹ Cfr. Art. 1 "Draft Treaty. Fouchet Plan I (2 November 1961)", Selection of texts concerning institutional matters of the Community from 1950 to 1982. Luxembourg: European Parliament. Committee on Institutional Affairs, 1982, p. 112-115.

development of their common heritage and the protection of the values on which their civilization rests”, and “to strengthen, in co-operation with the other free nations, the security of Member States against any aggression by adopting a common defence policy”¹¹².

Title II of the draft treaty was dedicated to institutions: the Council, the European Parliament, and the European Political Commission. The Union would have been governed by a Council representing national governments, that should have deliberated on all questions raised by one or more Member States, and that should have adopted its decisions unanimously. In the decisional framework, the absence or abstention of one or of two members did not prevent a decision from being taken. Significantly, the decisions of the Council had to be binding only on Member States that participated in their adoption¹¹³. The Council would have met every four months at the level of heads of government, and at least once in the intervening period at the level of foreign ministers¹¹⁴. The European Parliament was the one “provided for under Article 1 of the Convention relating to certain institutions common to the European Communities signed in Rome on 25 March 1957”¹¹⁵, and had the power to address oral or written questions to the Council as well as recommendations. On its part, the Council had to report annually to the EP.

Concerning the newest element, that is the European Political Commission, its main task would have been to assist the Council, by preparing its deliberations and carry out its decisions. Significantly, the Political Commission, based in Paris and made of senior officials of the Foreign Affairs departments of each Member State¹¹⁶, had to perform only the duties that the Council would have entrusted to it to perform¹¹⁷. Also significantly, the Political Commission established under the draft treaty by-passed the existing European Commission established under the ECSC in the performance of her duties. According to Article 16, three years after the entrance into force of the Treaty, it should have been subjected to a general review aimed at introducing “a unified foreign policy and the gradual establishment of an organization centralizing, within the Union, the European Communities referred to in the Preamble to the present Treaty”.

The first Fouchet Plan collected little success. Three countries, namely West Germany, Italy and Luxembourg, declared the basis offered by the draft text as suitable starting point for further agreements, while still seeking more precise guarantees on the role NATO had to play within the union and the need to preserve the existing EC integrity. On the other hand, the Netherlands and

¹¹² Cfr. *ibid.*, Article 2, The reference here is made to the Atlantic Organization Member States, when the draft treaty reads “in co-operation with the other free nations”.

¹¹³ Cfr. *ibid.*, Article 6.

¹¹⁴ Cfr. *ibid.*, art 5.

¹¹⁵ Cfr. *ibid.*, Article 7.

¹¹⁶ Cfr. *ibid.* Article 9.

¹¹⁷ Cfr. *ibid.* Article 10.

Belgium deemed the whole proposal as unacceptable, opposing it. Indeed, these latter, and Belgium in particular, feared strongly the influence and power that could have been granted to De Gaulle if the conditions under the draft treaty were to be accepted, given the absence of any sort of guarantee of balance within the Political Union.

Given these premises, in Netherlands' and Belgium ideas a more integrationist framework was to be constructed, one that would have at least allowed an element of majority voting among Member States in order to secure the triumph of a pro-NATO position and a guarantee against French power. A similar "guarantee" would have come from the UK, the entrance of which was strongly advocated by the two countries as a *conditio sine qua non* for the continuation of the discussions on the draft treaty¹¹⁸. Therefore, the Netherlands and Belgium basically posed "the problem of political union as a choice between two alternatives: either a supranational system [without the UK] or a looser *régime* with British participation"¹¹⁹. A third and ideal path, that is, a system that was both supranational and inclusive of Britain, was not viable.

Concerning France, supranationalism was not a path that could have been walked, and the issue of Britain's inclusion foresaw the risks of UK outstanding France in its role as first power within the new organization as well as of the Union being too strongly tied to NATO. An agreement did not seem close to the horizon, and by the end of 1961 the Fouchet negotiations reached effective deadlock. To heighten the tensions concurred the European Parliament, which in its 21 December resolution strongly criticized the contents of the first Fouchet Plan. The resolution, authored by former French prime minister and pro-supranationalism René Pleven, advocated for measures as the use of majority voting in the Council, the independency of the Council's president, the abolition of the proposed European Political Commission, and the granting of relevant powers to both the European Parliament and the European Court of Justice (ECJ) in Union affairs¹²⁰.

Unexpectedly, on 18 January 1962, France decided to put forward a revised version of the Fouchet Plan. Interestingly enough, the amended text did nothing but to harden the position of its predecessor and was characterized by crucial changes which enhanced the intergovernmental character of the proposed Union and emphasised its ability to act independently of the US¹²¹. Chopped of some of its original parts, the new draft treaty involved five relevant changes.

¹¹⁸ Indeed, following the Bad Godesberg summit, the United Kingdom applied for membership of the EPU on 10 August 1961, followed by Denmark, Norway and Ireland. To deepen United Kingdom role and viewpoint on the EC, see CAMPS, M., *Britain and the European Community 1955-63*, Oxford: Oxford University Press, 1964.

¹¹⁹ Cfr. MASCLET, J.-C., *L'Union politique de l'Europe*, Paris, PUF, 1994, p. 45.

¹²⁰ Cfr. TEASDALE, *op.cit.*, p. 35.

¹²¹ For the text of the second Fouchet Plan, see "Draft Treaty. Fouchet Plan II (18 January 1962)", Selection of texts concerning institutional matters of the Community from 1950 to 1982. Luxembourg, European Parliament. Committee on Institutional Affairs, 1982. 561 p. p. 119-121.

In the first place, Committees of Ministers now figured among the institutions of the EPU¹²². The treaty set up specifically a Committee of Foreign Ministers and a Committee of Ministers of Education, nevertheless other groups of ministers could have been set up by the Council for the various policy areas of the Union, *de facto* leaving the space for a structure similar in scope and conformation to the Council of Ministers of the EC, that in time could have been by-passed. In the second place, Article 2 now provocatively included economics among the aims of the cooperation of the Union, creating an overlap between the field of action of the Political Union and that of the EC. In the third place, any reference to “other free nations” featured in the first version were in the second one removed, implicitly erasing direct reference to NATO. Fourth, the European Parliament was deprived of some of its consultative powers, and lastly but significantly, the review of the treaty fixed to be undertaken after three years of its entrance into force suppressed the possibility of a progressive unification of the political union and the EC under the treaty. At that point, even those countries that initially showed themselves available for a compromise, namely Italy, Luxemburg, and West Germany, all retreated from their positions and joined the others in opposing France proposal.

The five Member States answered de Gaulle’s provocation by the same weapon, by drafting only two days after the second draft produced by the Fouchet committee, on 20 January 1962, an “alternative” treaty¹²³ which was very much similar in its contents to the Pleven’s December resolution, and quite strongly opposed several core principles of the first and second Fouchet plans. In its third draft, the treaty envisaged the creation of a union of States and European people, to be named “European Union”¹²⁴, separated and different in scope from the EC¹²⁵, not including economy within its fields of cooperation. Under Article 1, the Union was directed at unifying the policies of its Member States, and at adopting a common defence policy within the framework of (or as a contribution to the strengthening of) the Atlantic Alliance¹²⁶.

The institutions were outlined in Article 4, which kept the existence of Committees of Ministers – and specifically of Foreign Ministers, Ministers for Defence and for the Armed Forces, and Ministers of Education – as well as the Council, which were both to be assisted by a Secretary General. Significantly enough, Article 6(2) read “decisions necessary for achieving the aims of the European Union shall be passed by the Council unanimously”. However, an important addition was

¹²² *ibid.* Article 4

¹²³ See “Alternative Treaty drawn up by France's five partners (20 January 1962)”, Selection of texts concerning institutional matters of the Community from 1950 to 1982. Luxembourg, European Parliament. Committee on Institutional Affairs, 1982

¹²⁴ *Cfr. ibid.*, Article 1.

¹²⁵ Therefore not willing to prejudicate its powers. *Cfr. ibid.*, Article 2(4).

¹²⁶ *Cfr.* “Alternative Treaty drawn up by France's five partners”, *op.cit.*, Article 2(2).

that the Council had the power to, by means of a unanimous decision, waive the principle of unanimity in specific cases¹²⁷. Moreover, the abstention of one or two member states could not prevent decisions requiring a unanimous vote from being taken, while in the event of the opposition by one member state on a decision requiring unanimity, the Council should have suspended and rescheduled the deliberation to a later date of its discretion¹²⁸. If unanimity was not reached on the occasion of the second deliberation of the Council because of the opposition of only one member state, the other states would have had “the right to refer the matter to the European Parliament, with a view to securing the support of the State in question”¹²⁹. Such a statement assumed that some compromises would have necessarily been done in order to convince the member state in question not to oppose the decision anymore.

The remaining institutions were the Parliament and the Court of Justice. Concerning the first, once again it was the one provided under article 1 of the Convention relating to certain institutions common to the European Communities¹³⁰, and other than addressing oral and written questions and submitting recommendations to the Council was now able to give its opinion – non binding – on questions submitted by the latter. Lastly, in Article 16 the intents of the five countries truly emerged and were truly unmistakable. In fact, the treaty read that at the time fixed for the transition from the second to the third stage laid down in the Treaty of Rome¹³¹, it should have undergone a review aimed at developing the independence of the institutions of the Union and the powers exercised by them.

The agreement reached by the Five on a counter-treaty represented a major defeat for France from a diplomatic viewpoint, and some attempts to rectify the situation were tried by De Gaulle through bilateral agreements with Italy and Germany. Indeed, it was agreed that any treaty could have made reference in its preamble to a common defence aimed at ‘strengthening the Atlantic alliance’. On the other hand, economics should not have figured among the fields of cooperation of the Union, but it could have been a topic of discussion within the Council without prejudicing the EC prerogatives.

These amendments were presented to the other states gathered in the persons of their foreign ministers in Paris, on 17 April 1962. However, unable to reach an agreement on majority voting,

¹²⁷ And voting through qualified majority.

¹²⁸ Cfr. *ibid.*, Article 6(3).

¹²⁹ Cfr. *ibid.*

¹³⁰ Under the Treaties of Rome of 25 March 1957.

¹³¹ That is, June 1966. In fact, art 8 of the Treaty establishing the European Economic Community lays down that the common market was to be progressively established over a transitional period of 12 years, divided into three stages, of four years each, and the duration of which may have been amended. Each stage had a set of actions to be undertaken and carried out jointly.

on that occasion the Dutch and Belgian foreign ministers simply rejected the amendments, declaring that negotiations could have been continued once the UK had entered the EC. Of course, this was not possible due to strong French oppositions¹³² and discussions on the European Political Union were suspended, never to be resumed. Indeed, for so long as de Gaulle remained President of France, any communitarian project for Europe was to be set aside¹³³.

6. From the European Political Cooperation project to the Single European Act

After the failure of the Fouchet plans little was done about political cooperation until 1969. From June of that year France was governed by Georges Pompidou, a personality close to the United Kingdom, with much more flexible view of Atlantic questions than that of his predecessor, and wishful to break France for good out of its diplomatic isolation within the EC by giving a fresh impetus to European integration¹³⁴. With this objective in mind the heads of state and governments of the six Member States of the European Economic Community met on 1 and 2 December 1969 in The Hague, under French invitation, once again to broach the subject of political cooperation. As the Hague summit's final report read, that occasion represented a turning point in the European Community's history¹³⁵, which aimed at reaching completion, enlargement and deepening¹³⁶ among the Six.

Such actions were to be achieved: through a completion of the Common Market by harmonizing the common agricultural policy¹³⁷, the enlargement of the EEC through the accession of three candidate countries¹³⁸, as well as the deepening of economic, monetary, and political cooperation. The study of the path to follow in order to meet the political cooperation was entrusted to an *ad hoc* committee consisting of the political directors of the six foreign ministries, chaired by Belgian diplomat Étienne Davignon. The initial work of the committee¹³⁹ proposed a cooperation aimed at ensuring greater mutual understanding on the major issues of international politics through the exchange of information and regular consultations.

Indeed, the report set ministerial meetings at foreign ministers level to be held at least once every six months, that could have been replaced by a conference of Heads of State or Government

¹³² After the Fouchet plans episode, it took ten years for the United Kingdom to join the EC, in 1973.

¹³³ Cfr. Teasdale p. 52.

¹³⁴ Cfr. The Hague Summit (1–2 December 1969): completion, enlargement, deepening, available online.

¹³⁵ *Communiqué final du sommet de La Haye (1er et 2 décembre 1969)*, available online.

¹³⁶ On 10 July 1969 the French President Georges Pompidou launched the idea of a meeting of the Heads of State or Government of the Six to discuss the urgent problems faced by the EC, whose new priorities, in Pompidou's words, had to be "completion, deepening, enlargement".

¹³⁷ A compromise was found which allowed for the adoption of the financial regulations relating to agriculture, as requested by France, and an increase in the European Parliament's budgetary powers, which the other parties, especially Italy, wanted.

¹³⁸ Denmark, the United Kingdom and Ireland joined the EC on 1st January 1974.

¹³⁹ The so called Davignon report or Luxembourg report, presented in Luxembourg on 27 October 1970.

on the basis of the relevance of the discussed topic. Concerning these latter, it was indicated that governments of the Member States consulted each other on all major questions of foreign policy and were free to propose any subjects for political consultation. The groundwork for the ministerial meetings were to be prepared by a Political Committee made of the heads of the political departments of the Member States, to meet at least four times a year. According to the Luxemburg report, the Ministers and the members of the Political Affairs Committee of the European Parliament had to hold six-monthly informal meetings to discuss matters which were the subject of consultations in the framework of foreign policy cooperation.

The informal nature of the meetings wanted to ensure that the parliamentarians and Ministers could express their views freely. Significantly, the report read “the Ministers stress the correlation between membership of the European Communities and participation in activities making for progress towards political unification”, therefore indicating that the EPC should have been located within the scope of the EC. However, the indication was not observed as the political cooperation remained outside the Community Treaties legal framework for the following decade.

Starting from 1969, the European Political Cooperation was strengthened and furthered during 1970s and the first half of the 1980s¹⁴⁰ through the consolidation of the habit of ministerial meetings among Member States¹⁴¹, established by the first report, and the continuous study of the path to be walked to reach an ever better political integration by the designed committee. Moreover, the will to pursue an increasingly comprehensive cooperation within the framework of the enlarged Community was explicitly expressed on the occasion of the Paris Summit held between the Nine on 19-21 October 1972, when the ambitious objective of transforming the whole complex of the relations of Member States into a European Union by the end of the decade was set¹⁴².

On that occasion, after having witnessed the successful onset of the political cooperation between the Member States of the Community on foreign policy matters, it was agreed for consultations to be intensified at all levels, and for annual meetings of Foreign Ministers to be held four times instead of twice yearly for this purpose¹⁴³. In Paris, there was an implicit recognition that economic union must have been followed up by political union and that the latter was the ultimate long-term goal of the Community. However, differences between the countries still made it difficult

¹⁴⁰ The Single European Act will be signed in 1986.

¹⁴¹ At first, from 1970 to 1974, ministerial meetings had to take place two times a year, after 1974 the number of encounters mounted at four.

¹⁴² See Article 16 in Bulletin of the European Communities. October 1972, No 10. Luxembourg: Office for official publications of the European Communities. “Statement from the Paris Summit”, p. 14-26.

¹⁴³ See *ibid.*, Article 14.

to formulate definite formulas on how to achieve that objective¹⁴⁴. A second report was presented and adopted on 23 July 1973 in Copenhagen¹⁴⁵. The document reaffirmed the objectives of EPC as defined in Luxemburg and more strictly fixed the priority subjects that had to be covered within the EPC framework. In Copenhagen, the committee agreed on the fact that as a general rule, each member state had to avoid taking a fixed and unmovable position prior previous consultation under the political cooperation.

Significantly, while the Luxembourg Report did not include reference to security and defence, the Copenhagen Report referred to security in the framework of the coordination arrangements between Member States under the Conference on Security and Cooperation in Europe (CSCE)¹⁴⁶. The report stressed the distinct and additional nature of foreign policy cooperation under the Political Cooperation from the EEC institutional and legal set-up. However, probably the most important feature of the text approved in Copenhagen was the acknowledgement of the fact that “both sets of machinery [had] the aim of contributing to the development of European unification”¹⁴⁷, and that “having regard to the widening scope of the European Communities and the intensification of political cooperation at all levels”¹⁴⁸ EPC should have developed with full consciousness of “the implications for and the effects of, in the field of international politics, Community policies under construction”¹⁴⁹.

The understandings of the report reflected the decision that was took on the occasion of the Paris summit of December 1974, which gathered the Heads of Government of the nine States of the Community, the Ministers of Foreign Affairs and the President of the Commission to examine the various problems confronting Europe¹⁵⁰. The summit communique in its second and third articles read that “recognizing the need for an overall approach to the internal problems involved in achieving European unity and the external problems facing Europe, the Heads of Government consider it essential to ensure progress and overall consistency in the activities of the Communities and in the work on political cooperation”, therefore leading to the decision for the Heads of

¹⁴⁴As Avi Shlaim will comment on the Paris 1972 summit: “The nine leaders did not limit themselves to the statement of principles and aims. In many spheres they provided schematic programmes of work and issued a series of mandates to Community institutions. They fixed targets and issued detailed guidelines, accompanied by definite time limits for the work of the Community, particularly over the next two years. They also set the milestones which development must follow until the end of the decade (...) All this represents a definite improvement on the style and form of previous summit”. Cfr. SHLAIM, A., “The Paris Summit”, *The World Today*, Volume 28, Issue 12, 1972, pp. 520–30.

¹⁴⁵ See Bulletin des Communautés européennes. Septembre 1973, n° 9. Luxembourg: Office des publications officielles des Communautés européennes, « Deuxième rapport sur la coopération politique européenne en matière de politique étrangère », p. 14-22.

¹⁴⁶ This was a forum for discussion between the US, URSS and European countries.

¹⁴⁷ Cfr. *ibid.*, Article 12a.

¹⁴⁸ Cfr. *ibid.*, Article 10.

¹⁴⁹ Cfr. *ibid.*, art 12.

¹⁵⁰ Cfr. Bulletin of the European Communities, December 1974, No 12. Luxembourg, Office for Official Publications, “Final communiqué of the Paris Summit (9 and 10 December 1974)”.

Government “to meet, accompanied by the Ministers of Foreign Affairs, three times a year and, whenever necessary, in the Council of the Communities and in the context of political co-operation”¹⁵¹.

In that way, the European Council of Heads of State or Government¹⁵² was set up, establishing a first uncodified and non-binding institutional link between the economic integration policies taking place within the EC and the intergovernmental cooperation in foreign affairs established under the EPC¹⁵³. At that stage, the meetings of the 9 heads of State and government were still separated from the EC institutions and the difference from previous summits was more in the intentions than in the institutional set¹⁵⁴.

In Paris, the Nine also entrusted to the Belgian Prime Minister Leo Tindemans the task of submitting a detailed report on how the Community might be transformed into a European Union. The Report on the European Union was published on 29 December 1975 and presented to the European Council in Luxembourg on 2 April 1976¹⁵⁵. The document was incredibly ambitious in its aims and contents and comprehensive in its scope, dealing in detail with every relevant aspect of cooperation among the Member States and deeply stressing the importance of the community method and of the Member States as a “unified front”. The Union should have had “a comprehensive and coherent outlook, and act accordingly”¹⁵⁶. Therefore, the establishment of a single decision-making centre was to be achieved by removing the existing distinction between ministerial meetings which dealt with political cooperation and those which dealt with the subjects covered by the Treaties, that is, “by changing the political commitment of the Member States which [was] the basis of political cooperation into a legal obligation”¹⁵⁷.

¹⁵¹ Cfr. *ibid.*, Article 2 and 3.

¹⁵² European Council.

¹⁵³ Cfr. OPI, S.B., and FLOYD, R., “A Shaky Pillar of Global Stability: The Evolution of the European Union's Common Foreign and Security Policy”, in *Columbia Journal of European Law*, Volume 9, Issue 2, Spring 2003, p. 303. The gathering of the Council gradually replaced the summits. On the occasion of the conclusion of the Summit on December 10th 1974, French President Giscard declared: “le sommet est mort, vive le Conseil européen”. Cfr. TELÒ, M. “Assessing Origins, Developments and International Relevance of the European Council: Intergovernmental Summits in Historical and International Comparison”, in *European Review of International Studies*, Volume 2, Issue 2, 2015, pp. 40–65. On the establishment of the European Council, see MOURLON-DRUOL, E., “Steering Europe: Explaining the Rise of the European Council, 1975–1986”, *Contemporary European History*, Volume 25, Issue 3, 2016, pp. 409–37; Murlon-Druol, E., “The creation of the European Council at the December 1974 Paris summit”. In: Knudsen, A.-C.L. and Rasmussen, M. (eds.) *The Road to a United Europe: Interpretations of the Process of European Integration*. Series: Euroclio (48). Peter Lang: Bruxelles, Belgium, 2009, pp. 349-364.

¹⁵⁴ Cfr. MOURLON-DRUOL, E., “The Victory of the Intergovernmental Method? The Emergence of the European Council in the Community's Institutional Set-up (1974–1977)” in PREDA, D., PASQUINUCCI, D., (eds.), *The Road Europe Travelled Along* (Brussels: Peter Lang, 2010), pp. 27–40. As the EPC developed, however, the European Council became more involved, causing the line between the EPC and the Community eventually to fade. The dividing line blurred further when the EPC attempted to control a third state's activities by imposing economic sanctions. The Member States quickly realized that to be a truly international actor, there would have to be closer ties between their economic and political external policies. Cfr. Duquette, *op.cit.*, p. 172.

¹⁵⁵ Luxembourg Report, 2 April 1976, available online.

¹⁵⁶ Cfr. heading II, point A.A., in Bulletin of the European Communities. Dir. of publ. Commission of the European Communities, 1976, n° Supplement 1. Bruxelles: European Communities, “Report on European Union”, p. 11-35.

¹⁵⁷ *ibid.*

Moreover, the unified front made by the Member States reunited in a European Union implied that the coordination of policies, still sufficient in the context of the transitional period, must have gradually made way for truly common policies, that is, policies to be drawn up and enacted together. In particular, the states should have walked the path towards a common foreign policy, within which the political decision had to be the responsibility of the Council¹⁵⁸.

Among the other topics, security was a prominent issue within the document text, which required “immediate positive action”¹⁵⁹. The realization was clear that security could not have been left outside the scope of the European Union, given the sharing of a common destiny and the consciousness of the fact that the security of one member necessarily affected the security of others. If it was known that such process should have been accomplished progressively, it was also acknowledged that the European Union would not have been complete until it had drawn up a common defence policy.

No specific reference was made concerning the timings of such achievements, which the Member States had to reach on their own times. Indeed, with great foresight the Report read that in the strictly political field of external relations the European Union must carry on the kind of cooperation begun in 1970 “until the natural evolution of their undertaking leads Member States to accept the more compelling formula of a common policy”¹⁶⁰. On 30 November 1976, the European Council meeting in The Hague considered the Tindemans Report and confirmed that European cooperation on foreign policy issues would eventually lead to the elaboration of a common foreign policy.

The final stage of the development of EPC is marked by the approval in London of a third report, that set out a more coherent and comprehensive approach to international issues and to matters of security. Adopted on 13 October 1981, the London report¹⁶¹ articulated the objectives of EPC in considerably grander terms than the previous Reports, reflecting the vision shared by the Ten¹⁶² of a necessary further strengthening of political cooperation among them.

Significantly, the Report adopted a language that will be recurring in subsequent policy documents¹⁶³, demonstrating a consolidation of intents and the further shaping of a common vision

¹⁵⁸ *ibid.*, point B.

¹⁵⁹ *ibid.*, point C.

¹⁶⁰ *ibid.*, point C.4.

¹⁶¹ London Report, adopted on 13 October 1981, available online.

¹⁶² Greece joined the EC in 1981, bringing the Member States to 10.

¹⁶³ See “A Secure Europe in a Better World—European Security Strategy”, Brussels, 12 December 2003.

concerning the necessity to establish a common foreign policy. Consciousness on the greater influence that the EC had been developing in the previous years over the international system was reflected by the Report text, and reference was made to the necessity to improve the Community's ability to shape events rather than reacting to them¹⁶⁴, as well as to carry out something more than a common attitude, that is, a joint action in political matters.

The acknowledgement of the fact that political cooperation, based on membership of the EC, had developed to become a central element in the foreign policies of all Member States, by contributing greatly to the recognition of the Community as a prominent and coherent international actor, was also included in the Report. Most importantly, the Report acknowledged the usefulness of the tool as over the years the EPC answered a real need felt by the Member States of the European Community for a closer unity in the field of political cooperation. The importance of consultation among the Ten was underlined as lying at the heart of European political cooperation.

Moreover, in order to protect the informal character of these meetings, they should have taken the form of 'gymnich-type' meetings, characterized by strict confidentiality, no formal drafting of agenda, and the handing over to the press of only briefings that had to be agreed in advance among the Member States. The commitment to reciprocal consultation before the adoption of final positions or the launch of national initiatives on all important questions of foreign policy which were concern of the Ten was also emphasised, as well as the fact that in those consultations each Member State had to take full account of the position of the others and had to try to give due weight to the desirability of achieving a common position.

Finally, the London Report referred to security for the first time in broader terms¹⁶⁵, by pointing out that in EPC the Foreign Ministers agreed to maintain the flexible and pragmatic approach which made it possible to discuss in the framework of Political Cooperation certain important foreign policy questions bearing on the political aspects of security¹⁶⁶. In the wake of the positive approach to further and deeper political cooperation of the London Report, on 6 November 1981 the German and Italian Governments submitted to their partners in the European Communities the document of a "Draft European Act"¹⁶⁷. Known as the Genscher-Colombo Plan, the document argued for a strengthening of political cooperation between the Ten through its institutionalization. According to the initiative text, the Heads of State or Government, desiring to consolidate the

¹⁶⁴ Cfr. the preamble, and more precisely par. 5, of the London Report on European Political Cooperation, in Bulletin of the European Communities. 1981, n° Supplement 3. Luxembourg, "Report on European Political Cooperation (London, 13 October 1981)", p. 14-17, available online.

¹⁶⁵ Cfr. Koutrakos, *op.cit.*, p. 13.

¹⁶⁶ Cfr. London Report, part I.

¹⁶⁷ Draft European Act, submitted to the European Council 26-27 November 1981, available online.

political and economic progress already made towards a European Union reaffirmed the aims to strengthen and further develop the European Communities as the foundation of European unification, in accordance with the Treaties of Paris and Rome, and to enable Member States, through common foreign policy, to act in concert in world affairs.

Such aim, namely the further development of European political cooperation, should have been reached through several measures among which “the acceptance of statements by the Ten as a binding common basis”.¹⁶⁸ While the Italo-German plan proved too ambitious for its time, it contributed to the ‘reactivation’ of WEU, which offered to European countries another framework for consultation. In particular, on 26 and 27 October 1984 the Belgian and French governments initiated in Rome a preliminary joint meeting of the foreign and defence ministers within the WEU framework. The outcome was the “Rome Declaration”, which objectives were the definition of a European security identity and the gradual harmonization of its members' defence policies and is considered to be the founding text of WEU's reactivation¹⁶⁹.

It has been argued that the London Report of 1981 and the Genscher-Colombo initiative led to the Solemn Declaration on the European Union made by the Ten in Stuttgart on 19 June 1983, and appeared to culminate in the arrangements laid out in the Single European Act (SEA) of 1986. Indeed, the declaration signed at Stuttgart by the ten Heads of State or Government of the Member States of the European Communities and the European Council included some major elements of hope for the future of European political cooperation. A direct and open reference to security was made in the text of the document, that stated the Member States’ willingness to speak “with a single voice in foreign policy, including political aspects of security”¹⁷⁰, and their determination to achieve a comprehensive and coherent common political approach to transform the whole complex of relations between their States into a European Union.

With this in mind, the Member States reaffirmed at Stuttgart the objective to strengthen and develop the EPC through the elaboration and adoption of joint positions and joint action, on the basis of intensified consultations, in the area of foreign policy, including the coordination of the positions of Member States on the political and economic aspects of security, so as to promote and facilitate the progressive development of such positions and actions in a growing number of foreign policy fields. Moreover, the Heads of State or Government emphasized the importance of greater coherence and close coordination between the existing structures of the European Communities and

¹⁶⁸ Cfr. Part I, point 4, in Bulletin of the European Communities. November 1981, No 11. Luxembourg: Office for official publications of the European Communities, “Draft European Act”, p. 87-91, available online.

¹⁶⁹ Cfr. WEU Secretariat General, “Rome Declaration”, October 1984,

¹⁷⁰ Cfr. Bulletin of the European Communities. June 1983, No 6. Luxembourg: Office for official publications of the European Communities, “Solemn Declaration on European Union (Stuttgart, 19 June 1983)”, p. 24-29,

European Political Cooperation at all levels so that comprehensive and consistent action could have been taken in the future to achieve a European Union¹⁷¹.

The idea to bring under a single roof the structures of the Community and the EPC in order to strengthen cooperation and coordination of the Member States actions on foreign policy stemmed from the major changes of the 1980s, brought up by the further enlargement the Community witnessed in that decade¹⁷², and was institutionalized in 1986 within the signing of the Single European Act (SEA)¹⁷³. The SEA was the result of two intense years of negotiations among the EC Member States on economic and political matters, under the form of several European Council's meetings held between 1984 and 1986¹⁷⁴. The agreement concerned the completion, before the end of 1992, of the Single Market, the extension of qualified majority voting, further development of the Economic and Monetary Union, economic and social cohesion, reorganisation of the powers and responsibilities of the Commission, Parliament and the Court of Justice of the European Communities, the implementation of a European Technological Community and European cooperation in the foreign policy sphere.

The SEA¹⁷⁵, amended for the first time the European Communities' founding Treaties, and entered into force on 1 July 1987. Under it, the EPC acquired a treaty foundation¹⁷⁶. In particular, as laid down in the common provisions of the treaty, Political Cooperation under SEA was governed by Title III, made of one single but extensive Article¹⁷⁷, whose measures confirmed and supplemented the procedures agreed in the three reports of Luxembourg, Copenhagen, and London,

¹⁷¹ Cfr. *ibid.*, point 2.

¹⁷² Following Greece access in 1981, Spain and Portugal joined the Community in 1986, bringing the Member States of the EC to twelve. The entrance of the emerging democracies of southern Europe changed the balance of the Community, which prior to the 80s had been composed solely of the industrialised countries of Northern Europe. The enlargement represented an opportunity for more political stability within western Europe, and development for the region. However, it also came with challenges as increased regional imbalances among the Twelve aroused, leading to an increased need for a common regional policy. Considerable economic and social obstacles impeded the integration of these mainly agricultural countries into the highly industrialised Community. Protracted negotiations and lengthy transitional periods would prove to be necessary for the successful integration of the new Member States.

¹⁷³ *Single European Act*, signed in Luxembourg on 17 February 1986, entered into force on 1 July 1987.

¹⁷⁴ The European Parliament contributed to the discussion on the creation of a European Union by drafting and adopting, on 14 February 1984, a "draft Treaty establishing the European Union", also known as the 'Spinelli Plan'. The document, visionary in its nature and very ambitious for the times being, was rejected by the Member States' governments. However, its contents and spirit paved the way for the draft Single European Act, in December 1985. See Bulletin of the European Communities, February 1984, No 2. Luxembourg: Office for official publications of the European Communities, "Draft Treaty establishing the European Union", p. 8-26.

¹⁷⁵ *Single European Act*, 1987. The SEA treaty was signed in two times due to the uncertain position of Denmark, which affected the signing of Italy and Greece. In fact, on 21 January 1986 the Danish Parliament rejected the draft Act and called for the reopening of intergovernmental negotiations, a proposal that was immediately rejected by the other states. Denmark therefore indicted a national referendum on the matter. Later that month, without even waiting for the final results of the referendum in Denmark, the Council fixed 17 February 1986 as the date for the signing of the SEA. On that day, only Belgium, the FRG, France, Ireland, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom signed the SEA in Luxembourg. Italy, Greece, and Denmark signed it on 28 February, one day after the referendum results established Denmark's population support of the treaty.

¹⁷⁶ Cfr. MCLAREN, *op. cit.*, p. 528; DUQUETTE, *op. cit.*, p. 172.

¹⁷⁷ Art. 30. *Single European Act*, 1987.

the Solemn Declaration on European Union, and the practices gradually established among the Member States¹⁷⁸. As per Article 30, EPC fell under the scope of “any foreign policy matters of general interest”¹⁷⁹: this directly included security, under Article 30(6); however, as it will be analysed further, no explicit reference to defence was made¹⁸⁰. As the provisions of the SEA Treaty on political cooperation matters will be object of discussion in the next chapter, it suffice here to note how the provisions concerning political cooperation were not exactly ambitious in their contents, constituting nothing more than the codification of existing practice¹⁸¹. Indeed, no consistent step further was taken under Title III of the SEA concerning objectives and actions to pursue to achieve a common foreign policy, as the goal the Member States – now significantly and symbolically named under Article 30 the “High Contracting Parties” – set for themselves was to ensure that common principles and objectives were “gradually developed and defined”.

Therefore, the SEA represented no arriving point for political cooperation but rather the institutional baseline for future and more significant codification of rules yet to be shaped and a political cooperation in foreign policy matters that was so evidently yet to be achieved. Despite its limited ambitiousness and ambiguous wording, it is important to underline that the importance of Title III of the Single European Act primarily lies in the fact that reference to security was included for the first time in primary law. That security became object of binding nature between the EC members represented *per se* a noteworthy achievement, if only for the demonstration of political willingness that this fact implied. Still, the Single European Act made no attempt toward the actual unification of foreign policy and economic goals, which remained literally separated from the Titles’ structure, with EPC preserving the distinct and intergovernmental nature that characterized its history since its very origins.

7. The Maastricht Treaty: the Common Foreign and Security Policy

The debate about the nature and scope of EPC took on a new meaning during the last years of 1980s and the beginning of 1990s. That period’s events eventually led to the signing of the Treaty on the European Union¹⁸². In those years, events of major international relevance occurred, resulting in a profound impact upon the security environment of the European Community. In the first place, the challenges of German unification following 1989 and the developments in Eastern Europe after the Soviet dissolution represented valuable reasons for EPC re-examination and revitalization.

¹⁷⁸ Title III concerned the “provisions on European Co-operation in the sphere of Foreign Policy”. Cfr. *ibid*.

¹⁷⁹ Cfr. art 30(2)(a), *ibid*.

¹⁸⁰ Art. 30(6)(a) reads “The High Contracting Parties consider that closer co-operation on questions of European security would contribute in an essential way to the development of a European identity in external policy matters . They are ready to co-ordinate their positions more closely on the political and economic aspects of security”. Cfr. *ibid*, Article 30(6)(a).

¹⁸¹ Cfr. DUQUETTE, *op.cit.*, p. 172.

¹⁸² *Treaty on the European Union*, signed at Maastricht on 7 February 1992, entered into force on 1 November 1993.

Secondly, the crises in the Gulf and Yugoslavia added a compelling and complicating element to the debate about the unity, coherence and motivation of the EC's international action.

On this grounds, two main and different approaches in the debate on the latter's reform emerged. If on one side, Italy, Belgium, the Netherlands, Germany and Greece called for the creation of a common foreign policy and security policy, which would have represented a "quantum leap forward"¹⁸³, on the other side, United Kingdom, Ireland and Denmark voiced doubts on the distancing from existing arrangements on foreign policy and on direct Member States' involvement in defence matters, usually a prerogative under NATO and the WEU mandate, and advocated to progressively improve the internal workings of EPC before arriving at a new formulation. In both cases the EC did not give proof of its unity and was unable to act "with one voice", given the huge disagreement and the reservations among the Twelve about the relationship of the EC to military aspects of the crises, namely on military interventions. Ultimately, unable to find a common ground for agreement on defence and military matters within the framework of the Gulf and Yugoslav crises, the Member States searched a solution within the WEU – which had been "reactivated" in 1984 with the Rome declaration – therefore making clear that the WEU was becoming the military arm of the EC¹⁸⁴. The Gulf crisis and Yugoslavian situation raised fundamental questions about cohesion and whether the exhortations contained in the SEA on common stances on foreign policy and security had any real relevance with regard of some important issues of those crisis.

In a similar framework, and decided to address and fix the weaknesses of the EPC as conformed by the SEA, the principle of revising the Treaty establishing the EEC was endorsed, with some Member States and the European Parliament putting forward new proposals on the strengthening of political union. In particular, in a resolution of 14 March 1990, the European Parliament, in the view of transforming the European Community into a European union of federal type to go beyond the single market and economic and monetary union, requested for the establishment of an Intergovernmental Conference (IGC) that would have had to work, among other things, on: the full integration of the EPC into the Community framework, in view of ultimately achieving common foreign and security policies, improvements in the decision-making capacity of Council, namely by introducing systematic majority voting, a strengthening of the Commission's powers, and the

¹⁸³ *ibid.*

¹⁸⁴ The period 1988 to 2001 was marked by intense WEU operational activity in the Gulf (1988-1990), operations in the context of the Yugoslav conflict (1992-1996) and the establishment of the joint WEU/NATO Operation Sharp Guard in the Adriatic to monitor the embargo against former Yugoslavia. The WEU provided assistance to Bulgaria, Hungary and Romania in enforcing the UN sanctions on the Danube. In October 1993, before the Treaty establishing the European Union came into being, the WEU sent a police consignment to the European Union (EU) administration of Mostar in Bosnia-Herzegovina. It was also involved in various crisis management missions between 1997-2001 in Albania, demining assistance in Croatia and general security surveillance in Kosovo.

recognition at Community level of the dual legitimacy conferred to the Council on the one hand and the European Parliament¹⁸⁵.

A further and relevant initiative was taken by France and Germany¹⁸⁶ aiming at accelerating the political construction of the Europe of Twelve, and at transforming the existing relations among the states in a European Union equipped with adequate means of action.

To this point, on 15 December 1990, the Foreign Ministers of the Twelve, inaugurated two separated Intergovernmental Conferences (IGCs), one on Political Union and one on EMU, which would have taken place in 1991 under the Luxembourg and Dutch Presidency¹⁸⁷. In April 1991, the Luxembourg Presidency submitted a plan in which a ‘pillar’ structure was introduced. According to the plan drawn up in Luxemburg, the first pillar consisted of the EEC. It would have included EMU and operated in accordance with the consolidated Community system. The second and third pillar were devoted respectively to foreign and security policy and to justice and home affairs. These latter would have operated in accordance with the intergovernmental method, following the strong positions by countries as France, UK, Denmark, and Portugal to keep their sovereignty in those areas. This stance to create three different pillars for each field was fiercely criticized by the Commission, who had in mind a different conformation of the new Union under a single structure, in which different decision-making processes could have been adopted depending on the areas to address.

In the end, the pillar structure was adopted. The structure of the newly to be established entity was not the only issue the Member States had to deal with. Indeed, as early as 1991 the WEU countries called for a “European Security and Defence Identity”¹⁸⁸ to be outlined in order to provide Europe with a greater say in international defence matters, one to be compatible with the Atlantic Alliance and NATO. On this point, in October 1991, Mitterrand and Kohl suggested that the second pillar of the to-be common foreign and security policy (CFSP) should have included all of the issues concerning security and defence and that the Union’s decisions in this regard should have been implemented by WEU in order not to affect the MS legal obligations toward NATO.

¹⁸⁵ Cfr. Official Journal of the European Communities (OJEC), 17.04.1990, n° C 96. [s.l.], “Resolution on the Intergovernmental Conference in the context of the Parliament's strategy for European Union”, European Parliament, p. 114-118.

¹⁸⁶ Cfr. Message conjoint de François Mitterrand, Président de la République française, et Helmut Kohl, chancelier de la RFA, adressé à Charles Haughey, Président du Conseil européen sur la nécessité d'accélérer la construction de l'Europe politique. [EN LIGNE]. [Paris]: Ministère des Affaires étrangères de la République française, 2 February 2005.

¹⁸⁷ See “Conclusions of the Rome European Council (14 and 15 December 1990)”, European Council (Rome, 14.-15.12.1990) - Presidency Conclusions (Part 1), SN 424/1/90. Brussels: Council of the European Communities, December 1990.

¹⁸⁸ The concept of the ESDI did not officially take shape until the 1997 Intergovernmental Conference leading up to the Treaty of Amsterdam where the WEU ministers announced that the WEU is both integral to the European Union's development and essential to the development of the ESDI within NATO. Cfr. DUQUETTE, *op.cit.* p. 181.

In this perspective, which will indeed find its place within the articles of the Maastricht Treaty, Western European Union would have become the European Union's military arm and would have had the power to cooperate with the Atlantic Alliance.

In Maastricht, the European Council held on 9 and 10 December overcame the last major obstacles¹⁸⁹. The first one regarded defence and the level of autonomy the European Union should have enjoyed on the matter. A compromise was reached with the reference to a 'common defence policy', supported by the United Kingdom, the Netherlands, Denmark and Portugal, and a 'common defence', called for by France, Germany, Belgium, Luxembourg and Greece. Secondly, if qualified majority vote in the Council of Ministers was extended to several areas, it was agreed, with particular insistence on the French and British part, that with regard to foreign policy issues joint actions were to be approved unanimously, with majority voting to be exercised only with regard to implementing measures and only if the Council agreed to do so unanimously.

The Treaty on European Union entered into force on 1 November 1993¹⁹⁰. Concerning cooperation under previous EPC, Article B stated the objective of the European Union as follows: "to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence". Even if in such vague terms, a Common Foreign and Security Policy was therefore established and its provisions delineated under Title V Article J (J1-J11) of the Maastricht Treaty, which had among its objectives the strengthening of the security of the Union and its Member States in all ways. More in general, the dimension of security and defence was improved within the Maastricht treaty as Article J.4(1) points out how the CFSP should have included all questions related to the security of the Union, namely the framing of a common defence policy which *might* have led eventually to the establishment of a common defence.

However, the value of such powerful goal-setting was somehow diminished by the provisions on the implementer of those objectives, that under article J.4(2) was to be the WEU. In this aspect, the Treaty amply reflected the events and the difficulties witnessed by the European Community in the international setting of the years that preceded Maastricht. Therefore, defence was delegated to the WEU, labelled as an integral part of the development of the Union, and requested to elaborate and implement decisions and actions of the EU which had defence implications. An important aspect lies in the fact that Article N provided for a conference of representatives of the governments of the Member States to be convened in 1996 for a possible

¹⁸⁹ European Council - Presidency Conclusions (Maastricht, 09.-10.12.1991), SN 271/1/91. Brussels: Council of the European Communities, December 1991.

¹⁹⁰ Treaty on the European Union, signed at Maastricht on 7 February 1992, entered into force on 1 November 1993.

review of the Treaty. This shows how important inconsistencies existed under the TEU on important matters of interest of the Member States. In particular, this clause was requested by Germany and France with regard to the provisions on the common foreign and security policy, deemed to be inadequate by the two countries¹⁹¹.

8. From the “Petersberg tasks” to the Amsterdam Treaty

In line with the provisions outlined in Maastricht, on 19 June 1992 WEU Foreign and Defence Ministers met in Bonn to develop the role of Western European Union as the “defence component”¹⁹² of the EU, to strengthen WEU’s operational capacity and to define the relations between the organization and the other European Member States of the European Union or NATO¹⁹³. The outcome of the meeting went down in history as the Petersberg Declaration giving life to the so-called Petersberg tasks. Within the document, it was established that, along with contributing to the common defence in accordance with Article 5 of the Washington Treaty and Article V of the MBT, military units of WEU member States acting under the authority of WEU could have been employed for humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management, including peace-making¹⁹⁴.

The tasks outlined in Bonn in 1992 became part of the Amsterdam Treaty¹⁹⁵, which amended the TEU for the first time paying particular attention to issues such as the creation of an area of freedom¹⁹⁶, security and justice, the strengthening of the CFSP, the reform of EU institutions and the general functioning of the Union to a more democratic and efficient entity, also in view of the enlargement to Central and Eastern Europe, Malta and Cyprus. The amendments of the Treaty on the European Union (TEU) by the Amsterdam Treaty retained the scheme of CFSP as introduced at Maastricht and built upon its main characteristics. As these features will be deeper analysed in the following chapter, suffice it to say that the Treaty made a step further towards a stronger security and defence policy by revising the wording on common foreign and security policy and its reference to defence. Indeed, among the aims of the European Union, as amended by the Amsterdam treaty, the one concerning CFSP read that the Member States were now resolved to implement a common

¹⁹¹ Germany requested a future revision also with regard to the co-decision procedure with the European Parliament, and Belgium with regard to the allocation of issues among the pillars.

¹⁹² Cfr. *Western European Union Council of Ministers. Bonn, 19 June 1992*, Bruxelles: Press and Information Service, 1992, p. 3.

¹⁹³ Cfr. PAGANI, F., A New Gear in the CFSP Machinery: Integration of the Petersberg Tasks in the Treaty on European Union, *European Journal of International Law*, Issue 9, 1998, p. 738.

¹⁹⁴ Cfr. *Western European Union Council of Ministers. Bonn, 19 June 1992, op. cit.*

¹⁹⁵ Treaty of Amsterdam, signed at Amsterdam on 2 October 1997, entered into force on 1 May 1999.

¹⁹⁶ The Treaty of Amsterdam will indeed introduce the Schengen *acquis* as part of the European Community pillar. The establishment of the Schengen area has a long history, that starts from 1985. On 19 June 1990, a Convention implementing the Schengen Agreement was signed. However, only in 1997 Schengen was institutionalized within the European Union. As it is well known, the agreement did not apply to the United Kingdom and Ireland, which had secured for themselves derogations. Cfr. *ibid*, Preamble.

foreign and security policy including “the *progressive* framing” of a common defence policy, which “might lead” to a common defence in accordance with the provisions of Article J.7¹⁹⁷.

These slight changes of labels indeed represented a great deal for the evolution of CFSP in terms of declared intents by the Member States. If the framing of a common defence policy as a necessary action for implementing a common foreign and security policy was not secured under the Maastricht Treaty¹⁹⁸, within the Amsterdam Treaty it acquired a definition in time with the adding of the word “progressive”. Significantly, a practical mean to achieve this progressive goal was set under art J.7, namely the cooperation between the Member States in the field of armaments. Moreover, the scope of the common defence policy was defined in order for it to include the three tasks – humanitarian and rescue, peace-keeping and crisis management – as defined in the Petersberg Declaration. These constituted a major indicator of the Member States’ intention to develop a European defence based on aid in third countries to guarantee security in Europe and to impose the Union as a powerful and trustworthy international actor¹⁹⁹.

At Amsterdam, the role of WEU was remarketed and better defined, without however prejudicing the obligations of certain Member States which saw their common defence realised in the North Atlantic Treaty Organisation. In fact, the Western European Union was substantiated as an integral part of the development of the European Union. Its contribution to the development of the Union’s defence included the provision of access to an operational capability in the context of the Petersberg tasks, plus support in framing the defence aspects of the common foreign and security policy, namely by elaborating and implementing decisions and actions of the Union which had defence implications. On its part, the Union was bound to boost closer institutional relations in view to the possibility of the integration of the WEU into the Union. Lastly, under Article J.8(3), the Secretary-General of the Council acquired the role of the High Representative for the common foreign and security policy, a figure introduced for the first time with the task to assist the Presidency of the Council²⁰⁰. The whole common defence policy framework was put under future revision agreements under article J.7(5)²⁰¹.

¹⁹⁷ Cfr. Article J.7, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.

¹⁹⁸ The framing of a common defence policy was “eventual”.

¹⁹⁹ Cfr. LORI, G., *The EU Common Security and Defence Policy: Historical Development, Current Status and Future Challenges*, Master’s Degree Thesis a.a. 2019/2020.

²⁰⁰ From December 1999, Mr Javier Solana was appointed as High Representative for the common foreign and security policy.

²⁰¹ Paragraph 5 of Article J.7. recited: “With a view to furthering the objectives of this Article, the provisions of this Article will be reviewed in accordance with Article N”.

9. From the Saint Malo Declaration to the Cologne and Helsinki European Council: the “common European security and defence policy”

The negotiation of the Amsterdam amendments to the TUE coincided with the escalation of hostilities in the Yugoslavian province of Kosovo and the burst of the war in 1998-1999. At the time, the newly adopted changes under the TOA seemed to indicate the Member States willingness to remove some political obstacles that were still preventing the effective functioning of the CFSP. As the inadequacy of the Treaty of Amsterdam was made clear due to the EU’s lack of its own military instrument and necessary expertise, the breakout of the events in Kosovo confirmed how CFSP developments under TOA were not enough to compensate for the deficiencies of the EU’s foreign and defence policy, since, yet again, CFSP and defence under WEU demonstrated its ineffectiveness in the international arena and the EU emphasized its dependence from NATO in the managing of the crisis.

In a similar context, a moment of great significance for the European common defence was marked by the signing of a “Joint Declaration on European Defence” by the then British Prime Minister Tony Blair and the then French President Jacques Chirac, on 3–4 December 1998, in St Malo²⁰². The short document was wide in its scope, and once again ambitious in its objectives, starting by pointing out the European Union’s need “to be in a position to play its full role on the international stage”²⁰³. From a territorial point of view, the European dimension of defence, and in a sort of way its independence, was emphasized as the Declaration read that, while acting in conformity with the Member States’ obligations within NATO, which still remained the “foundation of the collective defence of its members, EU countries were strengthening their reciprocal solidarity in order for Europe to make its voice heard in world affairs”. Importantly, Europeans would have had to operate within the institutional framework of the European Union, namely European Council, General Affairs Council, and meetings of Defence Ministers.

The search for a more independent action in situations of international crisis was to be found also in the fact that the EU, in order to take decisions and approve military action in cases where NATO was not engaged, was to be given “appropriate structures and a capacity for analysis of situations, sources of intelligence, and a capability for relevant strategic planning”²⁰⁴. Moreover, the EU would have also needed to have recourse to suitable military means, namely European capabilities within NATO’s European pillar, or national or multinational European means outside

²⁰² Joint Declaration on European Defence, 3-4 December 1988, available online.

²⁰³ Cfr. Joint Declaration on European Defence. Joint Declaration issued at the British-French Summit, Saint-Malo, 3-4 December 1998, Foreign and Commonwealth Office of the United Kingdom.

²⁰⁴ *ibid.*

the NATO framework. Lastly, the importance of the establishment of a strong and competitive European defence industry and technology was acknowledged as a mean to reach the desired aims.

The St Malo Declaration represented an important step in European defence for several reasons. As it has been argued, “it signalled a breakthrough that only an unprecedented degree of compromise between London and Paris could have allowed”²⁰⁵. If on one hand the UK was abandoning its historical opposition to a direct military role for the EU and was accepting the existence of WEU to that end, on the other hand France was accepting its equally historical criticism towards NATO’s role in EU security and defence affairs. Moreover, the Joint Declaration was seen as a revolutionary act, as it had the merit to have brought security and defence back at the centre of European policy and established a healthy debate about the security role of the Union on the international scene²⁰⁶. The St Malo declaration will also have a significant impact on the changes of the TEU provisions on security and defence introduced at Nice in 2003, and will contribute extensively to keep EU security and defence policy at the very centre of the political and legal process, eventually leading to the drafting of the Constitutional Treaty, and the Lisbon Treaty²⁰⁷.

The December 1998 Saint-Malo Summit paved the way for the landmark EU Cologne Summit of June 1999, and for the subsequent Helsinki summit. The Cologne European Council was held in the middle of the Kosovo turmoil, on June 2, 1999, and marked the Member States determination to launch a new step in the construction of the European Union. In fact, the document that was produced, the European Council “Declaration on strengthening the Common European Policy on Security and Defence”, posed different important objectives.

In the first place, in order to allow the European Union to play its full role on the international stage, the Member States agreed to provide the EU with the necessary means and capabilities to assume its responsibilities regarding a common European policy on security and defence²⁰⁸. Secondly, the Member States agreed on the fact that the European Council should have had the ability to take decisions on the “Petersberg tasks”. To do so, the EU was to be provided with the capacity for autonomous action and credible military forces to enforce it, the means to decide to use them, and a readiness to do so, in order to appropriately respond to international crises. This was to be achieved, once again, without prejudice to the actions carried out by NATO. In the third place, Member States declared their willingness to further develop more effective European military capabilities through the maintenance of a sustained defence effort, the implementation of the

²⁰⁵ Cfr. BAILES A.J.K., and MESSERVY-WHITING, G., “The EU Takeover: Origins and Process”, in *Death of an Institution, The end for Western European Union, a future for European defence?*, Egmont Institute, 2011, p. 39.

²⁰⁶ HOWORTH, J., *Security and Defence Policy in the European Union*, London: Palgrave Macmillan, 2007, pp. 36-37.

²⁰⁷ KOUTRAKOS, *op.cit.*, p. 19.

²⁰⁸ Cfr. Cologne European Council, Presidency Conclusions, Annex III, 150/99.

necessary adaptations and notably the reinforcement of their capabilities in the field of intelligence, strategic transport, command and control.

Lastly, they recognized the need to undertake significant efforts to strengthen the industrial and technological defence base of the EU, with the aim of working towards closer and more efficient defence industry collaboration, and seeking further progress in the harmonisation of military requirements and the planning and procurement of arms, as deemed to be appropriate.

Meeting in Helsinki on 10-11 December 1999, the European Council agreed to adopt measures to implement a strengthened common security and defence policy²⁰⁹. On that occasion, the European Council underlined its determination to develop an autonomous capacity to take decisions and to launch and conduct EU-led military operations in response to international crises to be resorted to whenever NATO as a whole was not engaged in the crisis-managing. In Member States' view, this process would have had to avoid, as always, unnecessary duplication²¹⁰, and, significantly, did not imply the creation of a European army.

10. From Nice to the Lisbon Treaty: the “Common Security and Defence Policy”

The Helsinki declaration called for the establishment of an Intergovernmental Conference on institutional reform to be convened in early February 2000. The principal aim of the IGC would have been to appropriately amend the TUE in view of the EU enlargement²¹¹. On 11 December 2000, the Nice European Council reached agreement on the text of the Treaty, which was officially signed in the French locality on 26 February 2001, and came into force on 1 February 2003²¹². Concerning CFSP and the progressive framing of a common defence policy, Article J.7 TEU turned in Article 17 TEU and was amended by removing the paragraph making direct mention of WEU being an integral part of the development of the union in the framing of the defence aspects of the CFSP. Some innovations concerned the voting mechanisms within the Council as well as the introduction of a broader concept of enhanced cooperation, which will be analysed thoroughly in next chapter.

²⁰⁹ Cfr. Helsinki European Council, Presidency Conclusions, 10-11 December 1999. At Helsinki, the Member States also adopted the Millennium Declaration, they adopted several decisions in view of the future enlargement process, as well as measures to implement reformed institutions, and a more competitive, job-generating, and sustainable economy.

²¹⁰ Annex IV of the Helsinki document clearly stated: “NATO remains the foundation of the collective defence of its members, and will continue to have an important role in crisis management”. Cfr. *ibid*, Annex IV (Presidency Reports to the Helsinki European Council on “Strengthening the Common European Policy on Security and defence” and on “non-military crisis management of the European Union”).

²¹¹ On 1 May 2004 Poland, Czech Republic, Slovakia, Hungary, Slovenia, Estonia, Latvia, Lithuania, as well as Malta and Cyprus became EU Member States. In 2007, Romania and Bulgaria will gain EU membership. Turkey was granted the role of candidate country.

²¹² *Nice Treaty*, signed at Nice on 26 February 2001, entered into force on 1 February 2003. The signatories of the Nice Treaty were the then fifteen EU Member States: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom.

The Treaty of Nice proved useful and meaningful with regard to the fifth and sixth enlargement that the EU would have witnessed a few years later, in 2004 and 2007, in the way that it established the place of the new Member States within the EU institutions. However, it did not address the major issues surrounding the future of the Union. Most importantly, it highlighted, once again, the inadequacies of the method of intergovernmental negotiation. Subsequently, meeting in Laeken on 15 December 2001, the Member States decided to convene a “Convention on the Future of Europe”, tasked with assessing the key issues arising for the Union's future development and trying to identify the possible responses²¹³. The identified key issues were the division of competences between the Union and its Member States, the simplification of EU's legislative instruments, the framing of an efficient decision-making procedure suitable for an EU “at 27” to guarantee a better implementation of EU decisions, democratization and the role of national parliaments. Most importantly, the issue of simplification was to be tackled through the constitutionalisation of the existing treaties.

The Treaty establishing a Constitution for Europe was signed in Rome on 29 October 2004 by the representatives of the 25 Member States. The Constitutional Treaty included several general aspects of innovation for the EU, and it improved its CFSP and the ESDP framework. Concerning the general aspects, the Treaty introduced a clear division of competences, namely “shared” and “exclusive” between the Union and the Member States²¹⁴. Art. I-40 was devoted to “specific provisions for implementing the common security and defence policy”. Significantly, Article I-40(2) read that the common security and defence policy “shall include the progressive framing of a common Union defence policy. This *will* lead to a common defence, when the European Council, acting unanimously, so decides”.

Once again, the change from the conditional tense “might”, which characterized the future of a European common defence policy and common defence since Maastricht, to the future tense “will” symbolized the renewed boost the Member States were willing to give to their common defence²¹⁵. Indeed, the common security and defence policy was labelled as an integral part of the CFSP, and it was stated that it should have provided the Union with an operational capacity based on both civil and military assets, to be employed on missions outside the Union for peace-keeping, conflict prevention and strengthening international security, these actions including “joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention

²¹³ See Bulletin of the European Union. 2001, No 12. Luxembourg: Office for Official Publications of the European Communities, “Presidency Conclusions of the Laeken European Council (14 and 15 December 2001)”, p. 19-23.

²¹⁴ Cfr. Part I, Article I-11, I-12, I-13, Draft Treaty establishing a Constitution for Europe, European Council.

²¹⁵ Cfr. *ibid.*, Part I, Title V, Article 40(2),.

and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation”²¹⁶.

Remarkably, the Petersberg tasks were amended and humanitarian tasks were added to the scope of EU security and defence. Also, under Article I-40(3) a European Armaments, Research and Military Capabilities Agency was to be set up, tasked with the identification of operational requirements and the promotion of measures to satisfy them, participation in defining a capabilities and armaments policy, and with assisting the Council of Ministers in evaluating the improvement of military capabilities. Furthermore, if enhanced cooperation was forbidden under Article 27b TEU for matters having military or defence implications, the Constitutional Treaty promoted it for military and defence purposes under Article I-40(6), and III-213. Concerning the decision-making mechanism, decisions on the implementation of the common security and defence policy, including the ones concerning the start of missions, should have been adopted by the Council of Ministers acting unanimously on a proposal from the Union Minister for Foreign Affairs or from a Member State²¹⁷. Lastly, under Article III-201(4), no derogations could have been made from unanimity requirement to QMV whenever decisions having military or defence implications were involved. As it is well known, the Treaty establishing a Constitution for Europe never entered into force since its text was rejected by France on 29 May 2005 and the Netherlands on 1 June 2005 in their national referenda.

However, some aspects of the Draft Constitution were pursued despite the missed ratification. Indeed, the idea to create a European Agency specifically devoted to defence, armaments, and strategic capabilities was encouraged by the Council decision of 17 November 2003 on “creating a team to prepare for the establishment of the agency in the field of defence capabilities development, research, acquisition and armaments”²¹⁸.

The European Defence Agency (EDA) would have been established in July 2004 with the aim to: develop defence capabilities in the field of crisis management by identifying the EU's future capability requirements, and assessing the capability commitments given by the Member States; promoting harmonization of military equipment; advising on prioritizing capabilities development and acquisition; promoting and enhancing European armaments cooperation by proposing multilateral projects to meet ESDP capabilities requirements, while coordinating individual Member State programs and managing cooperative Member State programs; identifying and

²¹⁶ Cfr. *ibid.*, Article I-40(1) and Article III-210(1).

²¹⁷ Cfr. *ibid.*, Article I-40(4).

²¹⁸ European Council, “COUNCIL DECISION of 17 November 2003. Creating a team to prepare for the establishment of the agency in the field of defence capabilities development, research, acquisition and armaments”, 3 December 2003, L 318/19 (2003/834/EC), Official Journal of the European Union.

implementing policies and measures to strengthen the European defence industrial and technological base; supporting the Commission in creating an internationally competitive European defence equipment market; promoting research to fill future ESDP requirements. The establishment of the Agency was preceded on 8 December 2003 by the European Security Strategy initiative, titled “A Secure Europe in a Better World”²¹⁹. The document defined the key threats to European security²²⁰, pointed out some strategic objectives, namely addressing the threats, building security in European neighbourhood, and embracing multilateralism, and it set out the policy implications for Europe, namely dynamicity, capability, coherency, and collaboration.

After the failure of the Constitutional Treaty and the political deadlock that followed it, on 23 June 2007, the Heads of State or Government meeting within the European Council agreed to convene a new Intergovernmental Conference to draw up a ‘Reform Treaty’ amending the Treaties in force. The Treaty of Lisbon²²¹ amended the Treaty on European Union and the Treaty establishing the European Community, which was renamed ‘Treaty on the Functioning of the European Union’. Therefore, after Lisbon, the TUE and the TFUE have equal juridical value²²². At Lisbon, the Member States merged the “three pillars” structure – namely the European Communities including the European Community (EC) and the European Atomic Energy Community (EURATOM), the CFSP, and the Police and Judicial Cooperation in Criminal matters – established at Maastricht, under a single entity, the European Union, which was granted legal personality under Article 46A TEU.

For what regards the previous common European security and defence policy as defined from Cologne to Nice, it found its own place in Lisbon Treaty within the framework of the Common Foreign and Security policy under the appellation “Common security and defence policy”. Title V TUE points out the general provisions on the union’s External Action and specific provisions on the Common foreign and security policy. In particular, Title V Chapter I TUE (Articles 21 and 22) deals with the general provisions on the Union's external action, while Chapter II (Articles 23 to 46) deals with the specific provisions on CFSP (Articles 23 to 42) and lays down the provisions on the Common Security and Defence Policy (Articles 42 to 46)²²³, which for the first time is given its own dedicated space under an explicitly designated section of the Treaty²²⁴.

²¹⁹ See European Council, A Secure Europe in a Better World, European Security Strategy, 8 December 2003.

²²⁰ Terrorism, proliferation on WMD, regional conflicts, state failure, and organized crime. Cfr. *ibid*.

²²¹ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 2009.

²²² Within TUE, the Member States established the European Union and gave her the competencies to carry out their common objectives. The TUE is made of 55 articles. The TFUE organises the Union’s functioning and determines the competencies’ sectors, delimitations, and exercise modalities. The TFUE is made of 358 articles.

²²³ *Consolidated Version of the Treaty on European Union, Official Journal of the European Union*, C 326/13.

²²⁴ Under Title V TEU, Section II of Chapter II focuses specifically on the “provisions concerning Common Security and Defence Policy”. This is significant since from Maastricht to Nice Title V TEU dealt with “Provisions on a Common Foreign and Security Policy”. Indeed, the Treaty of Maastricht established CFSP under Title V, however no section was

The Lisbon Treaty also renamed the role of the High Representative for the CFSP as High Representative of the Union for Foreign Affairs and Security Policy, whose figure should have also covered the role of Vice-President of the Commission and head of the European Defence Agency. Moreover, the HR was to be the head of the newly established European External Action Service (EEAS)²²⁵, instituted by Article 27 TUE. The EEAS was to serve as the EU's foreign ministry and diplomatic corps, and incorporated the EUMC and the EUMS, as well as the EU Satellite Centre and the Committee for Civilian Aspects of Crisis Management (CIVCOM). A very important aspect of the Lisbon Treaty concerning CFSP is the introduction of the possibility for some Member States to develop deeper military cooperation through the establishment of a permanent structured cooperation within the Union framework under Article 42 TUE. The permanent structured cooperation was to be governed by Article 46 TEU. Finally, no direct mention was made of WEU within the body of the Lisbon Treaty. Indeed, relations between WEU and the EU were pared down to a minimum, with Protocol No 11 on Article 42 of the Treaty of Lisbon simply stating that "the European Union shall draw up, together with the Western European Union, arrangements for enhanced cooperation between them".

Concerning WEU's security guarantees, they were replaced within the Treaty with a "Solidarity Clause" included in Article 222 TFEU²²⁶, which alone makes up Title VII TUE, and a "mutual assistance clause" within Article 42(7) TEU²²⁷, which incorporated the spirit of Article V of the modified Brussels Treaty²²⁸. Under Title II of Protocol I, the Treaty of Lisbon also provided for the

specifically and explicitly devoted to common security and defence policy. As we have seen in the previous paragraphs, Article J.4 of the Maastricht Treaty only referred to the "eventual framing" of a common defence policy which might in time have led to a common defence. The Amsterdam Treaty then amended TUE by referring under Article J.7 to the "progressive framing" of a common defence policy which might have led to a common defence, therefore validating common defence as a temporally-defined objective of the EU. At Nice, the provision stayed the same under Article 17, ex Art. J.7, and in its annexes it included a "Declaration on European security and defence policy" that had the objective to make the policy operational in accordance with the "Presidency report on European security and defence policy" approved by the European Council in Nice.

²²⁵ Please refer to EEAS website.

²²⁶ Article 222 TUE reads: "The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack; (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster". Decisions regarding Article 222 TUE were to be adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. Under Article 222(3), the Council "shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications", meaning that the Council should take such decisions acting unanimously.

²²⁷ Which states: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States. Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation".

²²⁸ Which stated: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power". Cfr. Brussels Treaty as amended by the Protocol modifying and completing the Brussels Treaty, signed at Paris on October 23, 1954, *op.cit.*

establishment of a conference of Parliamentary Committees for Union Affairs with the right to submit contributions to the European Parliament, the Council and the Commission, and with the power to “organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy”²²⁹. Considered expensive and superfluous, the WEU was eventually permanently dissolved. On 31 March 2010, the ten full Member States of WEU²³⁰ announced that the organisation would be shut down by the end of June 2011.

11. CFSP/CSDP initiatives after Lisbon

11.1. The 2016 EU Global Strategy

On 28 June 2016, the High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, Federica Mogherini, officially presented the text of the EU Global Strategy for Foreign and Security Policy to the Heads of State or Government²³¹. Indeed, the 2016 document, titled “Shared Vision, Common Action: A Stronger Europe” came after a particular period of the EU life which from 2008 to 2016 was tormented by internal and external crisis, namely the sovereign debt crisis, the Arab Spring, the Ukraine crisis with Crimea’s annexation by Russia, the conflict in Syria, the migrant crisis and Brexit.

The rise of challenges transnational in nature such as terrorism, climate change and cyberattacks, and the crisis of the European integration caused by the “leave” vote after the UK referendum undoubtedly put to the test the European Union’s capacity for adaptation and action. Within the 2016 EU Global Strategy five priorities were outlined, namely security of the Union, State and Societal Resilience to the EU’s East and South, integrated approach to conflicts, cooperative regional orders, and global governance for the 21st century, to be achieved through a more credible, responsive, and joined up Union.

Concerning CFSP, the Union had to strengthen its security and defence in full compliance with human rights and the rule of law, and by translating the commitments to mutual assistance and solidarity into action. This was to be done following five lines of action: strengthening the ability to deter, respond to, and protect the EU against external threats in a more autonomous way; encouraging greater information sharing and intelligence cooperation between Member States and EU agencies on counter-terrorism; strengthening EU technological capabilities to fight and prevent

²²⁹ Cfr. Protocol No 1, Article 10, Consolidated Version of the Treaty on European Union, *op.cit.* The Conferences of the Speakers of the Parliaments of the European Union held in Brussels on 4–5 April 2011 and in Warsaw on 20–21 April 2012, established the Inter-Parliamentary Conference for the CFSP and the CSDP.

²³⁰ Belgium, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom.

²³¹ See European Council meeting (28 June 2016), Conclusions, General Secretariat of the Council, Brussels, 28 June 2016 (OR. en) EUCO 26/16, CO EUR 5, CONCL 3.

cyber security threats; strengthening energy security by diversifying energy sources and promote high nuclear safety standards in third countries; strengthening strategic communication to better transmit the EU principles and actions.

11.2. PESCO, the EDF, and the CARD

In 2017 three important initiatives were undertaken in the framework of CFSP and CSDP with the aim of strengthening collaboration among the Member States on defence and the EU's capabilities on all areas concerning defence and security, namely the establishment of a European Defence Fund (EDF), the creation of a Coordinated Annual Review on Defence, and the implementation of the Permanent Structured Cooperation.

The EDF was proposed by the then President of the European Commission Jean Claude Juncker in his State of the Union Address in 2016²³², and then re-stated on the occasion of the Prague Defence and Security Conference held on 9 June 2017. If not able nor willing to replace Member States' budgets on defence, the EDF would have instead created incentives for the latter to cooperate on fields as joint research, development and acquisition of defence equipment and technology, making the European Union the biggest investor in collective defence research and technology in Europe²³³.

The Coordinated Annual Review on Defence was launched in 2017 as a useful tool for the implementation of the 2016 EU Global Strategy. As of today, it also represents an important tool in taking forward the EU Strategic Compass. The CARD is tasked with producing an overview of the EU defence landscape and facilitating cooperation by identifying collaborative opportunities²³⁴. It consists in a review of Member States defence plans, and its main objective is to improve coherence and find new paths for defence cooperative activities. Over time, this will lead to a gradual synchronisation and mutual adaptation of national defence planning cycles and capability development practices.

Article 42(6) of the Lisbon Treaty on European Union introduced the possibility for “those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in [the area of security and defence] with a view to the most demanding missions” to establish between them a permanent structured cooperation within the Union framework. Moreover, Protocol No 10 TFEU on permanent structured cooperation specifies that

²³² Titled “Towards a better Europe: a Europe that protects, empowers and defends”.

²³³ Cfr. Speech by President Jean-Claude Juncker at the Defence and Security Conference Prague: In defence of Europe, European Commission, 9 June 2017.

²³⁴ Cfr. European Defence Agency, Coordinated Annual Review on Defence.

the initiative is open to any Member States “which has higher capacities and undertakes to intensively develop defence capacities through the development of national contributions and their participation in multinational forces, in the main European equipment programmes and in the activities of the [EDA] in the field of defence capabilities development, research, acquisition and armaments”. Accordingly, on 22-23 June 2017 the European Council agreed on the necessity to start an inclusive and ambitious Permanent Structured Cooperation with the aim to strengthen Europe’s security and defence, and to contribute reaching the ambitious objectives expressed in the 2016 EU Global Strategy²³⁵.

In November 2017 a joint notification on PESCO was signed by the ministries of 23 Member States, and handed over to the High Representative and the Council. On 11 December 2017, Council decision (CFSP) 2017/2315²³⁶ formally established PESCO with 25 Member States participating²³⁷. Significantly, that was the first time since 2009 that PESCO was activated, a fact that in the previous year gave it the appellation of “the sleeping beauty of the Lisbon Treaty”. The Council decision, in respect of the dispositions under Article 2 of Protocol No 10 TFEU concerning the actions that the Member States had to undertake in the framework of PESCO, laid out a “list of ambitious and more binding common commitments undertaken by participating Member States in the five areas set out by Article 2 of Protocol 10”.

Generally speaking, PESCO allows the adherent Member States to jointly plan, develop and invest in shared capability projects, and enhance the operational readiness and contribution of their armed forces, with the ultimate objective to optimize the available resources and improve their overall effectiveness with a view to the most demanding missions and operations and contributing to the fulfilment of the Union level of ambition. The key difference between PESCO and other forms of cooperation is the legally binding nature of the commitments undertaken by the participating Member States. Accordingly, decisions taken within the framework of PESCO will remain in the hands of the participating Member States in the Council, which will have the right to take part in the decision-making.

²³⁵ See European Council meeting (22 and 23 June 2017), Conclusions, General Secretariat of the Council Brussels, 23 June 2017, (OR. en), EUCO 8/17, CO EUR 8, CONCL 3.

²³⁶ Cfr. Council Decision (CFSP) 2017/2315 of 11 December 2017, “Establishing Permanent Structured Cooperation (PESCO) and determining the list of participating Member States”, Official Journal of the European Union, L 331/57.

²³⁷ These are: Belgium, Bulgaria, Czech Republic, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden. Denmark and Malta are the only Member states that do not take part in PESCO.

11.3. The European Peace Facility

The European Peace Facility (EPF) was established on 22 March 2021 by Council Decision (CFSP) 2021/509²³⁸ and is tasked to address current limitations that do not allow for the Union's budget to finance expenditure with military or defence implications. It was established on the basis of the contents of Articles 30(1) and 41(2) TEU. Article 30(1) establishes the possibility for any Member State, and for the HR/VP, to submit initiatives or proposals to the Council, while Article 41(2) TEU points out that operating expenditure arising from the implementation of the CFSP is charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise²³⁹. Therefore, the Facility was created as a fund outside the Union's budget, aimed at enabling the financing of operational actions under the CFSP that have military or defence implications and thus allow more flexibility and effectiveness of EU operations abroad. By financing such operations, the EPF contribute to the enhancement of the Union's ability to prevent conflicts, build peace, and strengthen international security, in accordance with point (c) of Article 21(2) TEU, which states that the Union's CFSP pursues *inter alia* the objective of preserving peace, preventing conflicts and strengthening international security.

In particular, the EPF covers an increased range of EU military missions and operations and it allows the EU to support partners all around the world. The Facility replaces the ATHENA²⁴⁰ financing mechanism and the African Peace Facility, which no longer exist. The European Peace Facility is based on a two-pillar structure. The first pillar is represented by operations, and as such covers the common costs of military CSDP missions and operations²⁴¹. The second pillar includes assistance measures and finances the military aspects of Peace Support Operations (PSOs), as well as supporting capacity building of partner countries and international organisations in military and defence matters²⁴². The EPF has a total budget of €5.69 billion for the period 2021-2027.

11.4. The Strategic Compass for Security and Defence

On 21 March 2022 the European Council released "A Strategic Compass for Security and Defence. For a European Union that protects its citizens, values and interests and contributes to international peace and security". The initiative was adopted less than a month after the breakout of the Russian war in Ukraine, which exploded on 24 February 2022. Indeed, new fast-changing threats and geopolitical dynamics such as the Russian aggression of Ukraine, but also the crisis

²³⁸ Cfr. COUNCIL DECISION (CFSP) 2021/509 of 22 March 2021, "Establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528", Official Journal of the European Union, L 102/14.

²³⁹ Cfr. Council Decision (CFSP) 2021/509 Of 22 March 2021, *op.cit.*, point (10).

²⁴⁰ The ATHENA mechanism was the precedent financing mechanism of CFSP operations having military or defence implications. For more information, please refer to the ATHENA website.

²⁴¹ For more information, please refer to EPF webpage.

²⁴² *ibid.*

caused by the Covid-19 pandemic, the situation in the Western Balkans, the situation of crisis in the European southern neighbourhood²⁴³, Middle East and Gulf Region, global terrorism and the threat of climate change led the Member States to set out a common strategic vision for EU security and defence policy to be implemented immediately and in the course of the next 5-10 years to help them build a common strategic culture, strengthen their unity and solidarity and enhance their capacity and willingness to act together.

The Strategic Compass therefore guides and enhances the Member States' action to make the EU a stronger and more capable security provider. To that end, the Compass covers all the aspects of the security and defence policy and is structured around four pillars, namely "act", "invest", "partner" and "secure". Under the first pillar, the Strategic Compass calls for the establishment by 2025 of a strong EU Rapid Deployment Capacity of up to 5000 troops for different types of crises in order to be able to act efficiently in the event of an unexpected crisis. Also, the Member States agreed on strengthening the efficiency, flexibility and responsiveness of civilian missions in line with the Civilian CSDP Compact²⁴⁴, in particular by pledging to be able to deploy a mission with 200 civilian experts within 30 days and by speeding up their decision-making. Significantly, the Compass makes direct reference to the need to enhance the flexibility of the decision making mechanism for CSDP²⁴⁵. Indeed, the Member States committed themselves to use the potential afforded by the EU Treaties, including constructive abstention, and to decide on practical modalities for implementing Article 44 TEU²⁴⁶, in accordance with CSDP, by 2023²⁴⁷.

Concerning investments²⁴⁸, Member states committed themselves to substantially enhance their defence expenditures to match their collective ambition to reduce critical military and civilian capability gaps and strengthen their European Defence Technological and Industrial Base²⁴⁹. Such a progress is to be achieved through the exchange on national objectives on increased and improved defence spending to match their mutual security needs, the provision of further incentives for Member States to engage in collaborative capability development and jointly invest in strategic

²⁴³ Ongoing crises in Libya and Syria remain have lasting and pervasive regional consequence on Europe. Cfr. European Union External Action, "A Strategic Compass for Security and Defence. For a European Union that protects its citizens, values and interests and contributes to international peace and security".

²⁴⁴ On 12 December 2022, the Council reaffirmed its full commitment to strengthen civilian CSDP through a new Civilian CSDP Compact to be adopted by mid-2023. Cfr. Council of the European Union, Press release "Council approves conclusions calling for a renewed impetus towards the civilian Common Security and Defence Policy", 12 December 2022.

²⁴⁵ Cfr. *ibid.*, p. 26.

²⁴⁶ Article 44(1) TEU reads "Within the framework of the decisions adopted in accordance with Article 43, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. Those Member States, in association with the High Representative of the Union for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task".

²⁴⁷ For all the objectives under the "act" pillar, see "A Strategic Compass for Security and Defence", *op.cit.*, p. 30-31.

²⁴⁸ Cfr. *ibid.*, p. 43-51.

²⁴⁹ *ibid.*, p. 49.

enablers and next generation capabilities to operate on land, at sea, in the air, in the cyber domain and in outer space, and the boosting of defence technological innovation to fill strategic gaps and reduce technological and industrial dependencies.

Furthermore, the document states that as of 2022, annual Defence Ministerial meetings on EU defence initiatives addressing capability development would have been organised and chaired by the HR/VP of the Commission, making full use of existing formats of ministerial meetings. Also, the Member States committed themselves to take measures to promote and facilitate the access to private funding for the defence industry by 2023, also by making best use of the European Investment Bank²⁵⁰.

With regard to partnerships, Member States expressed the will to strengthen their close and mutually beneficial cooperation with NATO, presented as an “essential ally for our Euro-Atlantic security, as demonstrated in the context of Russia’s military aggression against Ukraine in 2022”²⁵¹, and their strategic partnership with the United Nations. The Member States also committed to achieve a more robust cooperation and to work together with OSCE, the African Union (AU), and the Association of Southeast Asian Nations (ASEAN) in areas such as conflict prevention, shared situational awareness and resilience.

1. Russian-Ukraine War and a new impetus for CFSP and CSDP

The aggression against Ukraine perpetrated by Russia on 24 February 2022 has marked “the return of war in Europe”²⁵² and represents the “most serious security crisis in Europe in decades”²⁵³, bringing instability and conflict at the EU’s own borders after decades of peace. In the past months, such an extraordinary event brought the EU to take vital decisions for its foreign and security policy, leading the issue of CFSP and CSDP decision-making within the EU institutions to emerge once again as a heatedly debated topic among EU elites and citizens.

Significantly, the latest attempt to bring European citizens closer to the European Union produced surprisingly results. In the report on the final outcomes of the Conference on the Future of Europe²⁵⁴, which concluded its works on 9 May 2022, citizens expressed their desire for the EU

²⁵⁰ Established in 1957 by the Treaty of Rome establishing the EEC.

²⁵¹ Cfr. “A Strategic Compass for Security and Defence”, *op.cit.*, p. 53.

²⁵² *ibid.*, p. 14.

²⁵³ *ibid.*, p. 5.

²⁵⁴ The proposal to launch a Conference on the future of Europe has been presented for the first time by the President of the French Republic Emmanuel Macron in his March 2019 “Letter to European Citizens”. Cfr. MACRON, E., *Pour une Renaissance européenne*, 4 March 2019. Other similar initiatives were the European Convention of the future of Europe, established by the Laeken European Council in December 2001, which was launched on 28 February 2002 with the task to formulate a draft of the Constitutional Treaty; the 2005 “Plan for Democracy, Dialogue and Debate”; the 2007 “Europe for citizens” programme; the European Citizens’ Initiative (ECI) introduced at Lisbon in 2009; the “European Citizens’ Dialogues” launched in 2012; the “White Book for the Future of Europe” presented from the Juncker European

to improve its capacity to take speedy and effective decisions, notably in Common Foreign and Security Policy, speaking with one voice and acting as a truly global player, projecting a positive role in the world and making a difference in response to any crisis²⁵⁵. This implies the amendment of CFSP decision-making rules from unanimity to qualified majority, and in particular the clean revision of CSDP decision-making rules, which would require Treaty revision.

Indeed, from the 1951 ECSC to the Treaty of Lisbon, EU Member States were able to reach some compromises on decision making mechanisms and to expand the fields requiring Qualified Majority Voting at the expenses of unanimity and the right to veto, compromises which were reflected within every amendment that contributed to the drafting of the Lisbon Treaty. However, issues constituting the hard core of national sovereignty were never released from the bonds of unanimity and of stricter decision-making mechanisms that often paralyzed the EU's action, weakening its role as global actor.

Commission in march 2017; and the European Citizens' Consultations (ECCs) which took place between 2018-2019 on the initiative of French President Macron.

²⁵⁵ Proposals 21 and 39 explicitly call for a revision of decision-making rules on issues that are currently decided by way of unanimity to be normally decided by way of a qualified majority, in particular in the area of the CFSP. Cfr. Council of the European Union, Conference on the Future of Europe, Proposals and related specific measures contained in the report on the final outcome of the Conference on the Future of Europe: Preliminary technical assessment, Brussels, 10 June 2022.

CHAPTER II

The evolution of the decision-making mechanism in the Treaties in the framework of the CFSP and CSDP

1. Premises

1.1. Decision making in the EDC Treaty

Although the Treaty establishing the European Defence Community never constituted a legal basis for European defence due to its non-ratification by the French Government in 1954, the analysis of the main characteristics concerning its institutions and their decision-making mechanisms seems relevant to the scope of this analysis, inasmuch it can help define the characteristics of the very first formal European project¹ including a defensive and military dimension.

Indeed, the Treaty constituting the European Defence Community instituted among its High Contracting Parties an entity, the EDC, supranational in character, consisting of common institutions, common armed forces and a common budget, whose objectives were set to be exclusively defensive². Remarkably, the Community was given juridical personality, therefore conferring it the juridical capacity necessary to the exercise of its functions and the attainment of its ends³. The Armed Forces of the Community, referred to as the “European Defense Forces” were to be composed of contingents placed at the disposal of the Community by the member States with a view to their fusion under the conditions provided for in Treaty.

Under the EDC Treaty, unanimity was required for a great amount of matters of various nature⁴. Unanimity was required for a great deal of matters having military nature. Unanimous decision of the Council was required to modify the features of the European Defence Forces as defined within the Military Protocol⁵, to reduce the number of members of the Commissariat⁶, to temporarily suspend one or more member of the Commissariat in the view to remove them from

¹ “European” in the sense that it was founded by the same founding members States of the ECSC – namely Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany – which formally started the European integration project. As we had the occasion to emphasize in the previous chapter, the EDC was fundamentally different from WU – then WEU – this latter not having a supranational character.

² Article 1 and 2(1). Cfr. *Treaty Constituting the European Defence Community*.

³ *ibid.*, Article 7, and 80.

⁴ Within the Treaty and its Annexes, the label “unanimous vote” appears 62 times. The label “majority”, 39 times.

⁵ Article 15, *Treaty Constituting the European Defence Community*.

⁶ *ibid.*, Article 20.

office⁷, and to assign high-level positions within the Commissariat. It was also required for modifications of parts of the Treaty defining the status of personnel and establishing the general organization, recruitment rules and size and structure of the European Defence Forces, as well as modifications in the plan establishing the Forces⁸.

Unanimity was the chosen procedure in the decisions concerning the composition of the Army Corps, which should have been composed of basic units of different national origins except in special cases resulting from tactical needs or organizational necessities (in this latter case to be determined by the Commissariat on the recommendation of the competent Supreme Commander responsible to NATO)⁹. With the unanimous concurrence of the Council, the Commissariat should have established the plans for the organization of the Forces¹⁰. Under unanimous regime were also the decisions concerning the period of active duty of the personnel conscripted to serve in the European Defense Forces, as well as the territorial deployment of the Forces, that was to be determined by the Commissariat with the intervention of the Council in the case of differences of opinions requiring the latter's intervention. Unanimity also concerned several decisions with financial implications¹¹.

1.2. The "Luxemburg compromise"

As it has been analyzed within chapter I, since the treaties of Rome establishing the EEC and Euratom did not include any security or defensive provision, and after the failure of the 1961 Fouchet plan, the subject evolved outside of the European institutional framework through the European Political Cooperation (EPC) established among the EC Member States throughout the 1970s and 1980s. The decision-making mechanism of what would have evolved as the CFSP and CSDP of the European Union was therefore affected by events whose focus was on subjects other than security and defence, namely the common market, within the legal framework of the EEC Treaty.

Indeed, important choices in decision-making were taken in January 1966, when a compromise was found on the occasion of the Luxemburg Council among the six EC Member States on some issues concerning the Common Agricultural Policy (CAP) of the Community¹². The so-called

⁷ *ibid.*, Article. 23. Members of the Commissariat who no longer fulfil the conditions necessary to the exercise of their functions or who have committed serious offenses may be removed from office by the Court on petition of the Council or of the Commissariat. In such a case, the Council, by unanimous vote, may temporarily suspend members of the Commissariat and provide for their replacement until such time as the Court shall have acted (Article 23).

⁸ Under Article 44, such modifications were to be done upon the proposal of a member of the Council or of the Commissariat and executed by the latter.

⁹ Article 68, *Treaty Constituting the European Defence Community*.

¹⁰ *ibid.*, Article 71.

¹¹ See Articles 1 to 41 of the Financial Protocol annexed to the EDC Treaty.

¹² Which establishment was promoted in the framework of the common market under Article 3 EEC Treaty and regulated under Articles 38, 39 *et seq* EEC Treaty. Cfr *Treaty establishing the European Economic Community, op.cit.*

Luxemburg compromise, an informal agreement among the EEC Member States, signed the end of the six month-long ‘empty-chair crisis’ provoked by De Gaulle’s France, which endured from July 1965 to January 1966, by effectively extending the life of the national veto beyond the transitional period allowed in the Treaties of Rome¹³. The issue at the origin of the empty chair crisis concerned the differences of opinion brought about by the contents of the Commission’s proposals¹⁴ on the occasion of the expiry of the agricultural financial regulations in force since 1962 on 1 July 1965. However, the main factor of friction which ultimately led to the 1965 Community crisis was that the expected progression, on 1 January 1966, to the third stage of the transitional period for the establishment of the Common Market was to involve the application of majority voting in the Council of Ministers¹⁵, something that France opposed strongly.

After the Council meeting in Luxembourg, the Community resumed its normal activities. However, it is generally argued that the document fundamentally altered the spirit of the EEC Treaty – the practical effect of the existence of the Luxembourg Agreement being that the Community did not pass, as the Treaty provided, to the use of majority voting¹⁶ – by creating a new mechanism by which States could have exerted pressure on the Council, without even defining what was meant by ‘vital national interest’ or provide for an arbitration procedure in the event of dispute¹⁷. Since then, the Luxembourg Compromise has frequently been invoked by Member States in order to block majority decisions, and has been employed contrarily to the literal interpretation of the text to basically make unanimity the normal decision-making procedure. This political arrangement, which became more and more unmanageable with the increase of Member States, was

¹³ Cfr. “Luxemburg Compromise”, EurWORK: *European Observatory of Working Life*, 11 March 2007.

¹⁴ Generally speaking, under EEC Treaty provisions, the Commission was the one institution with the power to make proposals. On its part, the Council had to decide on such proposals, with its decisions passing into law on the same footing as national laws. Moreover, the EEC Treaty provided that majority voting should have been adopted by the Council after the transitional phase in the event of decisions to be taken on already established policies, while new policies were to remain subject to unanimous decisions of the Council. Also, if the Council wanted to apport changes to a Commission proposal, rather than adopt it unchanged, unanimity would have been required. Cfr. NICOLL, W., “The Luxembourg Compromise”, *Journal of Common Market Studies*, Volume XXIII, Issue 1, September 1984, p. 35.

¹⁵ This was not acceptable for France, as this extract from the 20 October 1965 de Murville statement clearly explains: “Up to now, and except for limited measures regarding the running of the Community, the Six have had to decide by general agreement, that is to say, unanimously. This applies particularly to the acceptance or amendment of the Commission’s proposals. As from 1st January 1966, this would have been different: unanimity would still have been required for amending these proposals, but they could be accepted by a majority vote. In view of the present relations between the Six and also of what has just happened, this hardly seems possible. To prove this, I scarcely need to remind you that if there is a beginning of an agricultural policy in the Common Market today, it is not entirely, but mainly, due to the action of the French Government”. Cfr. *Statement in the National Assembly by Mr. Couve de Murville, French Minister for Foreign Affairs, on the Common Market Crisis (20 October 1965)*, *op.cit.* Indeed, when the common market was first implemented, that is, from 1958 to December 1965, unanimity was required for the adoption of a large number of Council decisions. Subsequently, namely at the end of that transitional period, that should have been replaced by majority decisions. Cfr. DENIAU, X., « Le vote au sein du Conseil des ministres des Communautés européennes. Théorie et pratique », *Revue du Marché commun*, juillet-août 1984, n° 279, Paris : Éditions techniques et économiques, p. 316-318. Cfr. also Article 8 of the EEC Treaty.

¹⁶ Cfr. NICOLL, *op.cit.*, p. 37.

¹⁷ Cfr. “The Luxembourg Compromise (January 1966)”, available online.

partway corrected by the application of the Single European Act, which considerably broadened the range of decisions that could be adopted by qualified majority¹⁸.

2. Unanimity after the Single European Act

As extensively discussed in the previous chapter, with the 1987 Single European Act the informal practice of European Political Cooperation entered the legal framework of the then European Communities¹⁹. After the events of the Luxemburg Compromise and the ‘EPC decade’, Title III SEA was exclusively devoted to provisions on European co-operation in the sphere of foreign policy. In particular, during the negotiations the Member States agreed to endeavour jointly to formulate and implement a European foreign policy, which became a legally-binding goal under Article 30 SEA.

In general, it can be stated that the aim of the title was still theoretical and definitely future-oriented, as Title III provisions vastly demonstrate. Concerning other important aspects of the SEA, it is noteworthy to say that it represented a step forward toward the objective of the completion of the common market by 1 January 1993. Generally speaking, the SEA amended the rules governing the operation of the European institutions and expanded the powers of the then European Community in a number of policy areas. Furthermore, by creating new Community competencies and reforming the institutions, it opened the way to further political integration and economic and monetary union that would have later been enshrined in the Treaty on European Union. Concerning the institutional changes, for the first time the SEA introduced an increased number of cases where the Council could have taken decisions by a qualified majority rather than by unanimity, simplifying decision-making procedures and reducing the risk of delays inherent to the search for a unanimous agreement among the then 12 member countries.

Qualified majority voting became the new norm in four of the existing areas covered by the treaties, namely common customs tariffs, free movement of capital, free movement of services and maritime and air transport²⁰. Also, the SEA introduced several new policy areas in which decisions

¹⁸ *ibid.*

¹⁹ On the Single European Act, see GUASCONI, M.E., “European Political Cooperation and the Single European Act”, in (eds.) GEHLER, M., and LOTH, W., *Reshaping Europe. Towards a Political, Economic and Monetary Union. 1984-1989*, 2020, pp. 129-148; SWANN, D., *The Single European Market and Beyond. A Study of the Wider Implications of the Single European Act*, London: Routledge, 1992; MORAVCSIK, A., “Negotiating the Single European Act”, in (eds.) O’KEOHANE, R., and HOFFMAN, S., *The New European Community, Decision Making and Institutional Change*, New York, Routledge, 1991; NOVAK, S., “Qualified majority voting from the Single European Act to present day: an unexpected permanence”, in *Notre Europe. Thinking a United Europe*, Issue 88, pp. 1-33.

²⁰ Concerning common customs tariffs, Article 16 SEA modified Article 28 EEC Treaty, which originally stated that any autonomous alteration or suspension of duties in the common customs tariff should have been decided unanimously by the Council, by providing that “any autonomous alteration or suspension of duties in the common customs tariff shall be decided by the Council acting by a qualified majority on a proposal from the Commission”. On free movement of capital and services, Article 100a SEA provided for derogation to Article 100 EEC Treaty, by reading that to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which

were to be taken by qualified majority, namely internal market, economic and social cohesion, social policy²¹, research and development and environment²². It has been stated that common foreign policy was also subjected to qualified majority voting under SEA, with the Presidency of the Council of the European Communities²³ to be responsible for initiating action and coordinating member countries' positions under Article 10(b)²⁴. However, no provision under Title III clearly and explicitly pointed out for the use of QMV in foreign policy decisions. As Duquette argued, the SEA "simply" imposed new obligations on Member States to inform and consult each other on foreign policy matters²⁵, "but in practice the commitments were weak"²⁶. In fact, common positions were still the products of consensus, and the obligation of the member States was to take "full account"²⁷ of the position of the other partners. By examining Title III's provisions, it can be agreed with Duquette that the SEA aligned Community and EPC processes without transferring any significant power over foreign affairs from the Member States to the Community institutions. In effect, it only added structure to an entrenched pattern of diplomatic dialogue²⁸.

3. Unanimity after the Maastricht Treaty

The Maastricht Treaty founding the European Union gave life to a formal European foreign policy among "The Union and its Member States"²⁹ under the newly-established Common Foreign and Security Policy "pillar", after years of failed attempts and negotiations on the matter of European political cooperation. Decision-making in the framework of CFSP was broadly defined under Article J.1(4), for which the Member States should have supported the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity, by refraining from any action which could have been contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The compliance with such line of behavior was to be ensured by the Council, however through not-specified measures. Decision-making in the framework of CFSP was then specifically defined,

have as their object the establishment and functioning of the internal market, The Council should have acted by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee.

²¹ In particular 2 new aspects of this policy, health and safety at work and social dialogue between trade unions and employers.

²² In this regard, the subsidiarity principle was introduced, according to which measures were to be taken at European level only where the EC measures could have been more effective than the measures taken at the level of an individual country.

²³ The Presidency of European Political Co-operation was held by the High Contracting Party which held the Presidency of the Council of the EC. Cfr. Article 30(10)a.

²⁴ Cfr. The Single European Act, *op.cit.*

²⁵ Article 30(2)(a) SEA.

²⁶ DUQUETTE, *op.cit.*, p. 172.

²⁷ *ibid.* Article 30(2)(c) SEA read "In adopting its positions and in its national measures each High Contracting Party shall take full account of the positions of the other partners and shall give due consideration to the desirability of adopting and implementing common European positions".

²⁸ DUQUETTE, *op.cit.*, p. 173.

²⁹ And no longer "The High Contracting Parties".

under Articles J.3(2) and J.8 of Title V. Within the scope of CFSP, the Council of ministers of the EU (the Council) could define common positions³⁰ and decide, on the basis of general guidelines from the European Council, that a matter should have been the subject of joint action³¹. As a general rule, the Council had to act unanimously on decisions whose aim was to define or implement the CFSP³². Such decisions were to be taken on the basis of the general guidelines adopted by the European Council.

Remarkably, the “Declaration on voting in the field of the common foreign and security policy”, attached to the TEU, read that with regard to Council decisions requiring unanimity, Member States would have made efforts, to the extent possible, to avoid preventing a unanimous decision where a qualified majority existed in favor of that decision. If unanimity was the norm, exceptions to it were envisaged though qualified majority voting. Indeed, the Council, when adopting joint actions and at any stage during their development was granted the power to define those matters on which decisions were to be taken by a qualified majority³³. Therefore, issues on which QMV applied or not applied were not previously stated within the Treaty. For their adoption by QMV, acts of the Council required at least fifty-four votes in favor, cast by at least eight members³⁴.

Significantly, already in Maastricht a provision was included which ruled that issues having defence implications under CFSP were not to be subjected to the procedures set out in Article J.3, meaning they did not fall under the umbrella of decisions that could have been adopted through qualified majority voting under Article J.3(2). Procedural questions were free from the unanimity requirement, meaning they could have been taken by the Council by majority³⁵.

Concerning the institutions and their role in CFSP decision making, the Council and the European Council remained the main executors of CFSP. The role of the Parliament and the Commission were residual and of consultative nature. In particular, the Presidency of the Council³⁶ had to consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and should have ensured that the latter’s views were duly taken into consideration. Moreover, the Parliament should have been kept regularly informed by the

³⁰ Article J.2(2) Maastricht Treaty on European Union.

³¹ Article J.3(1)

³² In cases which required a rapid decision, the Presidency of the Council, of its own motion, or at the request of the Commission or a Member State, should have convened an extraordinary Council meeting within forty-eight hours. In case of emergency, this should have been done in an even shorter period. Cfr. Article J.8(4).

³³ Qualified majority was weighted as provided for under Article 148(2) of the Treaty establishing the European Community. Therefore, Belgium vote was worth 5, Denmark 3, Germany 10, Greece 5, Spain 8, France 10, Ireland 3, Italy 10, Luxembourg 2, Netherlands 5, Portugal 5, United Kingdom 10. Cfr. Treaty of Rome, *op.cit.*

³⁴ *ibid.*

³⁵ J.8(2), first subpara.

³⁶ The Presidency of European Political Co-operation shall be held by the High Contracting Party which holds the Presidency of the Council of the European Communities.

Presidency and the Commission of the development of the Union's foreign and security policy, and may have asked questions to the Council or made recommendations to it. Also, the Assembly had to hold an annual debate on progress in implementing the CFSP. On its part, the Commission was to be fully associated with the work carried out in the common foreign and security policy field³⁷.

Lastly, it is noteworthy to highlight that a distinct administrative infrastructure was set up in the area of CFSP, rather than bring it to the monitoring of the “classic” institutions³⁸. This was the case of the Political Committee, consisting of Political Directors and tasked with the monitoring of the international situation in the areas covered by CFSP and the contribution to the definition of policies by delivering opinions to the Council at the request of the Council or on its own initiative.

To sum up, the unique normative features of the Community legal order, which had shaped its *sui generis* nature and in the light of which the Court of Justice had pronounced it ‘a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields’ were absent from CFSP. The Commission did not enjoy the exclusive right to initiate legislation, but shared it with the Member States. The Court of Justice was expressly excluded; the nomenclature of Community instruments (regulations, directives, decisions) was not applicable; decision-making by qualified majority was initially not provided at all, and subsequently was possible only exceptionally; rather than being part of the co-legislature, the European Parliament was merely to be consulted; a distinct administrative infrastructure was set up in the area of CFSP (for instance, the Political Committee), which operated alongside bodies, such as the Committee of Permanent Representatives, which had been central to the functioning of the Community legal order.¹⁶ Primacy in the strong form developed under European Community jurisprudence as well as uniform rules on direct effect did not apply to binding instruments adopted under the second and third pillars.

4. Unanimity after the Amsterdam Treaty

At Amsterdam the framework of rules and mechanisms regulating CFSP was polished and better defined. In the first place, Article J.2 of the amended TEU clearly and schematically pointed out the instruments through which the Union³⁹ had to pursue its CFSP objectives⁴⁰, namely the

³⁷ Article J.9. similarly, Article 30(3)b SEA stated that the Commission was to be fully associated with the proceedings of Political Co-operation.

³⁸ KOUTRAKOS, P., “The Common Security and Defence Policy within the framework of Common Foreign and Security Policy”, in *The EU Common Security and Defence Policy*, Oxford University Press, 2013, p. 25.

³⁹ Just “The Union”. There has been a clear progression on this aspect. As it has been seen above, under SEA the High Contracting Parties were responsible to define and implement the European foreign policy, while at Maastricht the CFSP was to be defined and implemented by “The Union and the Member States”.

⁴⁰ Which were, under Article J.1, “to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the UN Charter; to strengthen the security of the Union in all ways; to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders;

definition of principles and general guidelines, the decision on common strategies, and the adoption of joint actions and common positions.

The European Council was tasked with defining the principles of and general guidelines for the common foreign and security policy, including for matters with defence implications, and with deciding on common strategies to be implemented by the Union in areas where the Member States had important interests in common. On the contrary, the Council was tasked with taking the decisions necessary for defining and implementing the common foreign and security policy on the basis of those general guidelines defined by the European Council⁴¹. In particular, the Council could implement common strategies by adopting joint actions and common positions. These two latter were therefore the main instruments of Common Foreign and Security Policy.

Article J.13 laid out the provisions on decision making on issues falling within CFSP scope. As a rule, decisions under Title V had to be taken by the Council acting unanimously. Significantly, when voting, abstentions by members present in person or represented did not prevent the adoption of such decisions⁴². This was a significant innovation within TEU, which established the so called “constructive abstention”, which peculiarities and use will be explored in the last paragraph of this chapter. In fact, all Member States were granted the right to abstain in a vote, and to qualify this abstention by making a formal declaration. In that event, the Member State was not obliged to apply the decision, which did not create any direct commitment for him, however he had to accept that it committed the Union. A motivation for the inclusion of such a provision was included in the second part of Article J.13(1), for which “in a spirit of mutual solidarity”, the Member State concerned – the one making use of the abstention – should have refrained from any action likely to conflict with or impede Union action based on that specific decision. On their part, the other Member States should have respected the Member State’s position, that is, its abstention. Constructive abstention found its limits in the eventuality in which “members of the Council qualifying their abstention under Article J.13(1) represented more than one third of the votes weighted” in accordance with Article 148(2) of the Treaty establishing the European Community⁴³. In that case, in fact, the decision could not have been adopted.

One major feature of Title V on CFSP as delineated in Amsterdam was also the introduction of a sort of “passerelle clause”⁴⁴ under Article J.13(2), meaning a provision that enabled the Council

to promote international cooperation ; to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”.

⁴¹ Article J.3(1)(2)(3)

⁴² Article J.13(1).

⁴³ Cfr. *supra* note 81

⁴⁴ As we are used to know it today, that is, similar to the form provided under the Lisbon Treaty.

to derogate, that is, to switch, from unanimity to qualified majority voting when adopting a decision, under certain well-defined and well-confined circumstances. As already stated in the 1992 TEU, derogation to qualified majority voting could not apply to decisions having military or defence implications⁴⁵. The possibility to recur to qualified majority voting under the above-mentioned circumstances was then complemented with a sort of “security” provision, for which “if a member of the Council declared that, for important and stated reasons of national policy, it intended to oppose the adoption of a decision to be taken by qualified majority, a vote should not have been taken”⁴⁶. In that event, the Council could have requested, acting by a qualified majority, for the matter to be referred to the European Council, which should have decided on the issue by unanimity.

Concerning the role of the institutions in CFSP, the Council was the executor of the policy. Apart from what has already been said, similarly to what was stated at Maastricht, under the TOA the Presidency of the Council should have represented the Union in matters coming within the common foreign and security policy, and be responsible for the implementation of decisions taken under Title V. For the powers it was granted, the Presidency should have in principle expressed the position of the Union in international organizations and international conferences⁴⁷. The Commission was to be fully associated with the smooth running of these tasks. Moreover, the Presidency of the Council was to be assisted by the Secretary-General of the Council, who had to exercise also the newly-established function of “High Representative for the common foreign and security policy”⁴⁸.

Concerning the European Parliament, it was to be consulted by the Presidency on the main aspects and the basic choices of the common foreign and security policy, who should have also ensured that the views of the European Parliament were duly taken into consideration. The European Parliament had to be kept regularly informed by the Presidency and the Commission of the development of the Union's foreign and security policy. Lastly, the Parliament could have asked questions of the Council or make recommendations to it, besides holding an annual debate on progress in implementing the CFSP. The marginal – not-executive – roles of the Commission and the Assembly in the Union's CFSP were therefore re-stated under Title V TOA.

⁴⁵ Article J.13(2), fourth subpara.

⁴⁶ Article J.13(2), second subpara.

⁴⁷ Article J.8(1).

⁴⁸ Article J.8(3).

5. Unanimity after the Nice Treaty

The Treaty of Nice was adopted in December 2000 and is said to have dealt with the so-called “Amsterdam leftovers”⁴⁹, this term referring to institutional reform undertaken in the TON in view of the 2005 and 2007 enlargement process which were not adopted in the TOA. This specific nature of the Nice Treaty led some authors to highlight the unpretentiousness of the transformations included within the TON, and in particular the “very modest” nature of the changes that were made to the essence of the CFSP⁵⁰.

This opinion can be agreed with inasmuch no groundbreaking change is brought upon CFSP and ESDP functioning and decision-making – this latter remaining confined to unanimity –, with the exception of the extended scope of enhanced cooperation to the second pillar framework which will be explored below. With reference to CFSP, it can be therefore generally agreed that the institutionalization of the ESDP as endorsed by the European Council at Nice did strengthen further the role of Member States and proceeded to reinforce once more the intergovernmental nature of the area. Apart from these preliminary considerations, changes introduced in the TON were indeed instrumental to the completion of the reform of the institutional framework very much necessary for the European “big bang”⁵¹ expansion. Some of those changes seem relevant to the scope of this analysis, even when not specifically referred to CFSP and CSDP, inasmuch they modify the broader decision-making framework affecting all the European policies, including CFSP.

Going into the detail of CFSP and CSDP provisions, Title V was composed of Article 11 to 27*e* and was generally amended in several aspects. Article J.7 now became Article 17 of the Treaty on European Union and erased any provision making reference to relationship with the WEU and its role in the implementation of EU decisions with defence implications, meaning that the Union was given the competence to operate within the full range of the Petersberg tasks defined under Article 17(2). Most importantly, the Nice Treaty paved the way for the future establishment in the EU legal framework of a “Common Security and Defence Policy” (CSDP) in 2007, by adopting several of the proposals included within the 1999 Helsinki Presidency Progress Report on strengthening the common European policy on security and defence⁵². In fact, the new organs which were provided for in the progress report were established in the Treaty to deal with European Security and Defence issues.

⁴⁹ Cfr. SHAW, J., “The Treaty of Nice: Legal and Constitutional Implications”, in *European Public Law*, Volume 7, Issue 2, 2001, p. 209.

⁵⁰ MÜLLER-BRANDECK-BOCQUET, G., “The New CFSP and ESDP Decision-Making System of the European Union”, in *European Foreign Affairs Review*, Volume 7, Issue 3, February 2002, pp. 258.

⁵¹ ZALAN, E., “2004: 'Big Bang' enlargement: A homecoming”, *EU Observer*, 22 December 2004, available online.

⁵² Indeed, the Nice IGC adopted the Declaration on the European security and defence policy, which was attached to the Nice Treaty, according to which the objective for the European Union was for that policy to become operational “quickly”.

The Amsterdam “Political Committee” was therefore transformed into the Political and Security Committee (PSC) under Article 25 TEU, composed of national representatives at ambassador or equivalent level, its tasks remaining the monitoring of the international situation in the areas covered by the common foreign and security policy, therefore including ESDP⁵³, and the contribution to the definition of policies by delivering opinions to the Council under this latter request or on its own initiative. Under the responsibility of the Council, the PSC could have exercised political control and strategic direction of crisis management operations. Moreover, an EU Military Committee (EUMC) and an EU Military Staff were tasked with giving advice and make recommendations to the PSC, as well as military expertise and support⁵⁴.

Concerning decision making mechanisms on CFSP in the Council, nothing really changed at Nice. As Wessel fairly argues, “it came as no surprise” that the Nice Treaty provided for CFSP decision to be normally adopted by unanimity, of course reiterating the inclusion under that method of issues having defence implications, namely any issue falling under the concept of ESDP. Once again, qualified majority was contemplated only in well-defined cases. These are the same as the ones stated in Amsterdam, namely the one in which the Council had to adopt a CFSP joint action, common positions, or any other decision on the basis of a common strategy, or when it had to adopt any implementing decision (therefore, for which the operational details had already been decided unanimously).

A development to Article 23(2) was given by the fact that derogation to unanimity in the Council was now also possible when appointing a special representative⁵⁵. As mentioned above, with regard to qualified-majority voting in the Council a big innovation was given by the transformation of the weight of the Member States votes in view of the 2005 European enlargement from 15 to 25 Member States. Until 1 January 2005, just as was stated in the TOA, in order to be adopted by a qualified-majority acts of the Council required at least 62 votes in favor where acting on a proposal from the Commission, and 62 votes in favor, cast by at least 10 Member States, in

⁵³ As, under Article 17, “The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy”.

⁵⁴ Cfr. WESSEL, R.A., “The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice”, in *Journal of Conflict and Security Law*, Volume 8, Issue 2, October 2003, pp. 265–288. See also OAKES, M., “European Security and Defence Policy: Nice and Beyond”, *Library House of Commons*, Research paper 01750, May 2001; FELSENTHAL, D.S., MACHOVER, M., “The Treaty of Nice and qualified majority voting” in *Social Choice and Welfare*, Volume 18, Issue 3, 2001), pp. 431–464; DEHOUSSE, F., “The Treaty Of Nice: A Watershed In The History Of European Integration”, in *Studia Diplomatica*, Volume 53, Issue 6, 2000, pp. 19–42; GRAY, M., “Nice Work”, *The World Today*, Volume 56, Issue 12, December 2000, pp. 25–26; DE WITTE, B., “Anticipating the Institutional Consequences of Expanded Membership of the European Union”, in *International Political Science Review*, Volume 23, Issue 3, July 2002, pp. 235–248.

⁵⁵ Article 18(5) stated that the Council could have appointed a special representative with a mandate in relation to particular policy issues falling under CFSP scope, whenever it deemed it necessary.

other cases⁵⁶. Article 3(1)(i) of the Protocol on the enlargement of the European Union provided for new weighting of votes within the Council with effect from 1 January 2005⁵⁷. Acts of the Council should have from that moment on required for their adoption at least 169 votes in favor cast by a majority of the members where acting on a proposal from the Commission; in other cases, for their adoption acts of the Council required at least 169 votes in favor, cast by at least two-thirds of the Member States⁵⁸. Moreover, when a decision was to be adopted by the Council by a qualified majority, a member of the Council had the right to request verification that the Member States constituting the qualified majority represented at least 62 % of the total population of the Union. That was a condition that had to be met for the decision in question to be adopted⁵⁹.

Lastly, an innovation in CFSP concerned the introduction under Title V of the instrument of enhanced cooperation. Article 27(a) to 27 (e) were inserted in TEU *ex novo* by the Treaty of Nice, as Amsterdam did introduce the possibility of “closer cooperation”⁶⁰ however limiting its scope by excluding CFSP from the areas of action. In fact, although the provisions on closer cooperation had never been used, the European Council deemed it necessary to revise them with a view to making them less restrictive in view of the enlargement of the Union to 27 Member States between 2005 and 2007⁶¹. Therefore, enhanced cooperation was not among the topics of the original mandate of the Nice IGC but was eventually formally included by the Feira European Council of 20 June 2000.

Generally speaking, the Treaty of Nice brings several changes to Title VII of the EU Treaty concerning enhanced cooperation, however without fundamentally altering the system. The major transformations concerned the conditions which must have been satisfied in order for such cooperation to be set up. In particular, Article 43(e) now specified that enhanced cooperation had to contribute to enhancing the process of integration within the Union without undermining the single market or the Union's economic and social cohesion, and Article 43(f) stated that it could not have created a barrier to or discrimination in trade between the Member States or distorted competition between them. A significant change was given by the fact that the need for enhanced cooperation to be established among “at least a majority of Member States” included in Article 43(d) TOA was now replaced so that it should have gathered “at least 8 Member States”⁶².

⁵⁶ Article 205(2) TON stated that where the Council was required to act by a qualified majority, the votes of its Members should have been weighted as follows: Belgium 5, Denmark 3, Germany 10, Greece 5, Spain 8, France 10, Ireland 3, Italy 10, Luxembourg 2, Netherlands 5, Austria 4, Portugal 5, Finland 3, Sweden 4, United Kingdom 10.

⁵⁷ Under that Article, the above mentioned weighing had to change to these numbers: Belgium 12, Denmark 7, Germany 29, Greece 12, Spain 27, France 29, Ireland 7, Italy 29, Luxembourg 4, Netherlands 13, Austria 10, Portugal 12, Finland 7, Sweden 10, United Kingdom 29.

⁵⁸ Cfr. Article 3(1)(i) of the Protocol on the enlargement of the EU, *op.cit.*

⁵⁹ *ibid.*, Article 3(1)(ii).

⁶⁰ Title VII of the Consolidated version of the Treaty on European Union as amended by the Treaty of Amsterdam was titled “Provisions on closer cooperation”.

⁶¹ In 2013, Croatia will join the Eu raising the number of Member States to 28.

⁶² Article 43(g) of the Consolidated version of the Treaty on European Union as amended by the Treaty of Nice.

With regard to the specific application to Title V, in the Treaty of Nice, when pursued in the framework of CFSP enhanced cooperation could relate only to implementation of a joint action or a common position and could not be applied for matters having military or defence implications⁶³. Member States interested in starting an enhanced cooperation among themselves had to address a request to the Council, which forwarded it to the Commission – which could have given its opinion concerning the consistency of the proposed cooperation with Union policies and CFSP – and, for information, to the European Parliament. Authorisation rested in the Council’s hands, which should have acted by majority voting. However, if a member of the Council declared in the name of important and stated reasons of national policy that it intended to oppose the adoption of a decision to be taken by qualified majority, the vote could not be taken. In that case, in accordance with Article 23(2) TEU, the Council could have requested by qualified majority that the matter be referred to the European Council for decision to be taken unanimously. Significantly, CFSP was the only field falling under the scope of enhanced cooperation for which veto could have been invoked by a member state⁶⁴.

6. Unanimity after the Lisbon Treaty

The latest revision of EU’s founding texts was done by the Treaty of Lisbon, signed on 13 December 2007 and entered into force on 1 December 2009. Unlike the Constitutional Treaty, the Lisbon Treaty remained faithful to the method adopted by previous IGC in merely amending existing treaties, namely the TEU and the TEC, with this latter being renamed the Treaty on the Functioning of the European Union (TFEU)⁶⁵. The TOL brought several important innovations to the EU legal and institutional framework. This is true in particular with reference to CFSP. Under TOL, the European Council is formally recognised as an EU institution for the time since its actual establishment, back in 1975. The European Council naturally consists of heads of State or Government, and sets out the EU’s general political directions and priorities. An important innovation concerns the Council of Ministers, to which new majority voting rules applies when approving legislation, that is, the so-called “double majority”. In fact, under Article 16(4) TEU and

⁶³ Article 27(b) of the Consolidated version of the Treaty on European Union as amended by the Treaty of Nice.

⁶⁴ For example, Articles 40 to 40(b), which referred to enhanced cooperation under Title VI (“Provisions on Police and Judicial Cooperation in Criminal Matters”), did not include the possibility for a member state to invoke unanimity to adopt a decision establishing an enhanced cooperation between some Member States.

⁶⁵ Cfr. MENON, A., “Much Ado About Nothing: EU defence Policy after the Lisbon Treaty”, *Istituto Affari Internazionali*, 2011, p. 134. Despite this, the Lisbon Treaty is largely inspired by the Treaty establishing a Constitution for Europe. On the institutional transformations of the EU after the Lisbon Treaty, see KOWALIK-BAICZYK, K., SZWARC-KUCZER, M., “The EU Reform in the Treaty of Lisbon - the Horizontal and Systemic Changes”, in *The Yearbook of Polish European Studies*, Volume 11, 2007-2008, p. 139-156; OPROIU, M., “The European Union as a Conflict Manager: Perspectives after the Lisbon Treaty”, *Studia Diplomatica*, Volume 65, Issue 4, 2012, pp. 39-54; BLOCKMANS, S., “Differentiation in CFSP”, in *Studia Diplomatica*, Volume 66, Issue 3, pp. 53-68; MARQUARDT, S., “The institutional framework, legal instruments and decision-making procedures”, in BLOCKMANS, S., and KOUTRAKOS, P., (eds), *Research handbook on the EU’s Common Foreign and Security Policy*, Cheltenham, Northampton: Edward Elgar, 2018, *Research handbooks in European law series*, pp. 22-43.

238(3)(a) TFEU a qualified majority of its members is given by at least 55% of EU countries representing at least 65% of the EU's population (so called "double majority")⁶⁶. To block a proposal, at least 4 countries have to be against it. Concerning the Court of Justice, its jurisdiction is extended to all EU policy areas, except for the CFSP⁶⁷.

In the framework of CFSP, a European External Action Service is set up, in the framework of Title V, made up of officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States, to work in cooperation with the diplomatic services of the Member States. This body assists the High Representative for CFSP, which under TOL is renamed 'High Representative of the Union for Foreign Affairs and Security Policy'. The HR/VP⁶⁸ represents the Union for matters relating to the common foreign and security policy, contributes through his proposals to the development of the CFSP, and ensures implementation of the decisions adopted by the European Council and the Council. On the strictly military and defensive side, a European Defence Agency is set up, tasked with identifying operational requirements and promoting measures to satisfy them, contributing to identifying and implementing measures to strengthen the industrial and technological base of the defence sector, participating in the definition of a European capabilities and armaments policy, and assisting the Council in evaluating the improvement of EU military capabilities⁶⁹.

With regard to the main focus of this analysis, the TOL brings significant amendments to Title V TEU⁷⁰. In the first place, it does so by introducing within the text's body a chapter exclusively dedicated to Common Security and Defence Policy, which is for the first time explicitly part of the TEU as a separated policy. In general, CFSP is placed under the "Union's External Action", whose general provisions are pointed out under the first chapter of Title V. Specific provisions on CFSP are laid out in Articles 23-41, and in Articles 42-46 for the newly-established

⁶⁶ However, Article 238(3)(b) TFEU states that where the Council does not act on a proposal from the Commission or from the HR/VP, the qualified majority is to be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.

⁶⁷ On the role of the EU Court of Justice in CFSP see KOUTRAKOS, P., "Judicial review in the EU's Common Foreign and Security Policy", in *International and Comparative Law Quarterly*, Volume 67, Issue 1, 2018, pp. 1-35; HILLION, C., "A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy" in CREMONA, M., and THIES, A., (eds), *The European Court of Justice and External Relations Law – Constitutional Challenges*, Hart Publishing, 2014; LONARDO, L., "The Court of Justice and EU Foreign Policy: what jurisdiction should it have?", *EU Law Analysis*, 22 September 2016, available online; BREITLER, C., "Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?", *European Law Blog*, 13 October 2022, available online; ECKES, C., "Constitutionalising the EU Foreign and Security Policy", *Wefassungblog On Matters Constitutional*, 17 October 2020, available online; ROSAS, A. & ARMATI, L., *EU Constitutional Law*, Oxford: Hart, 2010; EECKHOUT, P., *EU External Relations Law*, Oxford University Press, 2011, p. 167-171; BLOCKMANS, S., SPERNBAUER, M., "Legal Obstacles to Comprehensive EU External Security Action", in *European Foreign Affairs Review*, 2013, Volume 18, pp. 7-24.

⁶⁸ Under Article 17(4), the High Representative also covers the role of one of the Vice-Presidents of the European Commission. Therefore the abbreviation "HR/VP".

⁶⁹ Article 42(3).

⁷⁰ See KOUTRAKOS, *op.cit.*, p. 57-78 and p. 22-56.

CSDP. This latter is an integral part of the first one under Article 42 TEU, and as Article 24 re-states the scope of CFSP as to 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”.

Remarkably, CFSP's unique character is very clearly defined under Article 24. In fact, this latter places CFSP under *specific* rules and procedures. This means that, in the first place, CFSP differs from other policies as it has to be defined and implemented by the European Council and the Council, acting unanimously. This exists as a general rule, and exceptions are admitted only where the Treaties provide otherwise. In fact, the specific role of the European Parliament and of the Commission in this area is defined, or limited, by the Treaties. This occurs in Articles 22(2), for which the HRVP and the Commission may submit joint proposals to the Council; 27(3), for which the HRVP has to consult the EP and obtain the Commission's consent prior to propose to the Council a decision on the organisation and functioning of the newly established EEAS; 30, for which the HRVP with the Commission's support may refer questions on CFSP on the Council as well as submit to it initiatives or proposals; 36, for which the European Parliament can address questions or make recommendations to the Council or the HRVP, and has to be regularly consulted by the HRVP on the main aspects and the basic choices of the CFSP and the CSDP and its views duly taken into consideration.

Moreover, the EU Council and the Council cannot adopt legislative acts on issues falling within the scope of CFSP. This is established by virtue of Article 31 TEU and implies that CFSP decisions, as they are not legislative acts, are not adopted according to the ordinary or special legislative procedure and the role of the European Parliament is limited⁷¹. Concerning the Court of Justice of the European Union, it explicitly has no jurisdiction with respect to CFSP provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of the Treaty (so-called ‘*non-affect*’ clause) and to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU, as provided for by the second paragraph of Article 275 of the TFEU⁷². As Cremona fairly notes, no

⁷¹ Cfr CREMONA, M., “The position of CFSP/CSDP in the EU's constitutional architecture”, in BLOCKMANS, S., and KOUTRAKOS, P., (eds), *Research handbook on the EU's Common Foreign and Security Policy*, Cheltenham, Northampton: Edward Elgar, 2018, *Research handbooks in European law series*, p.10. The use of the so-called ‘flexibility clause’ is also excluded by Article 352(4) TFEU.

⁷² *ibid.* The second part of Article 24 TEU states the EUCJ lack of jurisdiction on CFSP matters and points out the two exceptions, namely Article 40 TEU and 275 TFEU. Article 40 significance rests on the fact that it very clearly defines the dividing line existing between CFSP and other EU policies, as it reads that “the implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter”. Article 275, on its part, reiterates the concept and lays down the exceptions, namely that “the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought

other policy field is subject to a similar rule: Article 40 seems therefore “designed to ensure that each policy field respects its own boundaries and operates within its proper sphere, [and gives] an explicit articulation to the general principle of choice of appropriate legal basis, which – as the Court has said – has a constitutional significance”⁷³.

Indeed, it can be stated that CFSP is *deliberately* placed, under art. 2(4) TFEU, well outside of the scope of the exclusive (Article 2(1) and 3 TFEU), shared (Article 2(2) and 4 TFEU), or supporting (Article 2(5) and 6 TFEU) competences of the Union, as this latter simply *has* competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy (Article 2(4)). According to Cremona, it is clear, therefore, that the CFSP is “intended as a policy *of the Union*, distinct from (though in harmony with) the foreign policies of its Member States”⁷⁴. In fact, CFSP does not constitute a mere coordination of Member State policy, nor is it confined within the Treaties to give support or supplement MSs policy. Also, the CFSP is not described as a shared competence, and despite the Treaties declare that competences designated as neither “exclusive” nor “supporting” are to be shared (Article 4(1) TFEU)⁷⁵, it seems clear from the “specific allocation of CFSP competence in Article 2(4) that this residual allocation does not apply”⁷⁶.

Article 25 TEU defines the instruments, or legal acts, through which the Union shall conduct the CFSP, namely decisions, but not directives or regulations. Indeed, CFSP instruments are 1) the definition of *general guidelines* and 2) the adoption of decisions defining *actions* (formerly ‘joint actions’) and *positions* (formerly the common positions) to be undertaken by the Union as well as *arrangements* for the implementation of such decisions. The Council’s decisions in the field of the CFSP may relate to operational action, under Article 28 TEU, or may define the approach, or position, of the Union to a particular matter of a geographical or thematic nature, as laid down in Article 29 TEU.

Decisions of the Council can also conclude an international agreement as stated in Article 37 TEU. CFSP decision-making mechanisms are included under Article 31 TEU. As a rule, Article 31(1)

in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union”.

⁷³ Cfr. CREMONA, *op.cit.*, p. 8. This book chapter by Marise Cremona is helpful in understanding the ‘special’ character of CFSP as delineated in TEU and TFEU and in understanding the EUCJ position towards the matter. In particular, see C-263/14 *European Parliament v Council* EU:C:2016:435, para 47; C-72/15 *PJSC Rosneft Oil Company* EU:C:2017:236, para 72.

⁷⁴ *ibid.*, p. 6.

⁷⁵ “The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6”.

⁷⁶ CREMONA, *op.cit.*, pp. 6-7. Just as it does not apply to economic and employment policies of the Member States, which these latter shall coordinate and which the Union has competence only to provide.

stipulates that CFSP decisions are to be taken by the European Council and the Council acting unanimously. Constructive abstention, which will be deeper analysed in the next paragraph, remains as a possibility within TOL, under Article 31(1)(2), by admitting the chance for any MS when abstaining in a vote to qualify its abstention, *de facto* freeing himself from applying the decision but accepting that the decision commits the Union.

Constructive abstention finds its limit, like in previous amendments, in the number of members abstaining, that cannot overpass one third of the Member States comprising at least one third of the population of the Union for the decision to be adopted. If unanimity remains the rule in CFSP, four exceptions to it exist under Article 31(2)⁷⁷, according to which the Council can pursue QMV. The first one concerns the adoption of a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives. A second exception regards the adoption of a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative. The third and fourth exceptions are allowed when adopting any decision implementing a decision defining a Union action or position; or when appointing a special representative for CFSP.

However, all these exceptions are limited in their scope, as “veto power” in the case of “vital and stated reasons of national policy” also stands under Article 31(2)(1), so that in each and every one of the cases laid down in Article 31(2) any member state is entitled to pull the “emergency brake” and block a CFSP proposal “for vital and stated reasons of national policy”. In that case, a vote shall not be taken. An innovation in this regard is given by the fact that the High Representative has to search for an acceptable solution in close consultation with the Member State involved, and only after, if not successful, the Council can by QMV request for the matter to be referred to the European Council for a decision by unanimity. Remarkably, under Article 31(3), so called *passerelle* clause, the possibility to derogate from unanimity to QMV is extended to cases other than those specified in Article 31(2). This constitutes one *special* *passerelle* clause, which will be analysed below. As always, however, this passage from unanimity to QMV that is the *passerelle* clause is not applicable to decisions having military or defence implications. As in the past, majority voting inside the Council is always allowed for procedural questions.

Article 42 TEU replaces Article 17 TON under TOL and includes the provisions on Common Security and Defence Policy. In Article 42(1) CSDP is inserted within the CFSP

⁷⁷ So called “enabling clauses”.

framework to provide the Union with an operational capacity drawing on assets of civilian and military nature. These latter can be employed on missions outside the Union for carrying out tasks of peace-keeping and conflict prevention nature, as well as for strengthening international security in accordance with the principles of the UN Charter. It is noteworthy to highlight how the performance of these tasks is to be undertaken using capabilities provided by the Member States, and not by the Union as a whole, therefore emphasizing the intergovernmental nature of the policy. Moreover, this feature of CSDP is also stressed by the fact that decisions falling under its scope, including those for initiating a mission, are to be adopted by the Council acting unanimously on a proposal from the HR/VP – who can propose the use of both national resources and Union instruments, when necessary – or an initiative by a MS, under Article 42(4).

Another relevant provision to the scope of this analysis concerns the introduction of the “permanent structured cooperation”. The value of this initiative is given by the fact that it is proper of the CSDP. In fact, it can be established among Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in the area of CSDP with a view to the most demanding missions. Permanent structured cooperation is instituted by Article 42(6) TEU and broadly regulated by Article 46, as well as by Protocol No. 10 on Permanent Structured Cooperation Established by Article 42 of the Treaty on European Union annexed to the TFEU.

In order to activate a permanent structured cooperation, the interested Member States have to notify their intention to the Council and to the HR/VP. The cooperation is established by a decision of the Council adopted by qualified majority voting within three months following the notification by the MSs and after proper consultation with the High Representative. The scope of the permanent structured cooperation is limited inasmuch it cannot cover aspects included under Article 43, namely joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.

Lastly, provisions on enhanced cooperation are laid out under Title IV TEU and Articles Title III TFEU (Articles 326 to 334). The process to start an enhanced cooperation differs greatly depending on the area of the cooperation, as it will be seen in the last paragraph of this chapter. Indeed, for those areas which are outside the scope of CFSP, the Member states have to address a request to the Commission, which should submit a proposal to Council. This latter should authorize the enhanced cooperation after obtaining the European Parliament’s consent. The procedure is very different for enhanced cooperations in the area of CFSP. Under Article 329(2), the request of the Member States which wish to establish enhanced cooperation between themselves within the

framework of the common foreign and security policy shall be addressed to the Council and forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's CFSP, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. The request is to be forwarded also to the European Parliament, for information.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously. Under Article 330, in the framework of enhanced cooperation all members of the Council may participate in deliberations, however only the members of the Council representing the Member States participating in enhanced cooperation can take part in the vote. Accordingly, unanimity is given by the votes of the representatives of the participating Member States only. A specific *passerelle* clause exists in Article 333, for which when in the framework of enhanced cooperations a provision of the Treaties stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, can adopt a decision stipulating that it will act by a qualified majority. This derogation from unanimity to QMV is not applicable to decisions having military or defence implications, as per Article 333(3) TFEU.

7. Elements of “flexibility” for CFSP/CSDP and their limits under the Treaties

Some elements of “flexibility” have been established and have evolved within the framework of EU treaties throughout the years⁷⁸, which were the result of political efforts by the member States and often stemmed from the willingness to facilitate EU integration in more ‘sensitive’ areas, namely those in which national sovereignty is particularly eroded.

Naturally, CFSP and CSDP falls within such areas. As chapter I showed, it took decades for Member States to transfer part of their own sovereignty to the Community structure and then to the Union, and countless attempts for them to accept to place foreign policy’s core features, namely security and defence, under the Union’s set of policies. To speak the truth, such passage cannot be said to be completed to this day. This is well detectable from the fact that a lot of decision-making processes affecting core areas of national-sovereignty as CFSP and CSDP still requires unanimity

⁷⁸ On these elements, see GREVI, G., MORILLAS, P., SOLER I LECHA, E., ZEISS, M., “Differentiated Cooperation in European Foreign Policy: The Challenge of Coherence”, *EU Integration and Differentiation for Effectiveness and Accountability*, EU Idea Policy Papers Issue 5, August 2020, pp. 1-24, available online; BLOCKMANS, S., “Differentiation in CFSP: Potential and limits”, *Istituto Affari Internazionali*, March 2017, pp. 1-14, available online; JÓZON, M., “The Future of Europe: The Beginning of a New Era in EU Governance?”, in *European Journal of Comparative Law and Governance*, Volume 7, Issue 4, December 2020, pp. 408-434,.

voting as a general rule. This holds great value if we think about how QMV evolved and extended its scope within the Treaties on policies others than CFSP and defence and military matters⁷⁹.

Therefore, it can be said that CFSP still nowadays represents an exception, or one of the exceptions in the general framework of EU policies. Despite this, some provisions exist to regulate the use of unanimity when a decision falling under the scope of CFSP and CSDP must be adopted by the Council, thus allowing under certain circumstances to pass from the latter method to qualified majority voting, or to abstain in order not to prevent an important decision to be adopted.

This is possible through so called “passerelle clauses” and “constructive abstention”. On one hand, these elements of flexibility were progressively inserted⁸⁰ to simplify the process of adoption of the decision in object, and to allow Member States to conclude actions on CFSP and CSDP at a faster-pace, without necessarily having to put everyone to an agreement, that is, to achieve everyone’s approval of the measure. Indeed, these provisions have solid roots in historical events of various magnitude during which the European Union was not able to take quick and decisive action due to deadlocks in decision-making processes, thus undermining its own role as a global actor and power. On the other hand, flexibility elements have in the first place been equipped with strong counter-balances, or built-in-limits, that virtually and practically undermine their very objective and hinder the full disclosure of their potential. This is demonstrated by the number of times they have been recurred to⁸¹. Furthermore, similar in their aim however differing in their substance, provisions exist in the Treaties that allows for more flexible processes to be applied to CFSP and CSDP to allow willing Member States to pursue a closer cooperation in CFSP and CSDP matters. This is possible through means of enhanced cooperations or permanent structured cooperations, these latter having been established purposely in the field of CFSP. All such elements of flexibility and their limits will be explored in the following sub-paragraphs.

⁷⁹ Indeed, in response to enlargement, the EU has continuously extended the application of majority voting to other policy fields, so that it now applies to over 90 per cent of EU legislation. Cfr. NUGENT, N., “Enlargements and their impact on EU governance and decision-making”, in *Journal of Contemporary European Research*, Volume 12, Issue 1, 2016, pp. 424-439.

⁸⁰ The Treaty of Maastricht was the first one in which European foreign policy went under the CFSP framework. At that stage no proper passerelle clause as we know it nowadays existed. Still, Article J.3(2)(1) and J.3(2)(2) included provisions similar in the passerelle clause overall meaning by stating that the Council “when adopting the joint action and at any stage during its development”, could have defined those matters on which decisions were to be taken by a qualified majority. We understand how this does not qualify as a *passerelle* clause, since no *passage*, or derogation, from unanimity to QMV is explicitly established. From Amsterdam on, the “enabling clause” was inserted within TEU in Article 23(2), however, this was still no passerelle clause as the cases in which the decision could have been taken by means of a QMV were clearly pre-defined and in no other cases that switch could have been applied. The same goes for the Treaty of Nice under Article 23, which was amended only inasmuch it established one additional case to the enabling clauses. Therefore, the Treaty on Lisbon introduces the specific passerelle clause under Article 31(3) for the very first time.

⁸¹ NOVAK, S., “Qualified majority voting from the Single European Act to present day: an unexpected permanence”, *Notre Europe. Thinking a United Europe*, Issue 88, 2011, pp. 1-34.

7.1. “Passerelle” clauses

The first sub-paragraph of Article 48(7) TEU reads:

“Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case(...).”

This constitute one of the two so-called “general” passerelle clauses included in TEU, the second being enclosed in the second paragraph of Article 48(7) and exceeding from the scope of this analysis. Passerelle clauses are mechanisms to make decision-making in the EU more flexible and fast⁸².

Accordingly, the value of the provision of Article 48(7)(1) lays in the fact that it allows for the Council to act by qualified majority voting instead of unanimity for all those decisions for which the Treaties provide a vote by unanimity in the framework of TOFEU and CFSP and CSDP. The provision is monodirectional, namely it cannot be used to pass from a QMV to unanimity, and applies to decisions of the Council only.

Furthermore, the adoption of a general passerelle clause modifies the way in which decision-making is carried out in a particular area or policy, not only for the particular (legislative) act to be adopted, but also for its future amendments, meaning that the shift also affects the future life of the legal instrument or measure adopted under the activation of a general passerelle clause⁸³.

It goes without saying how the possibility for such derogation holds great potential as it virtually allows for some decisions within the Council to be taken through a much more simple decision-making mechanisms, therefore allowing to speed up the Council’s decision-making procedures. This is true inasmuch qualified majority voting, contrarily to unanimity, obviously does not need for the totality of Member States to agree on a decision to be taken, its fulfillment therefore being much rapid and smoother, as defined under Article 16(4) TEU. Naturally, such considerations are true only if though on from the Union’s perspective, namely through the optic for which in the wake of game-changing international events important decisions affecting areas such as security must be adopted in the smoother way possible by avoiding months-long deadlocks to reach a

⁸² KOTANIDIS, S., “Passerelle clauses in the EU Treaties Opportunities for more flexible supranational decision-making”, *European Parliamentary Research Service*, December 2020, p. 1. See also PATRAUS, M., PATRAUS, D.D., “Brief Considerations on the European Legislative Procedures, with Particular Reference to Passerelle Clauses”, *Agora. International Journal of Juridical Sciences*, Volume 1, Issue 1, 2017, pp. 7-15; CLAUWAERT, S., “Passerelle clauses in the EU Treaties”, *European Trade Union Institute*, pp. 1-15.

⁸³ KOTANDIS, *op.cit.*, p. 22.

unanimity. In fact, the result of such mechanisms is too often the revision of the original objectives for the sake of a compromise that will second every member state's foreign policy's strategies to the detriment of the Union's own sake. On the other hand, the above considerations seem way less convenient if looked at from the Member State's perspective, since the most remarkable legal as well as political effect derived from the adoption of a general passerelle clause is the loss of veto power for individual Member States.

Indeed, impacting greatly on the possibility for a Member State to exercise sovereign powers to influence an EU policy, this effect has been generally recognised by scholars and the judiciary⁸⁴. As will be stated below, it thus comes as no surprise that the Member States have proved to be deeply skeptical to appeal to this kind of clause. Moreover, under Article 48(7)(1) the Council can act independently, that is, without doing so on a Commission's proposal. In fact, under the passerelle clause the Council is "only" subject to the EU Council authorization on the matter.

This being stated, several limits to the actual application of the general passerelle clause exist that together contribute to lock-up its potential. The last mentioned item represents indeed the first of these limits. In fact, Article 48(7)(3) specifies that the decision to pass from unanimity to QMV in the Council should be adopted by the European Council acting unanimously, and only after having obtained the consent of the European Parliament by a majority of its members. Indeed, as these provisions may have been inserted to regulate a controlled and balanced use of the passage from unanimity to qualified majority voting, their effects seem dubious, and to allow the removal of a unanimous vote through means of another unanimous vote quite inconsistent.

The first one is the fact that the passerelle clause does not apply to decisions with military implications or those in the area of defence, as per Article 48(7)(1). This clearly translate the Member States unwillingness to risk to be committed to military and defence measures that could affect them without them having accepted those through a vote. In the second place, the applicability of the passerelle clause is subjected to the veto of national Parliaments. Indeed, Article 48(7)(3) states that the European Council's decision to authorize any derogation from unanimity to QMV in the Council shall be prior notified to the national Parliaments, which can within six months manifest their opposition to it. In such case, the decision shall not be adopted and the switch from

⁸⁴ As Kotandis notes, in two cases the German Constitutional Court addressed the issue of the reduced influence resulting from the introduction of majority voting not agreed with a formal revision of the Treaties. In one case in particular, the Court indicated that approval by the German representative within the European Council of such shift would have required "a law within the meaning of Article 23(1) of the German Basic law in order to guarantee the decision an adequate level of democratic legitimacy, requiring two thirds approval votes in both the Bundesrat and the Bundestag". Kotandis refers to the *Case of the Federal Constitutional Court*, 2 be 2/08 and others, Treaty of Lisbon, judgment of 30 June 2009, paragraphs 319-414, and *Case of the Federal Constitutional Court*, 2 BvR 2728/13 et al, OMT, of 21 June 2016, paragraph 131. Cfr. *ibid.*, p. 22.

unanimity to QMV does not occur. Lastly, explicit boundaries to the scope of Article 48(7) passerelle clause are inserted in Article 353 TFEU⁸⁵.

Other passerelle clauses have been distributed within the Treaties, and in particular in Articles 31(3) TEU, 81(3) TFEU, 153(2) TFEU, 192(2) TFEU, 312(2) TFEU, and 333 TFEU. These are defined “special” passerelle clauses as they are aimed at modifying decision-making in the same way as general passerelles but only in certain sub-areas of a specific policy field in which QMV – or the ordinary legislative procedure – *normally* do not apply. The analysis of Articles 31(3) TEU and 333 TFEU, this latter with regard to the special passerelle included in Article 333(1), seems relevant to the scope of this analysis, as they concern respectively CFSP and enhanced cooperation⁸⁶.

In particular, Article 31(3) TEU reads that “the European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2”, where paragraph 2, as it has been seen above in the framework of CFSP provisions within TOL, concerns some particular cases where the Council can act by qualified majority by derogation of unanimity, which is normally the rule in the framework of CFSP decisions by the Council (Article 31(1))⁸⁷. Therefore, Article 31(3) establishes the possibility for the Council to pass from a unanimous vote to a QMV for decisions on issues falling within the scope of CFSP that are not already covered under Article 31(2) “enabling clauses”.

The main limits to the CFSP special passerelle clause are that as per Article 31(4) it cannot be applied to decisions having military or defence implications, and that for the passerelle to be applied a unanimous vote by the European Council is required.

With regard to Article 333(1) TFEU, it states that where “a provision of the Treaties which may be applied in the context of enhanced cooperation” stipulates that the Council shall act

⁸⁵ This latter rules out application of the general passerelle in a number of cases, and in particular: in Article 311 concerning the Council’s decisions on the Union’s own resources; in Article 312(2) on the Council’s decisions on the Multiannual Financial Framework; in Article 352(1) establishing the “flexibility clause” which allows for the Council to adopt decisions to creating new powers that are not already established under the Treaties if this is deemed necessary to attain one of objectives set out in the Treaties ; lastly, in Article 354 concerning the Council’s decisions on the suspension of certain rights resulting from Union membership .

⁸⁶ Concerning the other mentioned Articles, they concern family law with cross-border implications (Article 81(3) TFEU), social policy (Article 153(2) TFEU), environmental policy (Article 192(2) TFEU), Multiannual Financial Framework (Article 312(2) TFEU).

⁸⁷ However, the QMV established for specific cases under Article 31(2) is mitigated by two safeguards. Firstly, an ‘emergency brake’ under Article 31(2)(2) TEU, which allows a formal vote to be avoided if a Member State declares its intention to oppose a decision by QMV due to vital and stated reasons of national policy. In that event the HR/VP will search together with the opposing Member State for an acceptable solution. If this attempt ends poorly, the Council may decide under QMV to refer the matter to the European Council, which takes its decision by unanimity. Secondly, under Article 31(4) TEU QMV is always non-applicable to decisions with military implications.

unanimously, the Council, acting unanimously, can decide that it will act by a qualified majority, except for decisions having military or defence implications. A passerelle clause is provided for enhanced cooperation precisely due to the fact that this latter can be started on provisions which stipulates unanimity, namely CFSP and CSDP. Indeed, as unanimity within enhanced cooperation is to be understood as unanimity of the participating Member States only, it is likely to reproduce the same difficulties in achieving a unanimous decision that exist in the non-enhanced cooperation scenario. For this reason, Article 333 (1) TFEU establishes a special passerelle clause that allows Council.

In the case of enhanced cooperation, the Member States that have the right to vote on the shift from unanimity to QMV are only those participating in the enhanced cooperation, as per Article 330(1) TFEU, while deliberations are open to all Member States. The limit remains the non-applicability to decisions having military or defence implications. Remarkably, no abstention is admitted in the framework of enhanced cooperation, nor the possibility to oppose the switch to QMV by virtue of veto.

A self-evident proof of the limits inherent in passerelle clauses is given to us by their practical application. Significantly, none of the existing general or specific passerelle clauses has been implemented to date⁸⁸, and as Marquardt notes, there has not been any case of actual voting by qualified majority in the Council under Article 33(3) or 48(7) since the Treaty of Amsterdam introduced that possibility⁸⁹. This applies to the enabling clauses as well: Article 31(2) have only been applied once, in 2015, when the EU's special representative to the Sahel was appointed by QMV⁹⁰. As Kotandis states, one explanation behind this non-application, aside from the poor attention these mechanisms get from academia⁹¹, could be the scarce political interest on the Member States' side as the application of passerelles entails the voluntary loss of the veto power. Another reason could lay in the built-in-barriers that the clauses contain, namely the unanimous authorization required to resort to them in the European Council, or in the Council for special passerelles. As it will be seen in the last chapter of this analysis, in recent years and in particular starting from 2017⁹² the European Commission has explored the issue and came up with some

⁸⁸ KOTANDIS, *op.cit.*, p. 37. The only experience in this sense relates to a special passerelle adopted in 2004 in the field of visas, asylum, immigration and free movement of persons under the TEC.

⁸⁹ MARQUARDT, *op.cit.*, p. 30

⁹⁰ SCHUETTE, L., "Should the EU make foreign policy decisions by majority voting?", Centre For European Reform, Policy Brief, p. 4.

⁹¹ As Kotandis reports, passerelle clauses have been little explored by academics, and still less so by policy-makers. Only in recent years the passerelles have begun to call attention, in particular on the part of the Commission, as a "lost Treasure" to be explored and perhaps utilized. Passerelle clauses were referred to as a "lost treasure" in the 2018 State of the Union address by the European Commission then led by President Juncker. KOTANDIS, *op.cit.*, p. 1, p. 49.

⁹² In the 2017 State of the Union address Juncker expressed the need for a stronger Union to be achieved in part by means of decisions taken in a quicker and easier manner through the activation of passerelle clauses. In the 2018 State of the Union the Commission launched four concrete proposals on the use of passerelles clauses as included in the Treaties. Cfr. *ibid.*

concrete proposals on policy areas or actions where passerelle clauses could be implemented⁹³. Specifically, behind these proposals there is the acknowledgment that “where unanimity is the rule, the culture of compromise is neglected if not put aside, for the reason that unanimity is not conducive to Member States finding common ground for agreement. The 'risk' of being outnumbered in a qualified majority scenario, however, is a powerful enough incentive for Member States to resort to dialogue and negotiation”⁹⁴.

7.2. “Constructive” abstention

Another flexibility element under Article 31 TEU exists which allows derogation from unanimity. In fact, Article 31(1)(2) TEU reads

“When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted”.

This provision, generally known as “constructive abstention”, is also included albeit more succinctly in Article 238(4) on the voting mechanisms within the Council, and does not represent an innovation under the Treaty of Lisbon as it was originally introduced under Article 23(1)(2) of the Treaty of Amsterdam. However, it presents some changes compared with the TOA and TON versions. This is true with regard to the last line of the second subparagraph of Article 31(1), which concerns the threshold of abstentions over which the decision can no longer be adopted. In particular, if a number which is equal or bigger than one third of the Member States comprising at least one third of the population of the Union express its will to “constructively” abstain from the vote, that is, not to formally impede it by placing the veto, the decision shall not be adopted.

This measure is inserted in order to guarantee the decision an adequate level of democratic legitimacy, which is determined through the double majority which more properly reflects citizens’ representation. Remarkably, no provision is present that states the non-applicability of the constructive abstention to CSDP. Therefore, constructive abstention applies to decisions having military or defence implications and to CSDP in broad terms. As it has been seen above, this is the

⁹³ Although for special and general passerelle clauses the Commission does not have a formal role as initiator or proponent with the exception of the special passerelle clauses on family law (Article 81(3)(2) TFEU), social policy (153(2) TFEU) and environmental policy (Article 192(2) TFEU).

⁹⁴ KOTANDIS, *op.cit.*, p. 37.

contrary of what happens for passerelle clauses, which mechanisms do not apply to issues having military or defence implications (Articles 31(4) and 48(7)).

Ultimately, it could be argued that constructive abstention presents no built-in limits if not for the one concerning the threshold for abstentions. Its potential is great, as the Member State that abstains is exempted from applying the decision within its national legal system and is committed to refrain from action likely to conflict with or impede the Union's action, while mutual solidarity requires the other Member States to respect its position, yet almost unexplored. In fact, the provision has been invoked once, that is, by Cyprus in February 2008, when the Council set up a civilian mission to Kosovo⁹⁵. This is may be due to the fact that, even if basically exempting the State to applying the decision, constructive abstention implies acceptance of the fact of it committing the Union, as a whole. In a way, this includes the abstaining member state, as well.

7.3. Enhanced cooperation

A very special element of flexibility is represented by enhanced cooperation, regulated under Article 20 TEU, which alone forms title IV TEU, and under Title III TFEU (Articles 326-334)⁹⁶. It has been said that enhanced cooperation represents a *procedural* passerelle, meaning it modifies the procedure under which Member States Enhanced cooperation was first introduced in the Treaties at Amsterdam, under Title VII TOA, with the name of "closer cooperation", and at that stage did not include under its scope CFSP and CSDP. Indeed, CFSP was introduced within enhanced cooperation's scope under TON, and in particular under the newly established Articles 27(a) to 27(e). However, under Article 27(b) TON, enhanced cooperation in CFSP was limited inasmuch it could have been established only for implementing a joint action or a common position, and, most importantly, it could still not apply to CSDP.

This changed only with the most recent treaties' amendment. In fact, the Lisbon Treaty presents no provision explicitly denying the possibility for Member States to set up a closer cooperation in

⁹⁵ Cyprus used the possibility of constructive abstention on the occasion of the adoption of the Joint Action establishing the EULEX Kosovo crisis management mission. In fact, Cyprus does not recognize Kosovo. Cfr. MARQUARDT, *op.cit.*, p. 30. See also SHUETTE, *op.cit.*, p. 4. On EuLex Kosovo mission, see SPERNBAUER, M., "EULEX Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date", in *German Law Journal*, Volume 11, Issue 8, pp. 769-802.

⁹⁶ On enhanced cooperation, see, CREMONA, M., "Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU", *European University Institute*, EUI Working Papers Issue 21, 2009, p. 15; DE LA SERRE, F., WALLACE, H., "Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea?", *Institute Delors Research and Policy*, Papers Issue 2, 1997, pp. 1-27.; KROLL, D.A., LEUFFEN, D., "Enhanced Cooperation in practice. An analysis of differentiated integration in EU secondary law", in *Journal of European Public Policy*, Volume 22, Issue 3, 2015, pp. 353-373; BORDIGNON, M., BRUSCO, S., "On Enhanced Cooperation", *Center for Economic Studies and ifo Institute* (CESifo), CESifo Working Paper Issue 996, July 2003, pp. 1-30; MARTENCZU, B., "Enhanced Cooperation. The Practice of Ad Hoc Differentiation in the EU since the Lisbon Treaty", in *Studia Diplomatica*, Volume 66, Issue 3, Variable Geometry Union: How Differentiated Integration is Shaping the EU, 2013, pp. 83-100.

the field of CSDP. Although the aim of this analysis points us to draw our focus exclusively on enhanced cooperation in the field of CFSP and CSDP, it must be noted that all European policies can constitute the objective of an enhanced cooperation among the Member States, as long as they do not fall within exclusive competences of the Union. Remarkably, as it will be seen at the end of this paragraph, enhanced cooperation within CFSP and CSDP framework is regulated differently from enhanced cooperation in other areas of the Treaties, namely those areas covered by the Treaties with the exception of fields of exclusive competence and the common foreign and security policy⁹⁷, therefore representing once again an exception among other policies of the Union.

Pillar-specific provisions which regulate the scope, functioning, and procedural conditions of enhanced cooperations in the framework of CFSP and CSDP lies in TFEU, and in particular in Articles 329(2), 331(2), and 333(3), this latter including the counter-balance provision to the passerelle clause for enhanced cooperation established in Article 333(1), as seen above. Other TFEU Articles from 326 to 334 refer to the general functioning of enhanced cooperation which applies to both CFSP, CSDP, and all other areas. Title IV TEU exclusively includes general provisions on enhanced cooperation. With regard to this latter, Article 20(1) states the broader scope of enhanced cooperation, its aims, and substantive conditions. As mentioned, under it enhanced cooperation can cover all of the Union's non-exclusive competences, and its goal is defined as to further the objectives of the Union while protecting its interests and reinforcing the integration process.

On substantive conditions, they are laid down in Article 20(2), 20(3) and 20(4). In the first place, a condition for enhanced cooperation to be employed is that it must represent at the moment of its adoption a measure of last resort, to be resorted when its objectives cannot be attained within a reasonable period by the Union as a whole. In the second place, the measure must be open at any time to all Member States, and can be activated only if at least nine Member States participate in it⁹⁸. On this point, it must be specified that although all members of the Council may participate in the enhanced cooperation's deliberations, only members of the Council representing participating Member States are allowed to take part in the vote.

Lastly, accordingly with the above, Article 20(4) states that acts adopted in the framework of enhanced cooperation can have binding effects only towards participating Member States, and that decisions establishing enhanced cooperation do not represent part of the *acquis* which has to be accepted by candidate States for accession to the Union.

⁹⁷ As stated in Article 329(1) TFEU.

⁹⁸ An not anymore eight, as the Treaty of Nice read in Article 43(g).

Under TFEU, TEU general provisions are furthered and more extensively take into consideration. Procedures for establishing enhanced cooperation in CFSP are laid out in Article 329(2) TFEU and 331(2) TFEU. The first one reads:

“The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union’s common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information. Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.”

The procedure is articulated, since a formal request from the member States shall be addressed to the Council and then forwarded to the HR/VP and the Commission for an opinion, and to the European Parliament for information. Eventually, the decision concerning the establishment of the measure is considered adopted after a unanimous vote in the Council. Article 330 TFEU recalls Article 20(3) TEU when stating that all Member States may take part into deliberations however only participating members can take part into the vote. Therefore, unanimity is given by the votes of the representatives of the participating Member States only.

While qualified majority is defined in accordance with the double majority rule included in Article 238(3). Article 331(2) concerns the procedure to follow in the case of a Member State joining an enhanced cooperation already “in progress”, that is, already established, in the framework of the common foreign and security policy. In that event, the Member State shall notify its intention to the Council, the HR/VP and the Commission. Once having consulted the HR/VP and after noting, if necessary, that the conditions of participation have been fulfilled, the Council can confirm by a unanimous decision the participation of the Member State concerned.

The limits of enhanced cooperation are in a way less “limiting” than those presented in passerelle clauses. In fact, a unanimous vote for establishing an enhanced cooperation in areas falling within the scope of CFSP and CSDP is given by the votes of the representatives of the *participating* Member States only. Intuitively enough, if some member States consult each other and decide to give life to a stricter cooperation among themselves, it seems unluckily that any of them will oppose such decision when it comes to the vote. Of course, the same cannot be said in the event of a new Member State requesting to participate in the enhanced cooperation “in progress”. At the same time, the biggest limit to enhanced cooperation in the framework of CFSP

and CSDP is the passerelle clause included in Article 333(1). The reason for this is the same as for the other general and special passerelles, namely that to switch from unanimity to QMV unanimity is required in the Council, in this case among participating members only, while the derogation does not apply to CSDP decisions, which can only be adopted through qualified majority. This situation replicates the condition of deadlock that is commonly observed within the Union when decision on important matters are taken. Therefore, even if enhanced cooperation was born as a flexibility mechanism to allow for stronger integration of willing Member States in certain areas, its potential, namely the actual furthering of European integration in a given CFSP/CSDP matter, remains blocked by the unanimity requirement. Similar restrictions possibly have a role in another major limit of enhanced cooperation, that is, its actual use, as the measure remained unexplored during the first ten years of its existence, becoming more commonly used only since the entry into force of the Lisbon Treaty in December 2009, with three cases of application⁹⁹, none falling within the scope of CFSP/CSDP.

7.4. Permanent structured cooperation

A true innovation within the Treaty of Lisbon and additional “flexibility element” in the framework of this analysis is the permanent structured cooperation. Established under Article 42(6) TEU as a CSDP exclusive measure and regulated under Article 46 TEU and Protocol 10 attached to TFEU¹⁰⁰, permanent structured cooperation allows for Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in CSDP area with a view to the most demanding missions “to integrate security and defence more fully within the Union framework”¹⁰¹. Indeed, the instrument of permanent structured cooperation has been

⁹⁹ MARTENCZU, *op.cit.*, pp. 83-86. The first case of authorization of enhanced cooperation concerned the law applicable to divorce and legal separation (Rome III). Its proposal was presented by the Commission in March 2010, and the authorization from the Council came relatively rapidly in July 2010, with 14 Member States participating in the cooperation. The enhanced cooperation was activated in December 2010 and after that one further Member State, Lithuania, was authorized to join the enhanced cooperation. The second case concerned the European patent, that was activated under the Commission’s proposal on 10 March 2011 and saw the participation of all Member States with the exception of Italy and Spain. Lastly, the most recent enhanced cooperation was established in the framework of the financial transaction tax (FTT) in January 2013. However, the Council’s authorization was challenged by the United Kingdom. See KUIPERS, J., “The Law Applicable to Divorce as a Test Ground for Enhanced Cooperation”, in *European Law Journal*, Volume 18, 2012, pp. 201-229; PEERS, S., “Divorce, European Style: The First Authorization of Enhanced Cooperation”, in *European Constitutional Law Review*, Volume 6, Issue 3, 2010, pp. 339-358; ULLRICH, H., “Enhanced cooperation in the area of unitary patent protection and European integration”, in *ERA Forum*, Volume 13, 2013, pp. 589-610;

¹⁰⁰ On permanent structured cooperation see BISCOP, S., “Permanent Structured Cooperation and the Future of ESDP”, *Royal Institute for International Relations*, Egmont Paper 20, pp. 1-20; BISCOP, S., “Permanent Structured Cooperation and the Future of the ESDP: Transformation and Integration”, in *European Foreign Affairs Review*, Volume 13, 2008, pp. 431-448; BISCOP, S., COELMONT, J., “Permanent Structured Cooperation in Defence: Building Effective European Armed Forces”, Collège d’Europe, Bruges Political Research Papers No 15, September 2010, pp. 1-23; BISCOP, S., COELMONT, J., “Permanent Structured Cooperation In Defence of the Obvious”, *Egmont Security Policy Brief No. 11, June 2010*, pp. 1-6; VAN EEKELLEN, W.F., KURPAS, S., “The Evolution of Flexible Integration in European Defence Policy: Is permanent structured cooperation a leap forward for the Common Security and Defence Policy?”, CEPS Working Document No. 296, June 2008, pp. 1-18.

¹⁰¹ Cfr. CREMONA, “Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU”, *op.cit.*, p. 13.

established, even if with delay compared to the entry into force of the Treaty of Lisbon, by a Council decision of 11 December 2017¹⁰², which instituted PESCO among 25 out of 27 EU Member States¹⁰³.

Under the Treaties, permanent structured cooperation is inserted in the CFSP framework, which is based on the achievement of growing convergence of action by Member States, on the conviction that a more assertive Union role in security and defence matters must be reached, as well as on the shared consciousness that to embark on a new stage in the development of the European security and defence policy requires a determined efforts by the Member States involved¹⁰⁴. Procedurally and in its general aim, permanent structured cooperation resembles enhanced cooperation, but, as Cremona states, differs from it as the first is agreed in advance by way of a specific Protocol¹⁰⁵. Indeed, one of its core features is the establishment not only of entry conditions with respect to military capabilities¹⁰⁶ but also the possibility of suspension if a Member State no longer fulfils the entry criteria¹⁰⁷, as well as of withdrawal¹⁰⁸. Moreover, differently from enhanced cooperation, permanent structured cooperation “is not to be tied in advance to a specific initiative but exists permanently to be called upon for the ‘most demanding missions’”¹⁰⁹. Thus, most aspects of permanent structured cooperation are defined in advance, even prior to its actual activation.

This is the case, along with the above-mentioned aspects, of the pre-requisites for the establishment of permanent structured cooperation, which are extensively defined under Article 1(a) and (b) of Protocol 10¹¹⁰, as well as of the commitments, which are stated throughout Article 2 of the same Protocol. Interestingly enough, operational aspects of such cooperation are not defined under the Treaties, and prior to PESCO’s establishment they were therefore subjects to a high degree of debate among politicians, scholars, and the EU public opinion.

¹⁰² Cfr. Council Decision (CFSP) 2017/2315 of 11 December 2017, *op.cit.*

¹⁰³ Malta, Denmark, and the UK – prior to Brexit - do not adhere to PESCO.

¹⁰⁴ These are some recitals of the preamble of Protocol 10 on Permanent Structured Cooperation.

¹⁰⁵ Cfr. CREMONA, “Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU”, *op.cit.*, p. 14.

¹⁰⁶ Member States wishful to participate must possess military capabilities that fulfil higher criteria under Article 42(6) TE. These are explicated in Article 1 and 2 of Protocol 10 TFEU.

¹⁰⁷ Article 46(4) TEU

¹⁰⁸ Article 46(5) TEU.

¹⁰⁹ Cfr. CREMONA, “Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU”, *op.cit.*, p. 14.

¹¹⁰ Two pre-conditions are in place under Protocol 10. In the first place the Member State wishful to participate in permanent structured cooperation must “proceed more intensively to develop its defence capacities through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programs, and in the activity of the [EDA] in the field of defence capabilities development, research, acquisition and armaments”. In the second place, it must “have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned” capable of carrying out within a period of five to 30 days joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation, “in particular in response to requests from ONU, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days”.

As Biscop pointed out back in time, from the “general nature of the wording of the Protocol and the absence of any figures it is evident that the crucial decisions have yet to be made”¹¹¹. This concerned, for example, how to “operationalize” the commitments of Article 2 and translate them into specific and practical criteria for participation¹¹². For example, no explicit indication exists in the Treaties on the minimum number of Member States that should participate in the initiative, and no factual provision exists that regulate the quantitative aspects of the commitments the Member State should support to implement CSDP actions in the framework of the cooperation. Prior to PESCO establishment in 2017, consensus emerged from the political debate that followed the initial proposals in the 2002 European Convention for a ‘defence Euro-zone’ on the fact that the permanent structured cooperation should have been inclusive as much as possible, meaning it should have allowed as many Member States as possible to participate in it¹¹³. A similar choice was supported by the fact that everyone would have benefited from such inclusiveness, with an added value being produced from joint synergies and the wider scope of the measure¹¹⁴. This being true, the challenge, as Biscop pointed out, was to reconcile inclusiveness and commitment, meaning to agree on criteria that would have allowed all Member States to participate, each at his own level of means, but at the same time implying a substantial commitment to make available more usable capabilities¹¹⁵.

Looking backwards at these speculations, it can be said that, in the end, the instrument of permanent structured cooperation serves its original goal inasmuch since 2017 it allows to 25 on a total of 27 member States to cooperate closely in the area of CSDP. In particular, it offers a legal framework to jointly plan, develop and invest in shared capability projects, and enhances the operational readiness and contribution of armed forces of every participating member state¹¹⁶. Indeed, sixty PESCO projects are currently being developed in areas such as training, land, maritime, air, cyber, each of which is carried forward by varying group of PESCO participating Member States and is coordinated by one or more PESCO countries¹¹⁷.

However, some limits to the functioning of PESCO remains. In particular, if PESCO basically guarantees almost all EU member States to cooperate more strictly in the framework of CSDP, it

¹¹¹ Cfr. BISCOP, “Permanent Structured Cooperation and the Future of ESDP”, *op.cit.*, p. 5.

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ An opposed idea emerged from past French President Nicolas Sarkozy proposal for a minimum membership of the permanent structured cooperation to be made up of the six more territorially extended EU Member States, namely France, Germany, Italy, UK, Spain, Poland, to be committed to a minimum level of defence spending at 2% of GDP. Cfr. *ibid.*, p. 6. See also KUBOSOVA, L., “France to Push for Intervention Force Created by EU Big Six”, in *EU Observer*, 15 February 2008, available online.

¹¹⁵ BISCOP, *op.cit.*, p. 6; CREMONA, *Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU*, *op.cit.*, p. 14.

¹¹⁷ Please refer to PESCO official website.

does so without providing their representatives in the Council with the decisional means necessary to make such cooperation the place for smoother and faster-paced action. This is dictated by Article 46(6), according to which, with the exception of procedural matters, the decisions and recommendations of the Council within the framework of permanent structured cooperation must be adopted by unanimity, a concept that is reiterated under Council Decision 2017/2315¹¹⁸. The provision is all the more restrictive considering that it is not matched to any passerelle clause, nor to the possibility of constructive abstention in the name of “mutual solidarity”. This represents a limit, albeit not surprising if thinking that CSDP never falls under the scope of passerelle clauses, not general nor specific ones.

¹¹⁸ Cfr. Council Decision (CFSP) 2017/2315 of 11 December 2017, *op.cit.*

CHAPTER III

Case study: EU response to the Russian-Ukrainian War

1. Current scenario: a new war at the gates of Europe

At the time of writing, eleven months have passed since Russia's "unjustified and unprovoked"¹ aggression of Ukraine, which took place on 24 February 2022. The Ukrainian war is only the latest addition to the long list of all-genre-crisis that have characterized Europe's life from the mid-2000s to current days. Flipping through the years starting from the 2008 financial and economic downturn and the European debt crisis to the migration emergency, from the rise of authoritarian populism to the spread of global terrorism, from Brexit to the breakout of Covid-19 global pandemic, arriving to the political and energetic slump unleashed by the ongoing conflict in the EU's eastern neighborhood, the events that succeeded in the last two decades led someone to rightfully comment that Europe finds herself in an "age of permacrisis"², whose end, it may be added, can at this moment hardly be foreseen.

Indeed, the repercussions of Russia's full-scale military invasion of Ukraine, a non-EU country bordering four EU Member States³, have shaken the EU to its core, and the world in its entirety, transforming the global and regional order in more than a way. Both at the regional, that is, European, and broader level, the impact this umpteenth crisis is recording can be observed on at least three different dimensions, namely military, economic, and political, which are very closely intertwined.

In the first place, the openly violent character of the Ukrainian war poses a direct threat to the European and global security order, in terms of citizens' physical safety, military re-organization and spending, as well as strategic thinking⁴. Indeed, if in a European perspective the use of force and coercion to change borders "finds no place in the 21st century"⁵, Russia's readiness to deploy the "highest level of military force, regardless of legal or humanitarian considerations"⁶, blatantly confirms the contrary.

¹ Cfr. "A Strategic Compass for Security and Defence. For a European Union that protects its citizens, values and interests and contributes to international peace and security", *op.cit.*, p.10.

² Cfr. ZULEEG, F., EMMANOUILIDIS, J.A., BORGES DE CASTRO, R., "Europe in the age of permacrisis" (Commentary), *European Policy Centre*, 11 March 2021, available online.

³ Romania, Hungary, Slovakia and Poland.

⁴ As the document on the Strategic Compass widely confirms.

⁵ The Strategic Compass For Security and Defence was indeed presented after the breakout of the Ukrainian war and was revised in accordance with the brand new geopolitical landscape that the EU is now confronted with.

⁶ Cfr. "A Strategic Compass for Security and Defence. For a European Union that protects its citizens, values and interests and contributes to international peace and security", *op.cit.*, p.17.

Already in March 2014 the Russian illegal annexation of Crimea⁷ did cast some doubts on the EU's imaginary for which the old continent had "for good arrived in the post-modern world"⁸, where territorial conquests and traditional military operations would belong only to a distant past. With the latest developments, among which the unilateral annexation by Russia of the Ukrainian regions of Donetsk, Luhansk, Zaporizhzhia and Kherson in late September 2022⁹, this has proved to be nothing but a delusion.

Among other things, Russia disengagement in the humanitarian consequences of the war, made explicit through the deliberate slaughter of civilians and the strategic blocking of humanitarian corridors, has caused thousands of deaths¹⁰ and a humanitarian crisis which led millions and counting to escape to neighboring countries¹¹, something that has strongly impacted on the Union, namely by unevenly destabilizing the most proximate EU countries. In general, Russia began to pose a concrete threat of internal instability in each and every EU Member State, and to the world, when it reminded them of the concrete brutality of on-ground conflicts and the prospect of an extension of the conflict.

The tragic military dimension of the war meets the others when reflecting on the fact that the substance of this conflict is expressed in a lethal mix of traditional warfare and hybrid tactics, these latter including cyberattacks, foreign information manipulation and interference, economic and energy coercion, and an aggressive nuclear rhetoric¹² which from time to time leads everyone from the media to political leaders to avert the start of a new planetary conflict.

⁷ The invasion and subsequent annexation of Crimea by the Russian Federation occurred between February and March 2014. The Autonomous Republic of Crimea and the city of Sevastopol were officially annexed by Russia on 18 March 2014 following the 16 March referendum, which results were highly disputed as being fraudulent and dismissed by foreign powers as illegitimate. Cfr. KOHLI, A., "What the 'Sham' Referenda in Russian-Controlled Ukraine Could Mean for Both Countries", *Time*, 22 September 2022, available online; See also GRANT, T.D., "Annexation of Crimea", in *The American Journal of International Law*, Volume 109, Issue 1, January 2015, pp. 68-95.

⁸ This concept is drawn from KOETH, W., "Leadership Revised. How Did the Ukraine Crisis and the Annexation of Crimea Affirm Germany's Leading Role in EU Foreign Policy?", in *Lithuanian Annual Strategic Review*, Volume 14, Issue 1, 2016, p. 26. Indeed, as Koeth notes, due to the last decade's lack of threats of a classical military nature, the EU built its foreign policy on the assumption that security challenges would now have stemmed from non-state actors, such as "terrorism, failed states, organized crime and Balkan-style regional conflicts". In general, the Union assumed that in our century foreign policy was to be based on the projection of European norms and values abroad, rather than on military strength. Indeed, the belief that through values and ideals projections it would have been able to transform former Soviet republics into modern European states led the EU to sign the association agreements with Ukraine, Georgia and Moldova in 2014.

⁹ The referendums on the regions' independence took place between 23 and 27 September 2022, with annexation treaties signed by Russia on 30 September 2022. Cfr. KNOTT, E., "Russia's attempt to annex Kherson, Zaporizhzhia, Donetsk, and Luhansk has undermined its claim on Crimea", *London School of Economics*, 14 October 2022, available online. Russia officially recognised the independence of the Donetsk People's Republic and Luhansk People's Republic on 21 February 2022. Cfr. ROTH, A., BORGER, J., "Putin orders troops into eastern Ukraine on 'peacekeeping duties'", *The Guardian*, 21 February 2022, available online. At the time being, besides Russia, only Syria and North Korea recognizes the Russian annexation of those territories. Cfr. DEMIRDJIAN, N., "North Korea recognizes Donetsk and Luhansk regions as independent", *Jurist: Legal News and Commentary*, 13 July 2022, available online.

¹⁰ Cfr. PAUL, A., "War crimes and genocidal intent in the heart of Europe", *European Political Centre, (Commentary)* 27 June 2022, available online.

¹¹ See UNHCR, *Operational Data Portal. Ukraine Refugee Situation*, available online.

¹² Cfr. "A Strategic Compass for Security and Defence. For a European Union that protects its citizens, values and interests and contributes to international peace and security", *op.cit.*, p.17.

Probably the most disruptive element of the crisis from an economic viewpoint, the strategic manipulation of the energy sector to the EU's and world's detriment contributed to the fueling of an energetic crisis which intensified the gravity of the economic downturn whose structural character had in turn already been exacerbated by the effects of the pandemic¹³. The spread use of the expression "weaponization of energy"¹⁴ when reflecting on Russia's behavior towards the EU is self-explanatory if taking into consideration the large and disproportionate energetic dependence in place between the Russian Federation and the EU until the breakout of the Ukrainian war. Indeed, before February 2022 Russia was the major EU gas supplier, with 38% of EU natural gas intake being imported from Russia in 2021, and values that wandered between 40 and 45% in the period 2015-2020¹⁵.

Significantly, countries like Germany, Italy, and France were among the most dependent on Russian energetic supplies before the war breakout, importing respectively 49%, 46%, and 24% of their total energy intakes from Putin's country¹⁶. The reliance on Russia's natural gas was massive in countries as Finland, Latvia, Bulgaria, and Poland, with levels of dependence going from 94% to 40%¹⁷. As it is self-evident, this in all respects made the EU dependent from a third country for the resources needed for a wide range of fundamental actions, from power generation to industrial processes to households heating. A similar discourse can be made for oil dependence, as Russia has for long been the EU's main oil supplier¹⁸.

Moreover, issues directly related to the war, namely the Russian block of products such as maize, wheat, rapeseed and sunflower oil from Ukraine¹⁹, not only caused problems to the EU's food industry and to food affordability within the Union due to high levels of inflation, but also contributed to aggravating the humanitarian facet of the war causing severe food-scarcity in already-fragile areas of the world. From an economic viewpoint, what resulted was a situation of deep differentiation among the EU Member States, with some countries witnessing more severe

¹³ See European Investment Bank, "How bad is the Ukraine war for the European recovery?", Thematic Studies, 2022, available online; PISANI-FERRY, J., "The economic policy consequences of the war", *Bruegel Blog*, 8 March 2022, available online; SOLDAVINI, M., "Vivere Con Meno Energia. Come Ci Colpisce La Rappresaglia Russa", 8 August 2022, in "*Limes*" *Rivista Italiana di Geopolitica*, available online.

¹⁴ Cfr. European Council and Council of the European Union, "Infographic - Where does the EU's gas come from?", available online.

¹⁵ BORRELL, J., EEAS, "The war in Ukraine and its implications for the EU", 14 March 2022, available online. After Russia, Norway and Algeria were respectively the second and third major EU natural gas suppliers between 2015 and 2021, while *circa* 20% of the demand was satisfied by imports of liquified natural gas (LNG). See also "Can the EU do without Russian gas?", *Italian Institute for International Political Studies*, 14 Mar 2022, available online.

¹⁶ Data is extrapolated from the European Union Agency for the Cooperation of Energy Regulators and it is available in "Statista" website.

¹⁷ *ibid.*

¹⁸ Cfr. RACE, M., "EU divided over how to step away from Russian energy", *BBC*, 2 May 2022, available online. See also FEVEILE ADOLFSSEN, J., KUIK, F., LIS, E.M., and SCHULER, T., "The impact of the war in Ukraine on euro area energy markets", *EBC Economic Bulletin*, Issue 4, 2022, available online.

¹⁹ To consult data, see Statista, "Share of wheat imports from Russia and Ukraine in total wheat imports in selected African and least developed countries as of March 2022*", available online; Statista, "Share of imports from Russia and Ukraine in total imports of meslin and wheat as of June 2022, by country", available online.

economic repercussions on the basis of their dependence from Russia²⁰, leading the EU, for the third time in a row, in a situation of asymmetric shock²¹.

Politically speaking, the ongoing war and Russia's role in blowing it up left the regional and international order completely unsettled, with new equilibriums to be set as a more defined clash of ideals makes its comeback and fresh economic and geopolitical interests impose themselves in a newly hyper-dynamic era of international relations. Indeed, since the conflict breakout, the world has been looking feverish. Signature stances of certain western countries, namely neutrality and military non-alignment, were dropped in the space of a few months, with Finland and Sweden request to join NATO three months after the war breakout, and Denmark's decision in July 2022 to abolish *via* referendum its historical "defence opt-out", in place since 1993²². At the same time, for the first time in her history the EU financed the delivery of military equipment to a country under attack²³.

In this sense, it can be agreed with Kusa that the Russian invasion only reinforced the "block politics" which "polarize international relations, escalate political and ideological tensions, and contribute to further militarization"²⁴. Also, in an era where the economic relations of the EU are divided between two increasingly antagonist poles, that is, USA and China, the Ukrainian war has postponed any EU's stance on the matter by implicitly pushing it towards a reinforced cooperation with the more familiar US-led NATO in the framework of the Ukraine crisis. At the same time, China and Russia's sharing of ideals, coupled with the latter's current political isolation, will likely bring the two countries closer.

Generally speaking, it can be stated that power balances have been indefinitely rewritten, inasmuch the Russian military offensive served as "an important milestone in pushing the world closer to what seems to become a multipolar international system, in which several regional countries will gain prominence and play a more active role in world affairs"²⁵.

²⁰ REDEKER, N., "Same shock, different effects: EU Member States' exposure to the economic consequences of Putin's war", *Hertie School. Jaques Delors Center*, Policy Brief, 7 March 2022, available online

²¹ An asymmetric shock is a sudden change in economic conditions that affects some EU countries more than others. The war in Ukraine is indeed having a much greater impact on neighboring countries due to the influx of refugees and their heavy dependence on Russian gas. The previous asymmetric shocks were the 2008 economic crisis and the Eurozone crisis. Cfr. BORRELL, *op.cit.*

²² Cfr. EU Information Centre, "The Danish opt-outs from EU cooperation", 25 November 2022, available online.

²³ The EU financed the supply of weapons and equipment to the Ukrainian armed forces by providing a total of 3.1 billion euros for items like armored vehicles, tanks, heavy artillery and ammunition.

²⁴ Cfr. KUSA, I., "Russia-Ukraine War: Harbinger of a Global Shift A Perspective from Ukraine", in *Policy Perspectives*, Volume 19, Issue 1, 2022, p. 11.

²⁵ *ibid.* This is the case of countries as Turkey, Israel, and Poland, which are very active in shaping events in Ukraine and have played and play a role in facilitating Ukraine-Russia negotiations, being also named as potential security guarantors for Ukraine's future neutral status.

Russia, on its part, saw its political credibility crushed in the West under the weight of the responsibility to have brought war back to Europe, and its trustworthiness erased in its “near abroad”²⁶, with whom it will unlikely restore any kind of values-driven relationship²⁷. Indeed, the aggressive stance on Ukraine has caused other eastern European states to question Russia’s true intentions towards them²⁸, and lead Georgia and Moldova, as well as Ukraine itself, to apply for EU membership only a few days after the invasion²⁹. These concerns seems the most justified when previous Russia’s measures are taken into consideration, from the 2008 military aggression in Georgia to the illegal annexation of Crimea and the military intervention in Ukraine in 2014, passing through the *de facto* control over Belarus to the standing presence of Russian troops in protracted conflicts, including in the Republic of Moldova³⁰.

In this respect, it is noteworthy to note how the distancing of several post-soviet countries³¹ from Russia can be traced back to several years ago, and specifically to the establishment of an Eastern Partnership (EaP) following the 2009 Prague Eastern Partnership Summit³² which eventually led to the 2014 Association Agreements and Deep and Comprehensive Free Trade Areas (AA/DCFTAs) between the EU and Georgia, the Republic of Moldova and Ukraine, aimed at strengthening political association and economic integration through legislation and standards’ alignment to the EU’s³³. The Russian effort to avert such distancing, and therefore to try to preserve its sphere of influence, succeeded in the case of Armenia³⁴ but failed with Ukraine, where the attempt to push the country’s leadership not to sign an association agreement with the EU was the

²⁶ This is a term to refer to post-Soviet states.

²⁷ Such values were in a way reflected in the list of claims which were mentioned by President Putin as a pretext for waging war to Ukraine. Among them, the need to demilitarize Ukraine’s army, the need to defend the Russian-speaking population, and the belief by Russian elites that Ukraine is an “artificial state”.

²⁸ Cfr. KUSA, *op.cit.*, p. 11.

²⁹ Ukraine applied for EU membership on 28 February 2022, while Georgia and Moldova did so on 3 March 2022. Ukraine and Moldova have been recognized the status of candidate countries, while Georgia represents, together with Kosovo, a potential candidate country as it does not satisfy the EU adhesion requirements (so called “Copenhagen requisites”).

³⁰ Cfr. “A Strategic Compass for Security and Defence. For a European Union that protects its citizens, values and interests and contributes to international peace and security”, *op.cit.*, p.17.Indeed, especially since the start of the Ukrainian war, Moldovans have repeatedly called on Russians to withdraw their military presence in Transnistria, a pro-Russian region in Moldova which confines with Ukraine. The Russian military presence in the area dates back to 1992. See JARDAN, C., McGRATH, S., “Moldova intel chief: Russia could aim for breakaway region”, *Associate Press News*, 19 December 2022, available online.

³¹ The post-soviet area is made of the following countries: Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.

³² See Council of the European Union, *Joint Declaration of the Prague Eastern Partnership Summit*, Prague, 7 May 2009, available online.

³³ Also, they had the objective of improving the lives of citizens in a tangible way. A notable example is that sense has been the Visa liberalization that entered into force for Moldova in 2014 and for Georgia and Ukraine in 2017. For an analysis of the influence that western European values and ideals may – or may not – have had in past years on Russia itself, see DERIGLAZOVA, L., “How Much 'Europeanness' Remains in Contemporary Russia?”, in *Anthropological Journal of European Cultures*, Volume 26, Issue 1, *THEMATIC FOCUS: Que reste-t-il de nos amours? The Expectations of 1989–1991 Revisited*, 2017, pp. 75-97.

³⁴ In 2013 Russia prevented Armenia to sign an Association Agreement with the EU and made it join the Moscow-led Eurasian Customs Union, later the Eurasian Economic Union, instead. Cfr. MEISTER, *op.cit.*

trigger for the 2013–2014 Euromaidan demonstrations, Russia’s annexation of Crimea, and the war in Donbas³⁵.

In a similar framework, the EU’s decision³⁶ in June 2022 to grant Moldova and Ukraine the status of EU candidates country and Georgia that of potential candidate country, in response to the war in Ukraine, represents the formalization of the Union’s geopolitical competition with Russia³⁷. Generally speaking, it can be said that the war against Ukraine accelerates the disintegration of the post-Soviet space. This is also true with regard to the remaining share of post-soviet countries, where Russia sees its historical ability to provide authoritarian stability running out³⁸, therefore creating a void of power to be disputed between third powers and the EU to impose one or the other’s set of ideals and political model. Here, as in the other mentioned areas, the political stakes are truly high for the EU.

2. Challenges and opportunities

Generally speaking, it can be stated that in a decade already dotted with complex contingencies all the above poses a series of new challenges for the EU’s short, medium and long term agenda. On a security dimension, awareness emerged among the Member States on the necessity to shift “from a paradigm of crisis management operations abroad to an approach based on territorial defence and dissuasion”³⁹. The Russian aggression of Ukraine has made clear that the EU must equip itself with a stronger defence to be able to efficiently compete on a military and defensive viewpoint and promptly and effectively address direct military confrontations. Therefore, a further and more decisive and cohesive action of consolidation of the European security and defence policy must be embraced.

It is noteworthy to highlight, however, how important it is that such a defence program stems from sincere political efforts and leads to concrete actions for implementation. Indeed, in this authors’ opinion, the war corroborated that the time is really ripe to finally develop a stronger European defence. However, the way in which this objective will be pursued represents the true challenge for the EU. In a time when geopolitical coalitions will further polarize, the Member States

³⁵ Cfr. MEISTER, *op.cit.* During the summer of 2013, both Russia and Ukraine were suddenly alerted by the possibly adverse economic consequences of AA/DCFTA signature after details of the agreement became public. Russia started once more to implement countermeasures (and threatened with more), such as import restrictions from the EaP countries, Ukraine and Moldova. Cfr. HAVLIK, P., “Economic Consequences of the Ukraine Conflict”, *The Vienna Institute for International Economic Studies*, Policy Notes and Reports No. 14, November 2014, p. 1, available online.

³⁶ See *European Council meeting (23 and 24 June 2022) – Conclusions*, EUCO 24/22, Brussels, 24 June 2022, available online.

³⁷ Similarly, the establishment in October 2022 of a European Political Community reflected an attempt to cooperate more closely with European countries that do not support Russia in the current war. Cfr. MESITER, *op.cit.*

³⁸ This is the case of the South Caucasus since the 2020 Nagorno-Karabakh war between Armenia and Azerbaijan. There, Azerbaijan used its military superiority, supported by NATO member Turkey, to press Armenia into a so-called authoritarian peace. Cfr. MEISTER, *op.cit.*

³⁹ Cfr. SIMÓN, L., “European strategic autonomy and defence after Ukraine”, *Real Instituto Elcano*, 28 November 2022, p. 1, available online.

must unite themselves in the framework of their Union and closely work together to achieve the highest possible level of independence from third parties, especially in core areas such as defence, while still growing and deepening strategic partnerships with like-minded, values-sharing actors.

Awareness on the point emerged soon after the Russian invasion of Ukraine on the occasion of the Versailles Summit that gathered EU Heads of State and Government on 10 and 11 March 2022, and whose declaration tasked the Commission to come up with initiatives necessary to strengthen the European defence industrial and technological base⁴⁰. It goes without saying that industrial advancement represents a big part of EU's path towards defence independency. Indeed, the opinion is widely shared for which the strengthening of a solid European defensive industrial basis is unescapable for the achievement of a progressively independent European military and defensive action.

Among other things, one relevant aspect of achieving such independence will be the EU willingness and effort to become free, or at least less reliant, from NATO, that is from the US' aegis. Even if this sound like a utopia, the EU institutions are well-aware of this dependence and its weight on bilateral relations when declaring that “initiatives to foster defence cooperation also help reinforce a *fairer* Transatlantic burden-sharing and a more effective European *contribution* within NATO”⁴¹. Since, for the time being, it can be argued that NATO – and the United States as its most powerful member – plays once again the role of main guarantor of security in Europe in the current Ukrainian situation⁴², the EU must seek political and industrial independence to pursue a more active role as a global actor and big power in future contexts of crisis.

As someone has noted, the rise in military spending across the continent “is testament to the change that is taking place” in defensive matters⁴³. However, similar initiatives must be homogeneous within the EU, in a way to ensure the Union's capacity to back up each and every one of its Member States in times of crisis like the one we are witnessing. In the Commission's words, the EU must “invest together, better and in a European way”⁴⁴. At the same time, the Member States are called to act in a spirit of solidarity to strengthen the European integration

⁴⁰ European Council, “Informal meeting of the Heads of State or Government - Versailles Declaration 10 and 11 March 2022”, available online.

⁴¹ European Commission, *EU steps up action to strengthen EU defence capabilities, industrial and technological base: towards an EU framework for Joint defence procurement*, Press Release, 18 May 2022, available online. The dependence from USA is noticeable also from a political point of view, in particular is evident in the EU's leaders dialogue with Putin. Indeed, French President Emmanuel Macron has tried to fill the gap left by Merkel's leadership in the war, however without much success. And although the leaders of France and Germany still communicate with Putin, neither is really able to influence him, leaving the United States as the leader of Western countries – including European ones – in this war. Cfr. MEISTER, *op.cit.*

⁴² This led someone to say that “there is no security in Europe outside NATO anymore”. Cfr. MEISTER, *op.cit.*

⁴³ SIMÓN, *op.cit.*, p.1. for example, the UK, Italy and Japan are working on a joint project on the production of sophisticated military aircrafts, as well as to improve their military capacity by 2035. This was declared on the occasion of the Pontignano Conference (Convegno di Pontignano) held exceptionally in Rome on 8 and 9 February 2023.

⁴⁴ European Commission, *EU steps up action to strengthen EU defence capabilities, industrial and technological base: towards an EU framework for Joint defence procurement*, *op.cit.*

process, if only because their unity is their main relevant strength in a world made of great powers, which indeed are “great” from a territorial, demographic, military and economic point of view⁴⁵.

This argument is applicable to economy and politics, as well. In particular, that logic should have been implemented time ago in the energetic sector, where the Member States were called to reflect on their own faults in the disastrous repercussions the ongoing war is having on the EU economies. In fact, if energetic differentiation, and in particular the necessity to detach from Russia’s energetic supplies, has been representing an issue for the EU starting from way before February 2022, several Member States pursued a short-sighted – to say the least – strategy in dealing with Russia, often working towards the attainment of a national-oriented vision rather than the Union’s. Therefore, the EU failed in taking a clear stance towards the Russian Federation, this resulting in ambiguity and dependence in bilateral relations attributable to the disunity among Member States in handling cooperation with Putin in the wake of the 2014 Crimean events, after which the EU kept in place the imposed sanctions while avoiding actions that could have damaged major energy projects or economic cooperation⁴⁶.

Concerning energy, this applies especially to Germany, whose stance toward Russia since after the Cold War period was “dominated by the concept of a partnership for modernization”⁴⁷, based on the idea of transforming the country through economic interdependence and trade. Indeed, as Meister reports, even after the 2014 events in Ukraine, the German government agreed to sell several gas stores, including one of Europe’s biggest, to Russian gas giant *Gazprom* in 2015⁴⁸. While the authoritarian nature of the regime does not allow for a transparent analysis of the effects that such policy have had on a societal level⁴⁹, what is clear is that it did not prevent Russia to wage war. On the contrary, it led Putin to underestimate the extent of a European response precisely because of the energy and economic interests that big EU Member States had in his country in the run-up to 24 February 2022.

Concerning politics, as Tyushka fairly notes, disunity is to blame inasmuch the EU’s deterrence of Russia did fail well before the 2022 war, namely in 2008 on the occasion of the invasion of Georgia and in 2014 at the time of the events of the Crimean annexation and eastern Ukraine invasion⁵⁰. Indeed, in those occasions “the politics of ‘deep concerns’ and half-hearted sanctions

⁴⁵ Let us not forget that the EU hosts merely 9.78% of the total world population. Countries as China and India, on their part, hosts 18.47% and 17.7%. of total world’s population, and they will see their populations grow immensely in the coming years. Indeed, these countries will likely increase their power and influence around the globe by becoming demographic powers. See World Economic Forum, “These will be the world’s most populous countries by 2030”, 11 August 2022, available online.

⁴⁶ Cfr. MEISTER, *op.cit.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ This is however a matter of current study and analysis by several think-tanks.

⁵⁰ Cfr. TYUSHKA, A., “Made in Ukraine: The EU’s Emerging Real(ist) Power”, *Carnegie Europe*, 3 May 2022, available online.

defined the EU's stance on the violation of borders in the twenty-first century", providing Putin with a good excuse for having greatly miscalculated the outcome of the current military campaign in Ukraine. Overall, "the result has been the increase of dependencies and vulnerabilities at the EU's expenses"⁵¹. Following the same pattern, there is, to date, no common approach on how to deal with Russia in the future, with some Member States wanting to prevent a further escalation, and others resolute in rejecting negotiations and believing that only Russia's total defeat can put an end to the conflict.

From a political viewpoint, new "blocs" are re-emerging abruptly, in what has turned out to be an all-too-familiar war of narratives that polarize relations between democracies and authoritarian regimes. As stated above, this can be the case for the post-soviet region, where the EU imposes itself as a direct geopolitical competitor to other players – namely China, Iran, and Turkey – with undemocratic governance models and authoritarian methods of conflict management that will likely challenge Russia's role in the area. This pushes the EU to adopt a strategic policy towards that region, namely by enhancing European support for economic and political transformation through more engagement in security and regional conflicts in the Eastern neighborhood⁵². As it cannot be stressed enough, this implies a coordinated approach in identifying the *common* threats the Member States face as EU countries, a logic which is also applicable to other fields and areas of the world, namely Africa.

If the above challenges are all part of the implications brought on the EU by the events of the Ukrainian war, it must be stressed that they come with opportunities, in an equal way. This is why the Ukrainian conflict has been often labeled as a political test of historical importance for the EU. If the full-scale invasion of Ukraine unveiled the deep risks of failing to detect too deep bonds of interdependence with potentially threatening countries, and the dangerousness of un-cohesiveness at the EU level, the crisis that ensued paved the way for a renewed boost to the European integration process. This, if properly leveraged, will allow for a political strengthening to which factual measures will follow, as the EU committed itself to "a new level of ambition" in building a stronger Europe in defence, energy, economy and foreign policy.

Indeed, to date, the European machine has pretty much been activated, in particular through the adoption of restrictive measures, CFSP instruments that have contributed to weaken Putin's Russia from an economic, military, political, and moral point of view. These measures and the EU cohesiveness in adopting them will be the focus of the remainder of this chapter, whose aim is to try and provide an analysis of the effectiveness of the EU's response to the Russian aggression of

⁵¹ MEISTER, *op.cit.*

⁵² *ibid.*

Ukraine based on the fastness and cohesiveness with which the sanctions were adopted since February 2022.

3. EU response to Russia's invasion of Ukraine: the use of the CFSP instrument of sanctions

To date, nine packages of sanctions have been adopted by the EU to contrast the Russian war in Ukraine. The vastness of their scope and relative speed in their adoption led many to argue that the EU's response to this crisis has been "swift and unprecedented"⁵³, with the first package of sanctions agreed on 23 February, a day before the invasion began. As an important instrument of the Common Foreign and Security Policy, the analysis of the restrictive measures put into place following the Russian aggression of Ukraine seems relevant to the scope of this dissertation, inasmuch it provides us with the chance to reflect on the Union's action following a major global crisis, and in particular on the cohesiveness shown in such action.

To this end, a study of the general agreement achieved by the European Union in the adoption of the restrictive measures and gas price cap against Russia will be conducted to try to find a pattern between the use of unanimity and qualified majority voting within the Council. To do so, sanctions' legal basis and standard decision-making process will be outlined in next paragraphs, as well as a brief assessment of previous EU sanctions. This will lead to lastly explore the current sanctions' regime in the framework of the Ukrainian war with a focus on the adoption of a so called "price cap" on gas to counter the effects of the economic and energy crisis.

3.1. Sanctions under international law: an overview

Prior to proceed with the analysis of EU restrictive measures in the framework of the Ukrainian war, it can be useful to briefly delineate a general framework of sanctions under international law in order to better frame the full extent of the instrument. As Voynikov notes, "international law understands sanctions as coercive measures applied in case of refusal of a subject of international law to fulfill its international legal obligations"⁵⁴. In particular, the adoption of international sanctions is provided, that is, finds its legal basis, under Article 41 title VII of the UN Charter⁵⁵,

⁵³ BOSSE, G., "Values, rights, and changing interests: The EU's response to the war against Ukraine and the responsibility to protect Europeans", in *Contemporary Security Policy*, 2022, Volume 43, Issue 3, pp.531–54

⁵⁴ Cfr. VOYNIKOV, V. V., "EU Anti-Russian Sanctions (Restrictive Measures): Compliance with International Law", in *Herald of the Russian Academy of Sciences*, Volume 92, Supplement 7, 2022, pp. S636–S642. On sanctions under international law, see KUNZ, J., "Sanctions in International Law", in *American Journal of International Law*", Volume 54, Issue 2, 1960, p. 324-347; OSIEKE, E., "Sanctions in International Law: The Contributions of International Organizations", in *Netherlands International Law Review*, Volume 31, Issue 2, 1984, pp. 183-198; RUYSS, T., "Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework", in van den Herik, L., (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing, 2016.

⁵⁵ *ibid.* The article reads: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".

which interprets them as measures having the ultimate aim of maintaining or restoring international peace and security without involving the use of armed force.

Therefore, sanctions find their place among those measures allowed by international law for the peaceful settlement of disputes between states, as they are not considered as an act of belligerence or war. Precisely their ostensibly non-violent nature has made sanctions a key element in contemporary international relations and a central tool of the post-1945 legal order, as their massive use by states⁵⁷ and international organizations indistinctly clearly demonstrates⁵⁸.

Sanctions usefulness rests in the fact that they can be imposed against a state or a non-state actor that does not respect its international commitments thereby representing an international threat and can be applied in various areas such as diplomatic, economic, or cultural relations between states. In all these domains, the sanction's goal is to "modify the behavior of an agent, reduce its capacity for maneuver or weaken its position and formally and publicly denounce the agent whose behavior poses a threat to international peace and security"⁵⁹. They materialize in decisions ranging from arms embargoes to restrictions on trade, finance, and travel, as well as interruption of diplomatic relations. Importantly enough, sanctions may be unilateral or collective in their nature, meaning that they can be imposed by one state against another⁶⁰, or by a group of states in the framework of an international organization⁶¹: this latter is the case of sanctions adopted, among others, by the United Nations and the European Union⁶². At the same time, individual countries and international organizations can recur to autonomous sanctions, that is, measures which do not rest

⁵⁶ Under international law, the term "sanction" identifies measures taken within the framework of an international organization, such as those decided by the UN Security Council pursuant to Article 41 of the Charter. Instead, the categories of retaliation and countermeasure are used to justify decentralized reactions to the commission of an international offence.

⁵⁷ In the case of states, the most important species of self-protection are counter-measures. Counter-measures consist in the conduct of the injured State, which in itself would be unlawful, but which becomes lawful as a reaction to a wrongdoing of others. See CONFORTI, B., *Diritto internazionale*, XI edizione, Naples, Editoriale Scientifica, p. 426.

⁵⁸ Cfr. CHACHKO, E., HEATH, J., "A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield", *AJIL Unbound*, Issue 116, 2022, p. 137. For example, since 1966, 30 sanctions regimes have been established in the UN framework by its Security Council, namely in Southern Rhodesia, South Africa, the former Yugoslavia, Haiti, Iraq, Angola, Rwanda, Sierra Leone, Somalia and Eritrea, Eritrea and Ethiopia, Liberia, Democratic Republic of Congo, Côte d'Ivoire, Sudan, Lebanon, DPRK, Iran, Libya, Guinea-Bissau, CAR, Yemen, South Sudan and Mali, as well as against ISIL (Da'esh) and Al-Qaida and the Taliban. Cfr. United Nations Security Council, *DPPA 2022 Factsheet*, available online.

⁵⁹ Cfr. VOYNIKOV, *op.cit.*, p. S636.

⁶⁰ For example, the Russian intervention in Ukraine in March 2014 triggered sanctions from individual countries as the United States, Canada, Australia, New Zealand and Japan. Cfr. RUYSS, *op.cit.*

⁶¹ As Voynikov reports, according to Yu.N. Zhdanov, two groups of coercive measures can be found in modern international relations, depending on the subject of application. These qualifies as counter measures (horizontal measures), applied by states, and sanctions (vertical measures), established by international organizations. Cfr. VOYNIKOV, *op. cit.*, p. S636. See also ZHDANOV, Y.N., "Prinuditel'nye mery v mezhdunarodnom prave [The coercive measures in international law]", Doctoral (Law) Dissertation, 1999, Moscow.

⁶² In collective sanctions, the Member States of the international organization are required to implement the measure or measures within their national legal system

on a pre-existing Security Council resolution⁶³. This is the case of the sanctions undertaken by the EU following Russia's aggression of Ukraine.

3.2. Sanctions under EU law: an overview

3.2.1. Legal basis, decision making, and implementation

Sanctions, or restrictive measures in EU treaties' jargon, find their legal basis under Articles 29 TEU and 215 TFEU. Under Article 29 TEU, they represent one of the possible tools that can be employed to pursue the goals of the CFSP as set out under 21 TEU, being part of those "decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature". Being instruments of CFSP under Title V TEU, decisions on restrictive measures can be adopted by the Council of the EU acting unanimously⁶⁴.

The Council unanimous decision can be adopted following a proposal of the HR/VP or of a Member State, which must be duly examined by the Council working party responsible for the geographical region to which the targeted country belongs, or thematic working party, as well as, when required, by the Political and Security Committee (PSC). The last step before the approval through the Committee of Permanent Representatives⁶⁵ and the Council is the Foreign Relations Counsellors Working Group⁶⁶, where the representatives of EU Member States negotiate the specific and concrete terms of each and every restrictive measure. After the decision being unanimously adopted within the Council, the measures foreseen in that decision can be implemented at EU or at national level. This latter is the case for measures such as arms embargoes or restrictions on admission (travel restrictions), which can be implemented directly by the Member States, which are legally bound to act in conformity with CFSP Council Decisions⁶⁷.

On the other hand, other measures aimed at interrupting or reducing, in part or completely, economic relations with a third country, namely asset freezes, economic measures and financial sanctions, are not directly applicable but have to be implemented, under Article 215 TFEU, by means of a Regulation adopted by the Council acting by qualified majority on a joint proposal from the HR/VP and the Commission. The proposal must be thoroughly scrutinized by the relevant

⁶³ The main difference here is that in the case of sanctions adopted under article 41 UN Charter, a state that is part of the UN agreed to recognize the authority of the UN Security Council to take sanctions measures, meaning that it agreed that sanctions could potentially be imposed on the state itself. As Morviducci notes, the EU has made large use of autonomous sanctions. Cfr. MORVIDUCCI, C., *Le misure restrittive dell'Unione europea e il diritto internazionale: alcuni aspetti problematici*", in *Eurojus*, Volume 2, 2019, p. 78., available online.

⁶⁴ As *per* articles 24 and 31 TEU. See Chapter II.

⁶⁵ COREPER II is composed of the permanent representatives of each Member State, and prepares the work of 4 Council configurations, namely economic and financial affairs, foreign affairs, general affairs, and justice and home affairs.

⁶⁶ RELEX in its so called "Sanctions formation". In fact, the RELEX working party deals with legal, financial and institutional issues of the Common Foreign and Security Policy (CFSP) and its priorities include, among other topics, sanctions.

⁶⁷ Cfr. Council of the European Union, "Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the framework of the EU Common Foreign and Security Policy", 4 May 2018, p. 6. Indeed, under EU law a "decision" is binding on those to whom it is addressed, namely a EU country or an individual company, and is *directly applicable*. On the other hand, a "regulation" is a binding legislative act that must be applied in its entirety across the EU.

Council preparatory bodies and agreed upon by the COREPER II. The Parliament must then be informed by the Council on the adopted regulation.

Concerning regulations' implementation, the task to verify that the Member States have implemented the regulations in a proper and timely manner falls on the Commission. For effectiveness reasons, the Council's decision and regulation are adopted together and enter into force on the same date to produce the desired effects⁶⁸, however their function is different since if the decision declares the EU's position in relation to the restrictive measures to be taken, the regulation is a document enacting these measures at the EU level⁶⁹. Lastly, it is noteworthy to note that Council decisions imposing EU autonomous restrictive measures have a built-in "sunset clause"⁷⁰ for which they usually apply for 12 months, while the corresponding Council regulations are open-ended⁷¹. The sanctions included in the adopted decisions are from time to time revised by the Council, who can decide to amend, extend or temporarily suspend them at any time.

Besides primary law, the EU's restrictive measures' policy framework has evolved during the years and has been specified in further detail within three evolving EU internal documents outlining basic principles, guidelines, and best practices to follow in the use of sanctions⁷². Indeed, the document on the "Basic Principles on the Use of Restrictive Measures (Sanctions)", firstly made public in 2004 under Council's request, defines the use of sanctions as an important way to maintain and restore international peace and security in accordance with the principles of the UN Charter and of EU's CFSP⁷³. More than that, it expressively mentions the possibility for the Council to impose autonomous EU sanctions when deemed necessary, narrowing their scope to fields such as the fight to terrorism and proliferation of WMD, and the promotion of respect for human rights⁷⁴,

⁶⁸ This is particularly relevant in the case of asset freezes. Please refer to the useful infographic assembled by the EU on the matter, Council of the EU, "Infographic – The EU sanctions process explained", available online.

⁶⁹ VOYNIKOV, *op.cit.*, p. S638.

⁷⁰ Cfr. GIUMELLI, F., HOFFMANN, F., KSIĄŻCZAKOVÁ, A., "The when, what, where and why of European Union sanctions", *European Security*, Volume 30, Issue 1, 2021, p. 6.

⁷¹ European Council, "Adoption and review procedure for EU sanctions", available online.

⁷² These are the document on "Basic Principles on the Use of Restrictive Measures (Sanctions)", the "Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the framework of the EU Common Foreign and Security Policy", and the "The EU Best Practices for the Effective Implementation of Restrictive Measures".

⁷³ Indeed, as we saw above, the Council imposes sanctions also when mandated by the UN Security Council, or, for example, according to the terms of the Partnership Agreement between the African, Caribbean and Pacific Group of States (APC) and the European Communities, the so called "Cotonou Agreement", which allows the EU to suspend humanitarian aid and to change the conditions of the agreement when signatory states have poor human rights records. Cfr. GIUMELLI, F., "How EU sanctions work: A new narrative", in *Institute for Security Studies*, Chaillot Paper No. 129, May 2013, p. 9.

⁷⁴ On 7 December 2020, the Council adopted a decision and a regulation establishing a global human rights sanctions regime. Its relevance of the acts lies in the fact that they aim for the very first time at equipping the EU with a framework that will allow it "to target individuals, entities and bodies – including state and non-state actors – responsible for, involved in or associated with serious human rights violations and abuses worldwide, no matter where they occurred". See Official Journal of the European Union, *Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses*, 7 December 2020; Official Journal of the European Union, *Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses*, 7 December 2020.

democracy, the rule of law and good governance⁷⁵. It is noteworthy to note how the *Basic Principles* document called for the use within the EU of targeted sanctions, a notion which is opposed to that of “comprehensive”, or “non-selective” sanctions⁷⁶. The reason for this must be searched in the Union’s aim to “reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighboring countries”. An example of targeted sanctions are embargoes, visa bans, and the freezing of funds⁷⁷.

The two following documents, concerning respectively “Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the framework of the EU Common Foreign and Security Policy” and “EU Best Practices for the Effective Implementation of Restrictive Measures” dealt throughout the years with expanding the contents of the first one by providing technical guidelines and concrete recommendations. These are useful for the comprehension of the subject, however, the *Best Practices*, lastly updated in 2022, are to be considered non exhaustive and non-legally binding recommendations of a general nature for effective implementation of restrictive measures in accordance with applicable Union law and national legislation⁷⁸.

As one important aspect of sanctions is given by safeguards opposable to them, Article 275(2) TFEU recognizes the EU Court of Justice’s jurisdiction in monitoring compliance with Article 40 TEU and to rule on proceedings reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 Title V TEU. This is all the more relevant when thinking that under the same Article (275(1) TFEU) the Court has no jurisdiction with respect to the provisions relating to the CFSP nor with respect to acts adopted on the basis of those provisions. Lastly, along with the respect of human rights and fundamental freedoms, in particular due process, the right to an effective remedy, and the right to be informed, EU restrictive measures must always be proportionate to their objective, and they should always be drafted in light of the obligation that the EU has under Article 6(3) TEU to respect fundamental rights, “as guaranteed by the European Convention on Human Rights and

⁷⁵ Cfr. Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 7 June 2004, p. 2.

⁷⁶ Which hit indiscriminately the country to whom they are directed with potentially devastating effects for actors who are not the exact target of the measure, namely the overall population of a country. Cfr. ZHBANKOV, V.A., TRUBACHEVA, K.I., SLEPAK, V.Y., “Pravovoi rezhim ogranichitel’nykh mer v evropeiskom prave [The legal regime of restrictive measures in EU law]”, *Aktual’nye problemy rossiiskogo prava*, Issue 10, 2015, pp. 240–255.

⁷⁷ In some author’s opinion, the EU initially adhered to the concept of targeted sanctions, however it is moving away from it as shown by the imposition of a new wave of sanctions against Russia following the Russian February 2022 “military operation on the territory of Ukraine”. Indeed, Voynikov believes that the 2022 restrictive measures against Russia are non-selective in their nature as they are aimed at causing maximum damage to Russia and to its entire population. Therefore, they violate the preventive nature of the instrument inasmuch they are been employed as punitive measures. Cfr. VOYNIKOV, *op.cit.*, p. S638.

⁷⁸ Cfr. Council of the European Union, “Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures”, 27 June 2022, p. 3.

as they result from the constitutional traditions common to the Member States, as general principles of Union law”⁷⁹.

3.2.2 Summary track-record of EU cohesiveness in adopting sanctions

As Giumelli notes, sanctions have a long way back as EU’s diplomatic tools, with the first restrictive measures being imposed by the then EEC in the framework of the 1970s-1980s’ EPC⁸⁰. This was the case for sanctions adopted against the Soviet Union in 1981, Argentina in 1982, Myanmar in 1988, China in 1989⁸¹, and on the Democratic Republic of Congo and Nigeria in April and July of 1993. After that, the establishment of the CFSP with the entry into force of the Maastricht Treaty in November 1993 ultimately equipped the EU with the authority to impose restrictive measures⁸². From then forward, the use of the instrument continued, leading some to label it as a “privileged instrument” of the Union’s foreign policy⁸³.

The first post-Maastricht decision adopted by the EU was the arms embargo imposed on Sudan in the spring of 1994. Since then, the number of sanctions regimes managed simultaneously by the EU has gradually increased from a handful to being regularly more than 20 in the last decade. The forms of sanctions as well as their motivations changed over time, as well. Indeed, if arms embargoes were the most diffused type of sanctions in the first decade post-Maastricht, asset freezes and travel bans have replaced them being the most common forms throughout the last 15 years⁸⁴. Concerning reasons, if one principal pattern could not be identified in the first years after 1993, it eventually became clear that democracy promotion was the most frequent reason for the EU resorting to sanctions⁸⁵. While one thing that did not change over time was the geographical distribution of restrictive measures, with the EU imposing them “both in its own immediate vicinity and elsewhere”⁸⁶.

On the EU’s cohesiveness in adopting sanctions, a long list of bad examples lines up. One above all: in 2020 the EU for more than two months failed to agree on the legal text of the political decision to sanction Belarusian officials – among which Aleksander Lukashenko – accused of falsifying presidential poll on 9 August 2020 and perpetuating brutal repression and human rights abuses on peaceful protesters, due to the blocking action of a single member state, Cyprus, that wanted its demands satisfied for sanctions to be imposed on Turkish officials responsible for drilling in

⁷⁹ Cfr. “Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the framework of the EU Common Foreign and Security Policy”, *op.cit.*, p. 7.

⁸⁰ Please refer to Chapter I.

⁸¹ These were both cases of arms embargoes.

⁸² Cfr. GIUMELLI, F., HOFFMANN, F., KSIĄŻCZAKOVÁ, A., *op.cit.*, pp. 5-6.

⁸³ Cfr. *Fondation Robert Schuman, The Research and Study Centre on Europe*, “Sanctions, privileged instrument of European Foreign Policy”, 31 May 2021, available online.

⁸⁴ Cfr. GIUMELLI, F., HOFFMANN, F., KSIĄŻCZAKOVÁ, A., *op.cit.*, p. 17

⁸⁵ *ibid.*

⁸⁶ *ibid.*

contested waters in the eastern Mediterranean⁸⁷. Although EU sanctions against Belarus were ultimately adopted, the delay led some Member States and the UK to act independently⁸⁸, with way less impactful results and a diminished role for the EU as a global actor. Indeed, critics came also from inside the EU, with EU's HR/VP Josep Borrell declaring on that occasion that the Union's credibility was truly at stake, as its inability to take rapid and cohesive action against "Europe's last dictatorship"⁸⁹ stood in evident contrast to its ambition to be more geopolitical and its desire to cultivate greater strategic autonomy⁹⁰.

However, that was not the first time the EU failed to reach unanimity on a pressing foreign policy issue due to a Member State's veto, as previous failed unanimity attempts occurred, for example, in relation to China and Venezuela⁹¹. Indeed, both Greece and Hungary blocked EU statements to condemn Chinese and human rights violations⁹² in the past. Also, Italy blocked a statement on Venezuela⁹³, and Poland and Hungary prevented the European Union from putting out a statement at the EU-Arab summit in 2019⁹⁴. Similar events truly urged for the EU to build a stronger and more coherent foreign policy, one that is able to advance and defend its interests.

3.2.3. EU cohesiveness in adopting sanctions following 2022 Russia's invasion of Ukraine

As it has been argued by many, the EU was able to bring forward fast response to the threat posed by Russia following the invasion of Ukraine⁹⁵. This is particularly true with regards to the sanctions that the EU has been able to adopt to date against Russia, which have been labelled as "the most far-reaching measures the EU has ever imposed"⁹⁶. Indeed, from 23 February 2022 to 16 December 2023 the EU has adopted nine packages of sanctions, with a tenth being discussed at the time of writing. Such sanctions range from individual restrictive measures in the form of asset freezes and travel restrictions, to economic sanctions targeting the financial, trade, energy, transport, technology and defence sectors, bans on media outlet, as well as diplomatic measures and visa measures⁹⁷. Moreover, in the framework of the Ukrainian war the EU adopted sanction regimes

⁸⁷ BERGMANN, M., BRATTBERG, E., "Washington Should Push For A Stronger E.U. Foreign Policy", *War on the Rocks*, 15 October 2020, available online; PEEL, T., "Cyprus blocks EU sanctions on Belarus", *Financial Times*, 21 September 2020.

⁸⁸ *ibid.*

⁸⁹ Cfr. The Economist explains, "Why Belarus is called Europe's last dictatorship", *The Economist*, 25 May 2021, available online.

⁹⁰ *ibid.*

⁹¹ Cfr. LAȚICI, T., "Qualified majority voting in foreign and security policy. Pros and Cons", *European Parliamentary Research Service*, Briefing, January 2021, p. 1.

⁹² See EMMOTT, R., KOUTANTOUHTTIPS, A., "Greece blocks EU statement on China human rights at U.N.", *Reuters*, 18 June 2017, available online.

⁹³ See Reuters Staff, "Italy blocks EU statement on recognizing Venezuela's Guaido: sources", *Reuters*, 4 February 2019, available online.

⁹⁴ Cfr. BERGMANN, BRATTBERG, *op.cit.* See also RUSHEVA, V., "Hungary blocks joint EU-Arab League statement over migration issue", *New Europe*, 7 February 2019, available online.

⁹⁵ MESITER, *op.cit.*; CHACHKO, HEATH, *op.cit.*, p. 137.

⁹⁶ Cfr. MELIN, Y., "EU sanctions against Russia: a timeline", *ReedSmith*, 22 March 2022, available online.

⁹⁷ Indeed, in February 2022 the EU decided that Russian diplomats, other Russian officials, and business people may no longer benefit from visa facilitation provisions, which allowed privileged access from Russia to the EU. To do so, in September 2022 the Council adopted a decision that fully suspended the Visa Facilitation Agreement between the EU

towards Belarus and Iran as well, respectively in response to the first's involvement in the invasion of Ukraine and the latter's role as a drones supplier in the Russian aggression against Ukraine.

The newly introduced sanctions built on and broadened the scope of previous restrictive measures introduced by the EU against Russia on the occasion of the 2014 annexation of Crimea and Sevastopol and the deliberate destabilisation of Ukraine. The legal basis for the currently in place sanction regimes are four main decisions and their relative regulations, namely Council Decision 2014/145/CFSP and Council Regulation (EU) No 269/2014⁹⁸ “concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine”, with which the Council adopted and implemented individual restrictive measures; Council Decision 2014/512/CFSP and Council Regulation (EU) No 833/2014⁹⁹ “concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, establishing mainly economic sanctions”; Council Decision 2014/386/CFSP and Council Regulation (EU) No 692/2014¹⁰⁰ “concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol”; and Council Decision (CFSP) 2022/266 and Council Regulation (EU) 263/2022¹⁰¹ “concerning restrictive measures in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas”. This latter imposed a sanction regime with a focus on trade and investment in regard to the non-government controlled areas of Donetsk, Kherson, Luhansk and Zaporizhzhia oblasts of Ukraine¹⁰².

The extent of the contents of these implementing regulations is really wide, also by virtue of the fact that each of them has been constantly amended with further sectors and actors being addressed by the sanctions since the breakout of the war in 2022. It is noteworthy to briefly mention how the EU as a whole committed to the Ukrainian crisis through military assistance and financial aid, as well. Indeed, the EU has to date committed 3.6 billion in funds for military assistance, provided through the EPF to deliver both lethal equipment and nonlethal supplies¹⁰³. Concerning financial aid, according to estimates as of February 2023 the EU and its Member States, together

and Russia. Consequently, the general rules of the visa code now apply to Russian citizens only. Cfr. European Council, “EU restrictive measures against Russia over Ukraine (since 2014)”, available online.

⁹⁸ See Council of the European Union, “Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine”, 17 March 2014.

⁹⁹ Cfr. Council of the European Union, “Consolidated text: Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine”.

¹⁰⁰ See Official Journal of the European Union, “COUNCIL REGULATION (EU) No 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol”, 24 June 2014.

¹⁰¹ See Official Journal of the European Union, “COUNCIL REGULATION (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and the ordering of Russian armed forces into those areas”, 23 February 2022.

¹⁰² See European Commission, Sanctions adopted following Russia's military aggression against Ukraine,.

¹⁰³ Also, Member States' bilateral military support to Ukraine amounts to over €8 billion. Cfr. Congressional Research Service, “Russia's War Against Ukraine: European Union Responses and U.S.-EU Relations”, updated 6 February 2023, available online.

with the European financial institutions have collectively provided Ukraine with €37.8 billion in financial, humanitarian, and emergency assistance.

The adoption of the very first package of sanctions in the framework of the 2022 conflict in Ukraine occurred on 22 February 2022 and was coordinated between the EU, the US, UK and Canada, on the wake of President Putin's decision on 21 February 2022 to recognise the separatist-controlled eastern Ukraine regions of Donetsk and Luhansk as independent and following a subsequent Russian troops' deployment in the area. At the EU level, an emergency informal meeting of EU Foreign Affairs Ministers took place in the morning of 22 February, which discussed on the proposals for contents to include in the package. This latter was then adopted unanimously by the Council gathered in its foreign ministers formation and included individual sanctions against members of the Russian State Duma who supported the illegal recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts¹⁰⁴, restrictions on economic relations with the non-government controlled areas of the Donetsk and Luhansk oblasts, as well as restrictions on Russia's access to the EU's capital and financial markets and services¹⁰⁵.

Further sanctions' rounds then rapidly succeeded in EU general agreement with a second and third package being adopted at the end of February¹⁰⁶, including measures as the freezing of Putin and Sergey Lavrov's¹⁰⁷ assets, the imposition of further individual measures on Duma members, the cut of Russian access to the most important capital markets as well as the introduction of measures limiting the financial inflows from Russia to the EU. Moreover, the third package¹⁰⁸ included closure of EU airspace to all Russian aircraft, the prohibition on transactions with the Russian Central Bank, SWIFT¹⁰⁹ ban for seven Russian banks, as well as the suspension of broadcasting in the EU of two state-owned outlets¹¹⁰ and the prohibition on exports to Russia of dual-use goods and technology items.

Under the fourth to the seventh sanctions' rounds which succeeded between 15 March 2022 and 21 July 2022, targeted economic sanctions against individuals rose increasingly and restrictive measures escalated. In March, the prohibition to start new investments in the Russian energy sector, to export luxury goods to Russia, and to import materials as iron and steel from Russia were

¹⁰⁴ In particular, it involved all 351 members of the lower house of the Russian parliament who voted in favor of the recognition. Putin was not part of the sanctioned individual within the first round of EU sanctions. Cfr. BRZOZOWSKI, A., "EU's first batch of Russia sanctions to target 351 lawmakers, high-ranking officials, banks", *Euractiv*, 22 February 2022, available online.

¹⁰⁵ See Council of the EU, *EU adopts package of sanctions in response to Russian recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and sending of troops into the region*, Press release, 23 February 2022, available online.

¹⁰⁶ Respectively on 25 February and 28 February and 2 March 2022.

¹⁰⁷ Russian Minister for Foreign Affairs.

¹⁰⁸ See Council of the EU, *EU adopts new set of measures to respond to Russia's military aggression against Ukraine*, Press release, 28 February 2022, available online.

¹⁰⁹ Society for Worldwide Interbank Financial Telecommunication.

¹¹⁰ *Russia Today* and *Sputnik*.

established. In April, such prohibitions were extended on imports of Russian coal and other solid fossil fuels, as well as of wood, cement, seafood and liquor, to the closure of EU ports to all Russian vessels and the prohibition on Russian and Belarusian road transport operators from entering the EU.

On 3 June, the sixth package was adopted and extended sanctions to crude oil, refined petroleum products¹¹¹ and Russian-origin gold, SWIFT ban for additional Russian and Belarusian bank, the suspension of broadcasting in the EU for several Russian media outlets¹¹², as well as the addition of 65 individuals and 18 entities to the sanctions' list. This came with some obstruction on the part of some Member States, namely Hungary, which held up the sixth sanctions package for 26 days in order to secure an exemption from the oil embargo on Russia¹¹³, and then withheld agreement by refusing to include Orthodox Church Patriarch Kirill in the EU's sanctions listing¹¹⁴. Moreover, in September Hungary threatened to derail the six-month renewal of the whole EU sanctions package and demanded for three oligarchs to be removed from the listing of sanctions¹¹⁵. Moreover, the country vetoed a European proposal to ask the U.N. Human Rights Council for a special rapporteur on Russian human rights violations, blocking the Union's action and leading the 26 remaining Member States to call for the rapporteur through their national delegations¹¹⁶.

The eighth and ninth sanctions' packages were adopted on 6 October and 16 December and included, among other things, a price cap related to the maritime transport of Russian oil for third countries, additional restrictions on trade and services with Russia, as well as bans on exports of drone engines, dual-use goods and technology, and transactions with the Russian Regional Development Bank.

The description of the sanctions' contents is propaedeutic to the understanding of Russia's reaction to them. Indeed, it let us comprehend the truly broad extent to which the Russian government and economy have been subjected to sectoral isolationism by the EU. This resulted in a significant negative impact on the Russian Federation's economy. Indeed, according to the analyses of entities as the World Bank, the IMF, and the OECD, it is estimated that in 2022 Russia's GDP dropped by at least 2.2% in the best-case scenario and by up to 3.9% in the worst-case scenario, and is projected to shrink, potentially declining by 5.6% in 2023 according to a worst-

¹¹¹ With limited exceptions.

¹¹² To date, these are Sputnik, Russia Today, Rossiya RTR / RTR Planeta, Rossiya 24 / Russia 24, Rossiya 1, TV Centre International, NTV/NTV Mir, REN TV, Pervyi Kanal.

¹¹³ Cfr. RANKIN, J., "Hungary 'holding EU hostage' over sanctions on Russian oil", *The Guardian*, 16 May 2022; PREISS, I., "Is there any hope for implementing qualified majority voting in EU sanctions decisions?", *The Parliament*, 14 June 2022. The exemption was granted also to Slovakia, Czech Republic

¹¹⁴ Cfr. "Hungary stalls new EU sanctions on Russia: Diplomats", *Al Jazeera*, 2 June 2022.

¹¹⁵ JOZWIAK, R., "Sources Say Hungary Is Threatening To Block Some EU Sanctions On Russia If Three Oligarchs Are Not Spared", *RadioFreeEurope*, 6 September 2022.

¹¹⁶ Cfr. VELA, J.H., "Brussels Playbook: Hungary can-kicking — Michel's nuclear warning — Russia's Madonna vs. the war", *Politico*, 19 September 2022.

case scenario¹¹⁷. Moreover, bans on materials' imports and exports from and to Russia have had the desired effect as in 2022 Russia's trade in goods and services declined and will continue to do so in 2023. Lastly, a relevant figure on the economic situation in Russia is given by inflation, which reached the level of almost 14% in 2022 and is going to keep on high levels in 2023¹¹⁸.

4. Sanctions repercussions on the EU and the gas "price cap" response

Several factors contributed to generate the major energetic crisis that hit Europe starting from the first months of the Ukrainian war, with peaks in the summer of 2022. Indeed, the unprecedented reduction of natural gas supplies from Russia to the Member States¹¹⁹, as well as Russia's weaponization of gas supplies and market manipulation through intentional disruptions of gas flows¹²⁰ impacted greatly on the EU, leading to skyrocketing energy prices and to a situation of economic and social hardship in the Union that reached a new stage in the last weeks of August.

Indeed, the urgent necessity to change supply routes and find alternative gas supply sources resulted in congestion in the European gas infrastructure and contributed to price volatility and price hikes¹²¹. This in turn endangered the economy of the Union through a sustained high inflation caused by higher electricity prices, which undermined consumer purchasing power, and through raised costs of manufacturing, particularly in energy-intensive industry, which seriously threatened and continues to threaten the security of supply¹²². In particular, while markets had already reacted with a significant increase of gas prices since the start of the Russian aggression towards Ukraine, natural gas prices saw unprecedented peaks and reached all-time highs in the second half of August 2022.

To understand the extent of the situation suffice it to think that if prices over the previous decade were stable and comprised within a band between EUR 5MWh and EUR 35MWh, in late August "European natural gas prices reached levels which were 1000% higher than the average prices seen before in the Union", with levels hitting EUR 350/MWh without significant changes in traded volumes. As the European Commission reports, "month-ahead prices¹²³ spiked well above 200 €/MWh and reached its peak at almost 314 €/MWh on 26 August 2022". Moreover, for two consecutive weeks – from 18 August to 31 August 2022 – the month ahead price remained above

¹¹⁷ According to OECD. The World Bank estimates a decline by 3.3%, while the IMF forecasts a growth by 0.3% in 2023. Cfr. European Council, Infographic - Impact of sanctions on the Russian economy, available online.

¹¹⁸ Projections for 2023 vary from 5% according to the IMF, to 6.8% according to the OECD. Cfr. *ibid.*

¹¹⁹ The Russian share of pipeline gas imports out of the total EU gas imports decreased substantially from September 2021 to September 2022 passing from 41% to 9%.

¹²⁰ As the European Commission reports, "Russia has engaged in intentional disruptions and supply manipulations, affecting European natural gas prices and the equilibrium of price formation in energy markets. Russia's decision to cut-off supply through the Nord Stream 1 pipeline and disrupt supplies to several EU Member States, the sabotage of the Nord Stream 1 and 2 pipelines, and the necessity to find new supply sources and routes on short notice has brought this crisis to a new stage". Cfr. European Commission, Proposal for a COUNCIL REGULATION Establishing a market correction mechanism to protect citizens and the economy against excessively high prices, 22 November 2022, p. 1.

¹²¹ *ibid.*, p. 1.

¹²² *ibid.* p. 1.

¹²³ It refers to the price of electricity or gas for delivery next month. Cfr. *Energy Intelligence Centre*, "Energy Markets Jargon Buster", available online.

EUR 225/MWh, with the highest price levels (above EUR 265/MWh) being reached for 5 consecutive trading days, from 22 to 26 August 2022.

A similar situation led EU institutions to take action to fight unprecedented high gas prices in order to preserve to the maximum extent the European economy and its consumers. Initiatives in this sense were included in a first Commission's proposal released on 18 October 2022¹²⁴, which was backed by a second one on 22 November¹²⁵. This latter followed the call from the EU Leaders on 20 and 21 October¹²⁶ to urgently submit concrete decisions on additional measures¹²⁷ to tackle high energy prices, including a temporary dynamic price corridor on natural gas transactions to immediately limit episodes of excessive gas prices. Ultimately, after several Council meetings, this was achieved through the establishment of a "market correction mechanism to protect citizens and the economy against excessively high prices"¹²⁸, that is, a "price cap" on natural gas, which after months-long consultations under the Czech Presidency-in-office was adopted on 19 December and will have effect starting from 15 February 2023.

Without going into the technicalities of the measure, starting from mid-February the adopted market correction mechanism will be automatically activated if two "market correction" events occur, namely whenever the month-ahead price on the TTF¹²⁹ exceeds 180€/MWh for three working days, and whenever the month-ahead TTF price is 35€ higher than a reference price for liquefied natural gas LNG on global markets for the same three working days. The measure is designed to be temporary, as it will be in force for one year, and can be prolonged following a review due by November 2023. The measure was adopted through Council Regulation 2022/0393 and its relevance lies in the fact that it is directed at limiting episodes of excessively high gas prices in the

¹²⁴ See Articles 23 and 24, European Commission, "Proposal for a COUNCIL REGULATION. Enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks".

¹²⁵ See European Commission, "Proposal for a COUNCIL REGULATION Establishing a market correction mechanism to protect citizens and the economy against excessively high prices". According to this proposal, which was not agreed upon by the Member States, the market correction mechanism should have been activated in the case of two "market correction" events, namely (a) if the front-month TTF derivative settlement price exceeded EUR 275 for two weeks, and (b) if the TTF European Gas Spot Index as published by the European Energy Exchange (EEX) was EUR 58 higher than the reference price during the last 10 trading days before the end of the same two weeks.

¹²⁶ See European Council, "European Council conclusions on energy and economy, 20 October 2022", Press release, 21 October 2022, available online.

¹²⁷ In Spring 2022 the Commission expanded its Energy Prices Toolbox from October 2021 with the Communication on short-term market interventions and long-term improvements to the electricity market design and the REPowerEU Plan. Then, it proposed new minimum gas storage obligations and gas demand reduction targets to ease the balance between supply and demand in Europe, proposals which were swiftly adopted by the Member States before the summer. Moreover, in September, following price increases over the summer, the Commission rapidly tackled the situation by proposing additional emergency measures to reduce electricity demand and capture unexpected energy sector profits to distribute more revenues to citizens and industry. Cfr. *ibid.*

¹²⁸ See Council of the European Union, "Proposal for a COUNCIL REGULATION Establishing a market correction mechanism to protect citizens and the economy against excessively high prices", Brussels, 19 December 2022, available online. This stemmed from the original 22 November Commission's proposal, however it modifies it as it places the "cap" over which the price will not be accepted at 180 rather than 275 Euros.

¹²⁹ Title Transfer Facility. This is a pricing location within the Netherlands which has become the most liquid pricing location in Europe. As such, it often serves as a pricing proxy for the overall European LNG import market.

European Union, which do not reflect world market prices but are given by the situation of energetic instability within the Union and abroad.

The gas price cap measure finds its legal basis in Article 122 TFEU¹³⁰, and as such it was adopted by a Qualified Majority of EU Member States. In the light of the events of September-December 2022, it seems appropriate to state that decision on price cap, contrarily to other sanctions measures which were described above, was not an easy one to take. Indeed, discussions on the instrument were taken from September¹³¹ on for almost three months, with negotiations reaching an end only on 19 December 2022, when it was clear that no further compromise would have been reached among the Member States. In particular, the price cap negotiations confirmed one habit of the Union according to which consensus should be reached among the Member States for a decision to be adopted, even when not foreseen by the Treaties.

Therefore, after several rounds of discussions, and even when the necessary “qualified majority coalition” eventually took shape, discussions in the Council were brought forward by the Czech Presidency in the effort to reach a consensus among the Member States, a praxis indeed widely adopted within European negotiations¹³². In the framework of the gas price cap discussions, if at the beginning wider differences existed, the situation stabilized on four main opposing countries emerging in the negotiations, namely Germany, Hungary, the Netherlands and Austria. In analyzing these countries’ behaviors, it can be argued that the gas price cap measure represented a real test for unity for the EU, with some richer and better-equipped major industrial and economic EU powers which did not hesitate to recur to separate measures to safeguard their national interests.

This is true in the case of Germany, with Chancellor Olaf Scholz’s proposal on 29 September 2022 to launch a national shield equipped with 200 billion euros to support German households and businesses by reducing energy costs. The measure, which was eventually approved on 18 October, was the proof of a national-oriented mindset governing EU Member States’ conducts in times of crisis, and was criticized by many within the EU as a “go-it-alone plan” and a solo breakaway¹³³ with the potential to “break up the Eurozone”¹³⁴ and skew the bloc’s internal market by giving German businesses access to cheaper energy than other states¹³⁵. Therefore, at the beginning of October, Germany was among the main countries against the price cap due to concerns

¹³⁰ Which reads “Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy”.

¹³¹ See European Council, “Extraordinary Transport, Telecommunications and Energy Council (Energy), 30 September 2022”, Press Release, available online.

¹³² This concept will be developed in Chapter IV.

¹³³ Cfr. Redazione, “L’Europa può ancora unirsi sul tetto al prezzo del gas?”, *QualeEnergia.it*, 3 ottobre 2022, available online.

¹³⁴ MALINGRE, V., “Germany’s energy package sparks a wave of criticism in Europe”, *Le Monde*, 5 October 2022, available online.

¹³⁵ Cfr. FIEDLER, T., “German parliament approves €200B energy relief plan”, *Politico*, 21 October 2022, available online.

that such a measure could have led gas suppliers to flee to markets with higher prices, resulting in a consequent shortage of volumes for the German market, a country characterized by an historic natural gas demand. In the end, it was thanks to guarantees¹³⁶ against the risk of deficiencies in the supplies, as well as to the awareness that a qualified majority would have formed either with or without her, that Germany sided with most EU countries in agreeing on the gas price cap.

On the contrary, Hungary strongly opposed the instrument since the very beginning of the consultations and until their very end, slowing its adoption and prolonging the negotiations as the Czech Presidency of the Council hoped for a unanimous agreement to be reached on the matter. Indeed, according to a statement of the Hungarian Foreign and Trade Minister Péter Szijjárt, Hungary would have opposed the introduction of a price cap on gas under any circumstances, deeming it as a “harmful, dangerous, and completely unnecessary measure”, this being backed by the fact that the continent managed to carry on without a price cap since August without stumbling in any major negative repercussion¹³⁷. Accordingly, Austria and Netherlands chose the way of abstention¹³⁸, which in a vote to be taken by qualified majority corresponds to a negative vote.

Overall, whereas the EU proved to be able to take swift and decisive action on sanctions, some exceptions may be noted and add themselves to the long list of precedents in which singular countries were capable to block the Union’s action due to their individual right to oppose veto. In the case of sanctions against the Russian invasion of Ukraine occurred on 24 February 2022, Hungary acted as the main opponent to the measures, also due to the country’s direct links with the Russian government. At the same time, problems were recorded for the approval of the price cap measure on gas, as well. Indeed, this latter had to wait almost a months to be finally approved. However, this is all the more curious if considering that unanimity was not even required for its regulation to be adopted, contrarily to sanctions where unanimous agreement is necessary. Indeed, it is counter-intuitive to think that it is precisely this quest for consensus at all cost can lead to those exact deadlocks that many within the EU wish to abolish. Interestingly enough, this confirms the data for which within the EU at least 80% of laws that could be passed under QMV instead get

¹³⁶ The Council regulation was drafted in a way for which the market correction mechanism contains a built-in instrument “to suspend, based on objective criteria, the dynamic safety ceiling immediately and at any time if it were to lead to serious market disturbances, affecting security of supply and intra-EU flows. (...) In such cases, the Commission should take a decision to suspend the market correction mechanism by means of an implementing decision. Considering the need to react swiftly, it should not be required to act in accordance with a comitology procedure”. Cfr. “Proposal for a COUNCIL REGULATION Establishing a market correction mechanism to protect citizens and the economy against excessively high prices”, *op.cit.*, p. 19.

¹³⁷ On the search for unanimous agreement and the length of the negotiations, Szijjárt commented how “the fact that although there is a legislative majority for the gas cap, they [the Czech Presidency] dare not propose it as a ballot initiative clearly shows that they are trying to build a broad consensus around it so that responsibility is shared. And when it turns out to have been a completely unnecessary, dangerous, damaging measure for the whole of Europe, then everyone should be held responsible”. Cfr. GENOVESE, V., “Accordo in extremis. Come funzionerà il tetto al prezzo del gas dell’Unione europea”, *Linkiesta*, 20 December 2022, available Online.

¹³⁸ TAYLOR, K., STUART LEESON, S., “Austrians, Dutch abstain from gas price cap vote”, *EURACTIV.com*, 20 December 2022, online.

passed completely without opposition¹³⁹. This is true inasmuch qualified majority exists to simplify and fasten decisions, and when foresaw by the Treaties, it should be implemented. This contradiction lies at the core of decision making in the EU, and in particular in decision making on issues which are part of the core of state sovereignty, such as CFSP and CSDP. The next chapter will try to sketch an outline of the debate on the matter and will try to identify some main calls for QMV extension in the framework of CFSP, as well as some objections that are often opposed to them.

¹³⁹ On the matter, see TSEBELIS, G., "Bridging qualified majority and unanimity decision-making in the EU", *IHS Political Science Series, Working Paper 132*, February 2013; NOVAK, S., "Qualified majority voting from the Single European Act to present day: an unexpected permanence", *Notre Europe*; NOVAK, S., "The Silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union", *Journal of Common Market Studies*, 29 July 2013.

CHAPTER IV

The state of the debate and proposals for a more effective European external action by extending QMV in CFSP/CSDP

1. An overview of the debate

As we got to see throughout the first chapter of this dissertation, the European integration process has been riddled with obstacles that the Member States managed through time to overcome, more or less cohesively, through compromise and downsizing. As a matter of fact, since the very beginning of the integration process, the initial ambition to build a European Defence Community was abandoned and its potential redirected, albeit impoverished¹, to economic cooperation, a domain in which it then stabilized². For a long time, and in particular until 1992, foreign policy and its defence dimension were not included in the institutional structure of the European Communities.

However, when they did, EU Member States accurately kept them behind a robust intergovernmental door, guarded by unanimity, under which, to date, they largely remained³. Indeed, whereas since the entry into force of the Single European Act QMV was firstly introduced and progressively extended, out of evident necessities – enlargement, to name one –, to most of the areas of Union's competence, certain key domains pertaining to the core areas of national sovereignty remained dependent on the unanimous agreement of the Member States. Among these, issues falling within CFSP/CSDP⁴. As seen in Chapter II, if some elements of flexibility do exist under the Treaties that permit to derogate from unanimity to QMV in CFSP/CSDP matters, they – deliberately – have never or rarely been recurred to.

Over the years the existing unanimous decision-making mechanism unveiled its fallacies in several occasions where the Union was called to provide a smooth and decisive response on foreign policy matters of international strategic relevance, namely human rights protection, political statements' adoption, sanctions' adoption, or the beginning of CSDP missions⁵. Since 2016, at least

¹ Personal opinion of the author. If foreign policy had become an area of cooperation already under the Treaties of Rome, the European integration process would have likely progressed further to this day, as national foreign policies would have converged sooner.

² Firstly, under the ECSC and then under the EEC.

³ Naturally, with some exceptions represented by the flexibility elements which were analysed on Chapter II.

⁴ As stated in Article 31(1) TEU.

⁵ To cite a few recent occasions, in June 2017 the EU could not adopt a statement at the United Nations Human Rights Council in Geneva concerning China's human rights records due to Greece's opposition. It was the first time that the EU failed to make any statement at the UN Human Rights Council. Moreover, in the summer 2017 unanimity voting blocked the adoption of targeted EU restrictive measures against Venezuela following the undermining of the democratically elected National Assembly. Measures were finally lately adopted in autumn 2017, only after the situation had further deteriorated. Also, unanimity rules have delayed or prevented agreement on the persons and entities to be listed under existing EU sanctions regimes. Furthermore, in some cases, unanimity voting rules have been used as a bargaining tool. This happened in 2018, when one Member State blocked the extension of an EU civilian mission in the Sahel until another Member State dropped its reservations on a separate mission to Iraq. Cfr. European Commission, *Qualified majority voting: a tool to make Europe's Foreign and Security Policy more effective*, 12 September 2018, available online.

eight EU Member States used their right to veto to block or stall CFSP/CSDP decisions⁶, producing deadlocks that have been detrimental to the Union's reputation, but most importantly to its ability to act swiftly on major issues on the international table. The result was that far too many times the unanimity requirement resulted in inaction and collective silence on the EU's side, or, in the best scenarios, in late compromises being agreed among the member States on the basis of a minimum common political denominator. In this sense, some scholar has fairly argued that the "position of the CFSP in the constitutional order is the most obvious area where stated aims lack the legal structures to bring about effective supranational policies", given that "if the EU is to become a successful global actor, one would expect its foreign policy and external relations to be similarly built on supranational law"⁷.

Moreover, the decision-making mechanism that applies to CFSP/CSDP proves to now be unmotivated apart from the Member States desire to maintain their national sovereignty. Indeed, with the increased "normalization" of CFSP⁸, that is, the further integration of CFSP and other external policies⁹, European foreign policy lost its character of exceptionality, making it unacceptable for its rules to obstruct the respect of one of the key obligations of the Union, that is, to act in a consistent manner¹⁰. Also, in a time when a strong and coherent foreign policy of the Union is perhaps more necessary than ever, it has become less acceptable when Member States block CFSP decisions for the 'wrong' reasons¹¹. As a matter of fact, far too many times Member States block the decision-making process for reasons not related to the specific issue at stake, using their veto power as a leverage to gain something in exchange from the Union, from another Member State or from a third country¹². In general, unanimity loses its utility inasmuch it discourages the Member states from seeking a constructive compromise, which is rather pursued out of necessity when deciding by QMV¹³.

Objectively invalidating the EU smooth and decisive action in international fora, from now and then the ineffectiveness of the mechanism resurfaced from the official circles of the EU to draw the

⁶ Hungary, Greece, Czechia, Romania, Italy, France, Cyprus, Poland. Cfr. KOENIG, N., "Towards QMV in EU Foreign Policy. Different Paths at Multiple Speeds", *Hertie School, Jaques Delors Centre*, Policy Brief, 14 October 2022, p. 3.

⁷ Cfr. CARDWELL, P., "On 'Ring-Fencing' the Common Foreign and Security Policy in the Legal Order of the European Union", in *Northern Ireland Legal Quarterly*, Volume 64, Issue 4, 2015, pp. 443-445.

⁸ On the point see WESSEL, R.A., "Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis", in KILPATRICK, C., SCOTT, J., (eds), *Contemporary Challenges to EU Legality, Collected Courses of the Academy of European Law*, Oxford University Press, 2021, pp. 71-99.

⁹ As Cardwell notes, the foreign policy the EU has committed itself to forge is unlikely to rely only on the CFSP, but inevitably depends on the myriad of other competences under the Treaties. Cfr. CARDWELL, *op.cit.*, p. 444.

¹⁰ POMORSKA, K., WESSEL, R.A., "Editorial: Qualified Majority Voting in CFSP: A Solution to the Wrong Problem?", in *European Foreign Affairs Review*, Volume 26, Issue 3, 2021, pp. 351 - 358.

¹¹ Cfr. *ibid.*, p. 352.

¹² Namely, in 2020 Cyprus blocked sanctions on Belarus as a leverage to obtain sanctions' imposition by the EU on Turkey. Cfr. DAVENTRY, M., "Cyprus 'holding up' EU sanctions on Belarus over bloc's stance on Turkey", *Euronews*, 18 September 2020.

¹³ European Commission, Communication From The Commission To The European Council, The European Parliament And The Council, *A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy*, COM(2018) 647 final, 12 September 2018.

attention of the European public opinion. As it will be seen in the following paragraphs, this occurred almost continuously starting from the Juncker Presidency of the Commission, back in 2017, when the topic was thoroughly addressed and discussed¹⁴, although without producing any practical outcome. In very recent times the debate has been revived and taken to the next level through the ambitious proposals of the Conference on the Future of Europe (CoFoE)¹⁵, thus demonstrating the European citizens' eagerness for a more cohesive and responsive Union on the international scene. This happened almost concurrently with the breakout of the Ukrainian war. Ultimately, the discourse on a shift from a decision-making by unanimity to one by QMV in CFSP/CSDP gained momentum following Russia's invasion of Ukraine on 24 February 2022, and lies at the very core of the current European debate. Explanations for this are multiple.

In the first place, the EU now find itself confronted with a truly unprecedented crisis, which changed the "rules of the game" for the foreseeable future inasmuch a great power decided to recur to armed attack to achieve territorial annexation at the very borders of the Union. Indeed, Russia's action represent not only an unprovoked attack on a sovereign country standing up for its rights and its democracy, but consists in "the biggest challenge to Europe's security order since the end of World War II"¹⁶, putting at stake the very principles upon which international relations are built, not least those of the UN Charter and the Helsinki Final Act¹⁷. A challenge of this gravity compelled the EU to act immediately in the past months through the adoption of severe sanctions, which under the Treaties required the agreement of every Member State to be passed.

A synergy was to some extent achieved, with many labeling the Union's action in the immediate aftermath of the events as "unprecedented" in terms of support provided and unity shown. Still, some exceptions, such as Hungary's non-constructive attitude, led many to realize how in urgent circumstances the EU's action cannot afford to be blocked by the egoistic veto of a single Member State. Therefore, the war in Ukraine shows just how detrimental the unanimity requirement is to the EU's capacity to act¹⁸. A rapid and effective decision-making is proving to be the ultimate yardstick for the Union's action in the framework of the current crisis inasmuch it dictates the promptness and effectiveness of such action, and, by extension, the relevance of the EU as a political actor within the international system.

In the second place, Russia's invasion of Ukraine accelerates the widening of the integration process by drawing nearer a further enlargement of the EU and making it a realistic option. This is

¹⁴ European Commission, *State of the Union Address by President Juncker*, Brussels, 13 September 2017.

¹⁵ Council of the European Union, *Conference on the Future of Europe - Proposals and related specific measures contained in the report on the final outcome of the Conference on the Future of Europe: Preliminary technical assessment*, 10 June 2022.

¹⁶ BORRELL, J., "Europe in the Interregnum: our geopolitical awakening after Ukraine", *EEAS*, 24 March 2022, available online.

¹⁷ KOENIG, *op.cit.*, p. 4.

¹⁸ *ibid.*

true as Ukraine, Georgia and Moldova applied for EU membership in the days immediately following the attack. Evidently, an enlarged European Union would necessarily require a revision of the mechanisms that govern it, including decision making¹⁹. This would require contemplating a shift to QMV in key-areas of action such as the CFSP and the CSDP, in order to avoid paralyses in a Union made of 30 or more²⁰ Member States with very different demographic compositions. In a similar context, as Koenig fairly notes, the balance between deepening and widening the European integration process will undoubtedly shape the debate on the EU's future during the months and years to come²¹.

A third reason for which the debate on revising the decision-making mechanisms in CFSP/CSDP is no longer delayable is that the Conference on the Future of Europe (CoFoE) ultimately put the issue at the top of the EU's reform agenda, as the European Parliament formal call for a revision of the Treaties widely demonstrates²². The relevance of the Conference's proposals lies in their laudable audacity, as well as in the fact that the CoFoE was an experiment in participatory democracy, meaning that its outcomes represent nothing less than European's hopes for the future. Therefore, the results produced by a similar experiment cannot be ignored and must be credited the worth they deserve, in particular in the wake of the debate around the democratic deficit of the Union²³. Thus, on the citizens' part, there is an expectation that the EU will follow up on the preferences they expressed in the Conference.

Apart from the European public opinion, calls for a shift from unanimity to QMV came from many actors over the last few years. As it will be explored in the following paragraphs, strong statements on the need to finally abandon unanimity in CFSP have come from European institutions, in particular the Commission and the Parliament, as well as from influential European and national leaders²⁴. In particular, the Commission and the Parliament have been at the front row of the debate for several years, supporting an easing of the decision-making process in those areas that are still governed by unanimity in order to make the EU more prepared for the challenges of the future.

Between 2018 and 2019 the Commission, then presided by Jean Claude Juncker, called for actions to be taken on the matter and a simplification of decision-making processes in all areas still

¹⁹ CVIJIC, S., NECHEV, Z., "Without qualified majority voting EU enlargement has no future", in *Euractiv*, 22 June 2022.

²⁰ That event implies that the accession process for the states of the Western Balkans is being revived, as well. See MINTEL, J., VON ONDARZA, N., "More EU Decisions by Qualified Majority Voting – but How? Legal and political options for extending qualified majority voting", *SWP Comment*, No. 61, October 2022.

²¹ KOENIG, *op.cit.*

²² European Parliament, *Parliament activates process to change EU Treaties*, Press Release, 9 June 2022.

²³ See ROSIGNOLI, F., "Il deficit democratico dell'Europa. Due punti di vista", in *Nomos: Le Attualità Nel Diritto*, Issue 2, 2014, p. 1-9; MAJONE, G., "Deficit democratico, istituzioni non maggioritarie ed il paradosso dell'integrazione europea", in *Stato e Mercato*, Volume 67, April 2003, pp. 3-38.

²⁴ DRACHENBERG, R., 'This is Europe' debate in the European Parliament: Speech by Mario Draghi, Prime Minister of Italy, 3 May 2022", *European Parliamentary Research Service*, May 2022.

resting under the unanimity rule, from taxation to CFSP. In the Commission's idea, this could have initially been done without necessarily going through a revision of the Treaties, but by simply deciding to fully exploit the potential of flexibilities instruments already envisaged in them, namely passerelle clauses, constructive abstention, and enhanced cooperation – fully-fledged “lost treasures”²⁵ of the EU Treaties. The concept was often reiterated, with Juncker labelling QMV as the tool to make Europe's Foreign and Security Policy more effective²⁶. In particular, he shared the opinion that precisely the “compulsive need” for unanimity concurred to keep the Union from being able to act credibly on the global stage and proposed a gradual transition to be started by extending qualified majority voting at least to certain specific areas of CFSP²⁷.

The quest was then inherited and relaunched by the following Commission Presidency, which started her work back in 2019. In her first State of the Union speech, Commission President Ursula von der Leyen invited the States to be courageous and to embrace the proposal of introducing QMV in decisions concerning “at least”²⁸ in human rights and sanctions, as well as the achievement of a more “geopolitical EU”. Also, she asked the HR/VP Josep Borrell to explore this idea²⁹. The discussion was then echoed by the leaders of France and Germany in their 2018 Meseberg Declaration³⁰, and strongly backed by the Parliament, whose position has been very clear over the past decade. Already in 2013, the European Parliament urged for an expansion of the domains under QMV in the context of CFSP/CSDP³¹. More importantly, following the outcomes of the CoFoE, the Assembly has seized the moment and launched a formal call to set up a Convention for a revision of the Treaties.

On the other end of the spectrum, these calls have been opposed and damped by several skeptical Member States, and by the Council of the EU. Indeed, Council President Charles Michel has often openly spoken against the usefulness of a potential QMV extensions in the fields of CFSP

²⁵ With reference to their meagre use during the years, Juncker defined them a “lost treasure” of the Treaties. Cfr *State of the Union 2018*.

²⁶ Cfr. European Commission, Communication From The Commission To The European Council, The European Parliament And The Council, “A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy, *cit.*”

²⁷ European Commission, *Qualified majority voting: a tool to make Europe's Foreign and Security Policy more effective, cit.*

²⁸ “But what holds us back? Why are even simple statements on EU values delayed, watered down or held hostage for other motives? When Member States say Europe is too slow, I say to them be courageous and finally move to QMV – at least on human rights and sanctions implementation”. Cfr. European Commission, State of the Union Address by President von der Leyen at the European Parliament Plenary, Brussels, 16 September 2020.

²⁹ She did so in her mission letter to Borrell. “To be a global leader, the Union needs to take decisions in a faster and more efficient way. We must overcome unanimity constraints that hamper our foreign policy. When putting forward proposals, you should seek to use the clauses in the Treaties that allow certain decisions on the common foreign and security policy to be adopted by qualified majority voting”. European Commission, “Ursula von der Leyen. President of the European Commission. Mission letter to Josep Borrell - High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission”, 1 December 2019, available online.

³⁰ Meseberg Declaration, Renewing Europe's Promises of Security and Prosperity, A joint Franco-German declaration adopted during the Franco-German Council of Ministers, which took place 19 June 2018 in Meseberg, Germany.

³¹ See European Parliament, *European Parliament recommendation to the High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the European Commission, to the Council and to the Commission of 13 June 2013 on the 2013 review of the organisation and the functioning of the EEAS*, Strasbourg, 13 June 2013.

and CSDP. Moreover, already on the eve of the beginning of the works of CoFoE, the Council declared in its preliminary contributions to the initiative that the experiment should not have produced or led to a revision of the Treaties, by stating it did not “fall within the scope of Article 48 TEU”³². Similarly, following the publication of the final proposals of the Conference, a group of thirteen Member States discouraged any revision of the Treaty on the premises of the CoFoE results³³.

On this point, it is noteworthy to highlight that deep differences exist on the feasibility of a Treaties’ revision, as well as on the domains that could – or not – be the object of such revision, namely QMV extension to CFSP/CSDP. This is well shown by the fact that the thirteen’s stance was opposed by a coalition of 6 different Member States this time calling for the implementation of the proposals of the CoFoE³⁴.

Having outlined a general framework of the situation, the chapter will now try to unwind the state of the debate on extending QMV to CFSP and CSDP. In particular, it will do so by briefly exploring the available legal avenues to switch from unanimity to QMV in the Treaties, whose functioning was thoroughly explored in the course of Chapter II of this analysis. It will then try to outline the positions of the main involved actors in the debate, namely European citizens, Member States and institutions. Their proposals on how to pursue an extension of QMV in CFSP/CSDP will be analysed, as well. Lastly, a reflection will be paid to the advantages and disadvantages that an extension of QMV to CFSP/CSDP would entail for the Union and its actors.

2. Legal avenues for extending QMV in CFSP/CSDP

2.1. Review of the Treaties

One possible avenue to achieve an extension of QMV to CFSP/CSDP matters is through a review of the treaties under the ordinary revision procedure³⁵. In fact, even if a faster “simplified revision procedure” is envisaged by the Treaties under Article 48(6) TEU, it is reserved to the specific area of the Union’s internal policies³⁶, and therefore it does not apply to CFSP or CSDP. The ordinary legislative procedure is regulated by article 48(2) to (5) TEU and consists of several steps.

³² Council of the European Union, *Council position on the Conference on the Future of Europe*, Brussels, 24 June 2020; Council of the European Union, *Conference on the Future of Europe - revised Council position*, Brussels, 3 February 2021.

³³ Non-paper by Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia and Sweden on the outcome of and follow-up to the Conference on the Future of Europe, 9 May 2022.

³⁴ Non-paper submitted by Germany, Italy, Luxembourg, the Netherlands, and Spain on implementing the proposals of the Plenary of the Conference on the Future of Europe, 13 May 2022.

³⁵ Cfr. SCHÜTZE, R., TRIDIMAS, T., *Oxford Principles of European Union Law: The European Union Legal Order: Volume I*, Oxford University Press, 2018, p. 130.

See also BARRETT, G., “Creation’s Final Laws: The Impact of the Treaty of Lisbon on the “Final Provisions” of Earlier Treaties”, *27 Yearbook of European Law* 3, 2008, pp. 10–15.

³⁶ Covered under Part III TFEU relating to the internal policies and action of the Union.

To start, the proposal for amendment of the Treaties under an ordinary revision procedure can be submitted to the Council on the initiative of any Member State, the European Parliament or the Commission. Once received, the Council must in turn submit it to the European Council and notify the national Parliaments. According to Article 48(3), “if the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favor of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission”.

The Convention is tasked with examining the proposals for amendments and to adopt by consensus a recommendation to a conference of representatives of the governments of the Member States. As provided for in paragraph 4, the Convention can be convened or not depending on the extent of the proposed amendments. In cases when the Convention is not convened, the European Council must deal with defining the terms of reference for a conference of representatives of the governments of the Member States, which should be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties³⁷. The last step is ratification. Indeed, the amendments enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements³⁸.

In the debate concerning the extension of QMV to CFSP and CSDP matters, the review of the Treaties can be considered as the best available option inasmuch it would permit a real deepening of the integration process by directly amending the legal basis of provisions on the use of unanimity in CFSP/CSDP matters. At the same time, this would be the longer, trickier, and, to date, the less likely path to be walked, due to divided positions of the Member States on the matter. As a matter of fact, the main obstacle would be triggering the process, that requires the achievement of a simple majority in the European Council. Indeed, this would mean that at least 14 member States out of 27 should decide to support the examination of the proposal for amendment of the Treaties. However, as we saw above, a bloc exists that oppose the starting of a revision process.

In the second place, whereas a simple majority would be formed in the European Council, another difficulty would be the convening of a Convention composed of representatives of the national parliaments and the institutions. Indeed, while the Parliament and the Commission support the creation of a Convention to revise the Treaties, the Council, which has the power to decide on the matter by virtue of a simple majority voting, would likely be divided on the matter, with seventeen Member States being reportedly opposed³⁹, including Bulgaria, Croatia, the Czech

³⁷ Article 48(4) TEU.

³⁸ According to Article 48(5) TEU, “if, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council”.

³⁹ See VELA, J.H., “Brussels Playbook: Scrapping vetoes - Trade scoop”, *Politico*, 20 September 2022.

Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia and Sweden⁴⁰. A third obstacle would then be given by undertaking negotiations and by the need for the 27 to agree on the reform package by unanimity. Finally, ratification would require adoption by all national parliaments, as well as referendums in some Member States. Ultimately, the whole revision process would thus be open-ended and require years. Nonetheless, many have called for this option as the more appropriate and desirable for a long-term solution of the issue⁴¹.

2.2. Using the potential of existing elements of flexibility

2.2.1 «Specific» passerelles clauses under Articles 31(3)TEU and 333(1) TFEU

The faster avenue to extend QMV to CFSP/CSDP decisions is offered by the prospect to exploit existing elements of flexibility as envisaged under the Treaties to their full potential. Indeed, the special CFSP passerelle clause included under Article 31(3) provides that the European Council may unanimously decide that the Council should act by qualified majority in fields falling within CFSP. The European Council can thereby unanimously decide to extend QMV to specific fields within CFSP. However, as mentioned in Chapter II, the clause comes with two limitations. In the first place, under Article 31(4) TEU, it does not apply to decisions with military or defence implications. Therefore, a revision of the Treaties would be necessary in order to vote by QMV on issue having military and defence implications. Secondly, an “emergency brake” exists under Article 31(2) TEU for which any member state can object to a decision being taken by QMV for vital and stated reasons of national policy. An additional limitation is given by the fact that the passerelle clause in turn needs a unanimous vote by the European Council for its potential to be deployed.

As will be explored in the following paragraphs, the Juncker Commission in 2018 proposed the gradual extension of QMV to three areas of CFSP/CSDP, namely positions on human rights, sanctions’ adoption and amendment, and the launch of civilian CSPD missions. However, the proposal found little success among Member States. In fact, according to Koenig, in 2019, only seven Western Member States were in favor⁴², ten skeptical⁴³, and the remaining strongly opposed⁴⁴. In 2022, as Vela reports, support slightly increased, namely on the occasion of the General Affairs Council on 20 September 2022, when “most of the ministers were open to consider the use of passerelle clauses in certain fields”, especially in CFSP, however “on a case-by-case basis”⁴⁵. Overall, Vela reported how there is a greater openness towards the extension of QMV to

⁴⁰ Cfr. KOENIG, N., “Qualified Majority Voting in EU Foreign Policy: Mapping Preferences”, *Hertie School, Jaques Delors Centre*, 10 February 2020, pp. 3-4.

⁴¹ *ibid.*, p. 7.

⁴² Belgium, Finland, Germany, The Netherlands, Spain, Sweden. Cfr. KOENING, “Qualified Majority Voting in EU Foreign Policy: Mapping Preferences”, *op.cit.*, p 4.

⁴³ *ibid.* Austria, Bulgaria, Denmark, Ireland, Italy, Luxembourg, Portugal, Romania, Slovakia, Slovenia.

⁴⁴ *ibid.* Poland, Malta, Lithuania, Latvia, Hungary, Greece, Estonia, Czech Republic, Cyprus, Croatia.

⁴⁵ Cfr. VELA, *op.cit.*

sanctions and human rights than for CSDP. In any case, as will be explored below, the Council has indeed launched a study on the practical activation of passerelle clauses included in the Treaties and the areas in which they could produce a switch from unanimity to QMV⁴⁶.

The special passerelle on enhanced cooperation, included in Article 333(1) TFEU⁴⁷, can also be used as a way to pass from unanimity to qualified majority voting in the framework of enhanced cooperations established under CFSP. On the point, the Parliament made a specific call for the use of the passerelle clause specific to enhanced cooperation, in which it envisaged to even deny its consent to any new enhanced cooperation proposal unless the participating Member States committed to activate the specific passerelle clause of Article 333 TFEU allowing a switch to QMV⁴⁸. Indeed, to date, enhanced cooperation in the field of CFSP/CSDP has never been established⁴⁹. Under the Treaties, it not only requires a minimum of nine participants, but within the CFSP it also requires, under Article 329(2) TFEU, a unanimous authorization by the Council prior to its activation. Some argue that enhanced cooperation could be an easier alternative to the passerelle clause⁵⁰. This is due to the fact that under Article 333 the Council can autonomously decide by unanimity, without the prior action of the European Council, to switch to QMV decision-making. However, that provision finds its limit cause it excludes decisions with military and defence implications to be taken by QMV. As the CoFoE proposals explicated, a review of the Treaties would be therefore needed to switch to QMV in decisions having military or defence implications.

2.3. Other avenues

2.3.1. Enabling clause under Article 31(2) TEU

An alternative avenue to extend QMV to CFSP/CSDP which is already included in the Treaties is the one under Article 31(2) TEU. The clause contained within the mentioned Article explicitly allows for the Council to act by qualified majority in specific cases falling under CSFP, which were detailed in Chapter II of this dissertation. As Koenig reports, the enabling clause has found application in the field of EU sanctions⁵¹. In fact, the Council has sometimes agreed on amending sanctions' listings by QMV, and in 2018 the Commission proposed that the Council could have amended all sanctions' listings by QMV⁵². As the recent case of Hungary in the adoption of

⁴⁶ See Council of the EU, *General Affairs Council, Main Results*, 20 September 2022.

⁴⁷ It reads "where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority".

⁴⁸ Cfr. "Passerelle clauses in the treaties", *op.cit.*, p. 50.

⁴⁹ Cfr. MARTENCZU, *op.cit.*, pp. 83-86. See also WESSELS, W., GERARD, C., "The Implementation of Enhanced Cooperation in the European Union", *Study Requested by the AFCO committee, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union*, PE 604.987, October 2018.

⁵⁰ KOENIG, *op.cit.*, p. 6.

⁵¹ *ibid.*

⁵² European Commission, "A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy", *op.cit.*

sanctions against Russia has proved, similar amendments can be highly controversial for some Member States, and therefore difficult to adopt for the Union as a whole. Moreover, a recommendation to extend QMV in the field of sanctions was made by the European Parliament⁵³, Commission and HR/VP⁵⁴ also with regard to the European framework for human rights sanctions or European Magnitsky Act⁵⁵. However, Member States eventually opposed the extension of QMV to this sub-area of EU sanctions policy⁵⁶.

2.3.2. Constructive Abstention

The alternative to the specific passerelle clause under Article 31(3) TEU which generates less controversy among Member States is constructive abstention. Under Article 238(4) TFEU, Member States are as a general rule allowed to abstain in a unanimous Council vote⁵⁷. Under Article 31(1) TEU, constructive abstention allows them to qualify their abstention by making a formal declaration. Constructive abstention translates in the fact that the abstaining Member is not obliged to apply the decision, but must accept that it commits the Union and must refrain from any action that would impede or conflict with the decision. Therefore, the constructive abstention seems like a potentially very useful tool in the hands of those states who would otherwise be constricted to veto a decision.

Yet, as we could see in previous chapters, it has only been used twice, both times in the context of the CSDP⁵⁸. Indeed, the second case is very recent and concerns the decision of Ireland, Austria and Malta to constructively abstain regarding the delivery of lethal assistance⁵⁹ to Ukraine under the European Peace Facility⁶⁰, the financial instrument under which the EU has provided Ukraine with €2.5bn worth of lethal and non-lethal military assistance between February and July 2022⁶¹. As Koenig argues, constructive abstention allows Member States to adhere to national specificities (e.g., neutrality) without blocking the path for the others. It is, however, unhelpful if one or a few Member States explicitly seek to do so to protect national strategic or economic interest⁶².

⁵³ European Parliament, *European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime*, 14 March 2019.

⁵⁴ See LAȚICI, T., “Qualified majority voting in foreign and security policy. Pros and Con”, European Parliamentary Research Service, 2021.

⁵⁵ See Official Journal of the European Union, “Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses”, 7 December 2020.

⁵⁶ Cfr. KOENIG, *op.cit.*, p. 6. See also Council of the EU, *EU adopts a global human rights sanctions regime*, Press release, 7 December 2020.

⁵⁷ Article 238(4) TFEU reads “Abstentions by Members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity”.

⁵⁸ The first case was the abstention by Cyprus in 2008 regarding the Decision to establish the EU’s civilian rule of law mission EULEX Kosovo.

⁵⁹ The countries still contributed to non-lethal support.

⁶⁰ See Chapter I.

⁶¹ See Council of the EU, “European Peace Facility: EU support to Ukraine increased to €2.5 billion”, Press Release, 22 July 2022.

⁶² KOENIG, *op.cit.*, p. 7.

3. Testing the ground: actors' positions and proposals on extending QMV in CFSP/CSDP

3.1. European citizens

The European citizens clearly expressed their vision for the future of Europe on the occasion of the initiative of the Conference on the Future of Europe. This was a citizen-led series of debates and discussions that started its works on 9 May 2021 and concluded them on 9 May 2022⁶³. Born from an idea of French President Emmanuel Macron, who advanced it in 2019 in his letter to Europeans⁶⁴, it was taken up by the President of the European Commission, Ursula von der Leyen, with the support of the European Parliament.

The Conference's primary goal was to be a "citizens-focused, bottom-up exercise"⁶⁵ to allow a strengthening of the Union's democratic legitimacy and a reinforcement of the link between the citizens and the institutions. Its outcome was a success, with a total of 6,465 events organized throughout the 27 Member States, and more than 600.000 participants. Citizens' proposals were also gathered through a Multilingual Digital Platform which registered five million visitors, collecting thousands of comments and ideas. In the initiative's framework, national citizens' panels were held in six countries⁶⁶, with four thematic panels, being organized and producing 178 recommendations. All the ideas and recommendations that emerged in the context of the Conference were assessed and synthesized by the Conference plenary assembly, made up of an equal number of representatives of the three institutions and representatives of national parliaments, as well as citizens and representatives of the social partners and civil society. A final report was drafted by an Executive Board of nine representatives from the Parliament, the Commission and the Council in collaboration with the Conference plenary, and included more than 320 measures divided into 49 ambitious proposals on nine main topics⁶⁷.

Among these, proposal 21 and proposal 39 explicitly call for a shift from unanimity to QMV in CFSP/CSDP. In particular, proposal 21 focused on "decision making and cohesion within the Union" as part of the topic "EU in the world"⁶⁸. According to the final document of the Conference, under the proposal the citizens showed great interest on the EU's ability to "improve its capacity to take speedy and effective decisions, notably in Common Foreign and Security Policy (CFSP), speaking with one voice and acting as a truly global player, projecting a positive role in the world and making a difference in response to any crisis". In this context, the citizens agreed that the

⁶³ Cfr. FABBRINI, S., "La Conferenza sul Futuro dell'Europa, Potenzialità e Problematiche", *Centro Studi sul Federalismo*, June 2021.

⁶⁴ See Elysée, "For European renewal", 4 March 2019.

⁶⁵ European Commission, Council of the EU, European Parliament, *Joint Declaration of the European Parliament, the Council and the European Commission on the Conference on the Future of Europe Engaging with citizens for democracy – Building a more resilient Europe*, 18 March 2021.

⁶⁶ Belgium, France, Germany, Italy, Lithuania and the Netherlands

⁶⁷ See DUFF, A., "The European Union makes a new push for democracy", *European Policy Centre*, 24 November 2019.

⁶⁸ Council of the European Union, "Conference on the Future of Europe - Proposals and related specific measures contained in the report on the final outcome of the Conference on the Future of Europe: Preliminary technical assessment", Brussels, 10 June 2022.

measure to be taken in order to follow-up on that action is for issues that are currently decided by way of unanimity to be changed and to be normally to be decided by way of a qualified majority, “in particular in the area of the CFSP”.

As it has been noted, it is already possible to switch from unanimity to QMV in the area of CFSP either under the general passerelle clause (Art. 48(7) TEU) or under the sectoral passerelle clause in the area of CFSP (Art. 31(3) TEU). However, as neither of these passerelle clauses applies to decisions with military implications or in the area of defence, switching to QMV in this field would require an amendment of the Treaty .

Proposal 39, part of the topic on “European democracy”, focus on “improving the EU’s decision-making process in order to ensure the EU’s capability to act, while taking into account the interests of all Member States and guaranteeing a transparent and understandable process for the citizens”. As the final document reads, and according to the opinions expressed by Europeans, this would require a reassessment of decision-making and voting rules in the EU institutions. In particular, by focusing on the issue of unanimous voting, which makes it very difficult to reach agreement, but at the same time by ensuring a fair calculation of voting 'weights' to protect small countries' interests.

Under the proposal, “*all* issues decided by way of unanimity” should be decided by way of a qualified majority. The only contemplated exceptions should be the admission of new Member States to the EU, and changes to the fundamental principles of the EU. As the document notes, to date, switching from unanimity to QMV in the Council can be done in 67 situations by using both the general and specific passerelle clauses. Article 48(7) TEU applies for the whole TFEU and for CFSP, with the exception of decisions with military implications or those in the area of defence. The general passerelle can be activated by the European Council, acting by unanimity, prior consent by the European Parliament and provided that no national parliament opposes its activation within six months from notification. However, 27 situations remain where switching from unanimity to QMV would require Treaty change⁶⁹.

In general, it can be argued that the outcome of the Conference on the Future of Union speaks clearly on the concerns of citizens as well as on their eagerness to see a more cohesive Union. In fact, they generally welcomed the debate on the extension of QMV to CFSP/CSDP by adding valuable contributions. Lastly, in more than one instance they have openly called for a revision of the Treaties.

⁶⁹ 18 related to the European Council and 9 to the Council. Cfr. *ibid*.

3.2. European Parliament

The recommendations expressed by the citizens in the context of the Conference on the Future of Europe have been heard and accepted by the Parliament, that on 9 June 2022 formally called for a Convention for a revision of the Treaties⁷⁰. The relevance of the call resides in the fact that the Parliament has advanced concrete proposals on the amendment of the Treaties, motivating its initiative with the urgent need to make sure that the Union has the competence to take more effective action during future crisis, in the wake of the seriousness of the most recent ones, namely the Russian invasion of Ukraine and the Covid-19 pandemic. According to the Parliament's document, first in the list of objectives of an amendment of the Treaties is the enhancing of the Union's capacity to act by reforming voting procedures⁷¹.

This includes allowing decisions in the Council by qualified majority voting instead of unanimity in "relevant areas"⁷², namely the adoption of sanctions and passerelle clauses, but also "in the event of an emergency". With this in mind, the Parliament proposed two amendments, respectively to Article 29 TEU and 48(7)(4) TEU. Concerning the first one, Article 29⁷³ should be replaced by the following

"The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. *Where a decision provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council shall act by a qualified majority.* Member States shall ensure that their national policies conform to the Union positions".

Therefore, as amended, the article would include the possibility to impose economic and financial sanctions by a QMV.

With regard to the second amendment, Article 48(7)(4)⁷⁴ would also be significantly revised, reading

⁷⁰ European Parliament, *European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties*, 9 June 2022.

⁷¹ In the second place, there is the adaptation of the competences conferred on the Union in the Treaties. Significantly, the Parliament refers to the fact that this should be particularly urgent in all those domains which demonstrated a need for strengthening, namely "health and cross-border health threats", "the completion of the energy union" to be carried out based on energy efficiency and with particular attention to renewable energies, in defence, and in social and economic policies. Thirdly, the Parliament proposed to provide itself with full co-decision rights on the EU budget, and with the right to initiate, amend or repeal legislation. Cfr. *European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties*, *cit.*

⁷² *ibid.*

⁷³ Which now reads "The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions".

⁷⁴ Which now reads "For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members".

“For the adoption of *these decisions*, the European Council shall act *by a qualified majority as defined in Article 238(3), point (b), of the Treaty on the Functioning of the European Union* after obtaining the consent of the European Parliament, which shall be given by a majority of its component members”.

This would imply changing the general passerelle clause by switching from unanimity to an enlarged or super-qualified majority, as defined under Article 238(3)(b) TFEU. By means of qualified majority voting, 72% rather than 55% of Member States, or 20 rather than 15, which comprise at least 65% of the population, must agree for the decision to be adopted. Therefore, this would imply that the European Council may adopt a decision by super-QMV rather than by unanimity authorising the Council to act by a qualified majority where the TEU provides for the Council to act by unanimity.

Even though the proposals did not reach the simple majority in the European Council, the proposals remain as a potential path to be walked. Someone⁷⁵ recommended an addition that the European Parliament left out of the 9 June resolution, suggesting amending the third subparagraph of Article 48(7) TEU⁷⁶, according to which any national parliament have the right to oppose to the use of the general passerelle clause within six months of the European Council decision. As Koenig notes, if such a clause remained in place resorting to Article 48(7) would remain highly unlikely⁷⁷.

Lastly, in its annual report for 2022 on the implementation of the Common Security and Defence Policy released in January 2023⁷⁸, the Parliament noted that the Member States “may assess the reform of the decision-making process with a view to realizing considerable untapped potential within the Treaties”, in particular by activating Article 31 TEU extending QMV to areas relating to the CSDP and fully exploiting the potential of the passerelle clauses. The Parliament specifically proposed that changes to the Treaties should be considered in the case of CSDP. According to the Parliament, this should be done through a convention, in response to the Conference on the Future of Europe, which, among other things, should address a switch from unanimity to QMV for Council decisions having military implications⁷⁹, and the amendment of Articles 42 and 46 TEU in order to enable the joint procurement of defence equipment and other security-related spending from the budget of the Union.

⁷⁵ DUFF, A., “Targeting the passerelle: How to trigger treaty change and abolish the national veto”, *Der (europäische) Föderalist*, 10 May 2022.

⁷⁶ Which reads “Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision”,

⁷⁷ KOENIG, *op.cit.*, p. 4.

⁷⁸ European Parliament, *European Parliament resolution of 18 January 2023 on the implementation of the common security and defence policy – annual report 2022*, 18 January 2023.

⁷⁹ *ibid.* With the exception of the mutual defence clause in Article 42(7).

3.3. European Commission

In his State of the Union speech of 2017, President Juncker encouraged to look “at which foreign policy decisions could be moved from unanimity to qualified majority voting”, underlying how Treaties already provide for this “if all Member States agree to do it”⁸⁰. In particular, the Commission has always centered the debate on the possibility to shift to QMV in fields like CFSP/CSDP without having to go through an amendment of the Treaties. Indeed, in 2018, some concrete proposal emerged concerning the shifting to QMV at least in some specific matters, namely human rights and sanctions, as well as CSDP missions.

Concerning human rights, the Commission proposed that based on Article 31(3) TEU the European Council should adopt a decision for which EU positions on human rights in international fora should be adopted by QMV in the form of Council decisions⁸¹. According to the Commission, a similar change should be achieved considering the “universality and indivisibility of human rights” and the need for the Union to act cohesively and affirm its role as a credible soft power. On sanction regimes, the Commission reflected on sanctions’ value, as they are indeed a very powerful tool in the EU’s foreign and security policy action, as the war in Ukraine has and will likely continue to demonstrate. In particular, it reflected on the fact that sanctions have been increasingly resorted to over the past few years to deter and influence external policy developments and for exercising economic and political pressure.

Therefore, given their strategic importance, the European Commission suggested the regular use of QMV under Article 31(1) TEU for adopting sanctions. Lastly, the Commission also made proposals on civilian missions under CSDP, this being an important tool to be deployed when responding or engaging in crisis and post crisis situations. For this reason, they need to be deployed quickly to respond to the challenges of a potentially threatening political environment. Therefore, once again on the basis of Article 31(3) TEU, the Commission suggested that the European Council should adopt decisions providing that all decisions relating to civilian CSDP should be adopted by QMV.

Similar proposals came with the new presidency of the Commission, as well. In particular, President Von der Leyen repeatedly pronounced herself on the matter⁸², calling for the extension of QMV to topics as human rights and sanctions, and asking HR/VP Borrell to seek to make use of the clauses in the Treaties that allow certain decisions on the CFSP to be adopted by qualified majority voting⁸³. The Von der Leyen Commission in particular spent some efforts in the extension

⁸⁰ European Commission, *President Jean-Claude Juncker's State of the Union Address 2017*, 13 September 2017.

⁸¹ Cfr. KOTANIDIS, *op.cit.*, p. 51.

⁸² European Commission, *Speech by President von der Leyen at the closing event of the Conference on the Future of Europe*, 9 May 2022.

⁸³ On its part, Borrell commented “I cannot think of a single change that would have a more powerful effect to improve our ability to act in a hostile world”. Cfr. KOENIG, *op.cit.*, p.1.

of QMV in the framework of the EU Global Human Rights Sanctions Regime, so called “European Magnitsky Act”⁸⁴. However, the attempt at innovating the EU’s methods for adopting sanctions in the field of human rights abuses have proved unsuccessful in moving from unanimity to QMV⁸⁵.

3.4. Member States and the European Council

In their 2018 joint declaration in Meseberg⁸⁶, France and Germany called for a search into new ways of increasing the speed and effectiveness of the EU’s decision making in the Common Foreign and Security Policy. In particular, they expressed the need for a European debate on new formats, bringing as an example the establishment of an EU Security Council, and more in general means of closer coordination within the EU and with third parties, as the proposal for a political European community shows⁸⁷. Most importantly, they proved themselves open to exploring possibilities of using majority vote in the field of the CFSP. German President Scholtz and French President Emmanuel Macron confirmed this position in several occasions⁸⁸.

However, to date no agreement exists on the matter within the Member States. This is partly due to ideological reasons, as in the case of countries such as Hungary and Poland⁸⁹, or strategical ones, namely in the case of smaller Member States as Malta. Also, the unwillingness to renounce to unanimity, that is, to its inherent veto assurance, is a heritage of the intergovernmental method which governed the Union since its very origins. A test on positions on the matter of extending QMV decisions was done by the Czech Council Presidency, which started its six-months turn by sending out a questionnaire asking Member States whether they are willing to consider an extension to QMV by exploiting the existing mechanisms in the Treaties and, if so, in which policy areas⁹⁰. The results were not made public. However, no uniform outcome emerged⁹¹, meaning the Member States are still very divided on the matter.

Similarly, back in 2019, according to a study conducted by Koenig⁹², Member States were divided on the gradual extension of QMV to three areas of EU foreign policy, namely positions on human rights in multilateral fora, the adoption and amendment of EU sanctions regimes, and the launch of civilian CSDP missions. In particular, Belgium, Finland, Germany, The Netherlands, Spain and Sweden were in favor, while Austria, Bulgaria, Denmark, Ireland, Italy, Luxembourg,

⁸⁴ See *Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses*; *Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses*.

⁸⁵ Cfr. LAȚICI, *op.cit.*, p. 1.

⁸⁶ See Elysée, “Meseberg Declaration - Renewing Europe’s promises of security and prosperity”, 19 June 2018.

⁸⁷ Launched by Macron on 9 May 2022. See BRZOZOWSKI, A., BASSO, D., VASQUES, E., “Macron teases alternative to EU enlargement”, *Euractive*, 9 May 2022.

⁸⁸ See “EU needs majority voting in foreign, tax policy – Scholz”, *Reuters*, 29 August 2022.

⁸⁹ Cfr. PERLE, P., “What should the EU do about Hungary’s illiberal turn?”, *European Policy Centre*, 4 November 2022.

⁹⁰ Cfr. ZACHOVÁ, A., VASQUES, E., ZICHOVÁ, K., NOYAN, O., “Czech Presidency takes EU countries’ temperature on bloc reforms”, *Euractiv*, 18 July 2022.

⁹¹ *ibid.*

⁹² Cfr. KOENING, “Qualified Majority Voting in EU Foreign Policy: Mapping Preferences”, *op.cit.*, p 4.

Portugal, Romania, Slovakia and Slovenia were in doubt. Poland, Malta, Lithuania, Latvia, Hungary, Greece, Estonia, Czech Republic, Cyprus and Croatia opposed.

A similar division seems to exist concerning a potential extension of QMV in CFSP/CSDP through a formal revision of the Treaties. Indeed, right after the publication of the final proposals of the Conference on the Future of Europe, a group of thirteen governments made by Bulgaria, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Slovenia and Sweden published a non-paper “on the outcome and follow-up to the Conference on the Future of Europe”⁹³. In the document they declared their opposition to “unconsidered and premature attempts to launch a process towards Treaty change”, which in their word would have at that moment drawn political energy away “from the urgent geopolitical challenges facing Europe”⁹⁴. A letter from Belgium, Germany, Italy, Luxembourg, the Netherlands, and Spain immediately followed, where the countries declared themselves “in principle open to necessary treaty changes that are jointly defined”, proposing an “interinstitutional process” involving the European Parliament, Council, and Commission to support “consensus-building” on these matters⁹⁵.

On the point, it must be said that the European Council explicitly declared since its first contribution on the matter that the CoFoE initiative would have not fallen under the provisions of Article 48(7) TEU. Actually, this does not amaze. Indeed, the European Council historically represent the intergovernmental side of the EU. This characteristic is inborn in its composition, for which it defends the national interest on Member States. The same seems to be done by its President. In fact, according to European Council President Charles Michel, unanimity in foreign policy is nothing less than “required”⁹⁶: if it is true that such requirement “slows down and sometimes even prevents decision-making”, nevertheless it “pushes us to work unremittingly to unite the Member States”⁹⁷.

This stands in total opposition to the Commission’s finding, according to which a further reason to embrace an extension of QMV comes precisely from the fact that where qualified majority is the rule, the push to reach common solutions is stronger. This is confirmed by the practice, which has shown that where qualified majority is applied as the decision-making mechanism decisions are, in the vast majority cases, *de facto* taken by consensus⁹⁸. Therefore, the prospect of a vote by qualified majority is “a powerful catalyst” to drive every actor involved to find compromise, consensus and

⁹³ Non-paper by Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia, and Sweden on the outcome of and follow-up to the Conference on the Future of Europe, *cit.*

⁹⁴ See PREISS, *op.cit.*

⁹⁵ Non-paper submitted by Germany, Italy, Luxembourg, the Netherlands and Spain on implementing the proposals of the Plenary of the Conference on the Future of Europe, *cit.*

⁹⁶ Cfr. DUFF, A., *Constitutional Change in the European Union. Towards a Federal Europe*, Palgrave MacMillan, p. 25.

⁹⁷ *ibid.*

⁹⁸ European Commission, “A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy”, *op.cit.*, p. 3.

ultimately to achieve unity. Lastly, it can be stated that “the pursuit of agreement means greater ownership of the decisions taken, which should be implemented – in respect of Article 24(3) TFEU – in a spirit of loyalty and mutual solidarity”⁹⁹.

⁹⁹ *ibid.*

Conclusions

By looking back at the historical evolution of the European Union, it can be argued that different degrees of integration were pursued and reached in different areas of cooperation. This statement is backed by the legal evolution of EU functioning under the Treaties, and in particular it is corroborated by the different decision-making mechanisms applicable to different domains of Union's competence. In fact, if to date qualified majority voting has been extended to the point that it represents the adopted voting procedure in up to 90% of decisions¹, unanimity is still the rule in certain fields², namely in matters that fall under the scope of Common Foreign and Security Policy and Common Security and Defence Policy³.

This has been increasingly problematic with regard to the Union's ability to take fast and decisive actions on issues of the utmost importance at the international level. As Piris notes, the essential problem is that the aims given to the EU by its Member States in the EU Treaties cannot be achieved by the EU with the means it was given, "which are ill-adapted to the number of its members"⁴. Over the years, the problematic nature of the topic opened up a debate⁵ on the necessity to switch from unanimity to qualified majority voting in certain areas of strategic relevance for the Union's action, in particular CFSP/CSDP, as well as on the modalities through which such an extension can be achieved. However, in spite of several recorded attempts to do so, no concrete action has yet been taken given the divisions expressed on the matter by both EU Member States and institutions⁶.

Recently, the debate to overcome unanimity in CFSP/CSDP has gained momentum after the breakout of the Ukrainian war following Russia's "unprovoked and illegal" invasion of the country on 24 February 2022⁷. The reasons for this are multiple. In the very first place lies the EU's response to Russia in the months following the war. Indeed, to defend itself from the economic repercussions of the conflict as well as to discourage Russia from taking its activity in Ukraine further, the EU adopted to date nine packages of sanctions, in accordance with provisions under Article 29 TEU. Being sanctions an instrument of CFSP⁸, they require unanimity to be adopted. In May 2022, this caused weeks of stall due to the lack of unanimous agreements among the Member

¹ Cfr. PREISS, *op.cit.*

² Taxation, social security, the accession of new EU Member States, operational police cooperation between Member States, and CFSP/CSDP.

³ Which under Articles 42(1) and 24(1) TEU is an integral part of the CFSP.

⁴ PIRIS, J.C., "The European Union in Crisis. What Should the Member States Do?", *Bridge*, Working Paper No. 16, October 2021, p. 1.

⁵ Which was brought forward also in the framework of the Conference on the Future of Europe.

⁶ In particular, the European Council and the Council.

⁷ EEAS, *EU Statement regarding Russia's unprovoked and unjustified military aggression against Ukraine*, 28 February 2022.

⁸ Indeed, sanctions dominate EU foreign policy with approximately 80% of CFSP decisions concerning the adoption of sanctions regimes on the basis of Article 29 TEU (50%) or their amendments on the basis of Article 31(2) TEU (30%). Cfr. Wessel, R.A., Larik, J., *EU External Relations Law. Text, Cases and Materials*, Bloomsbury Publishing, 2020, p. 8.

States. In particular, Hungary posed its veto on the sixth package of EU measures in order to receive an exemption from Russian oil embargo, and pursued its position by blocking the adoption of targeted sanctions toward a religious personality of the Russian Orthodox Church⁹. The episode caused reprehension within the Union and among other Member States¹⁰, raising awareness on the detrimental impact the unanimity requirement has on the Union's ability to adopt fast and decisive action, in particular in the event of complex and urgent circumstances like the one given by the war in Ukraine. Furthermore, the country continues to threaten its use of veto for further measures that should be included in the tenth package of EU sanctions against Russia¹¹.

In the second place, the issue of extending qualified majority voting to CFSP/CSDP is made ever-more urgent by one of the main implications the Russian attack of Ukraine produced for the EU, namely the prospect of enlargement. Indeed, Russia's invasion of Ukraine accelerated the widening of the integration process by drawing nearer a further enlargement of the EU, and making it a realistic option. This is true inasmuch Ukraine, Georgia and Moldova applied for EU membership in the days immediately following the attack, respectively on 28 February and 3 March 2022. Although it is unlikely that any enlargement will occur any time soon before the end of the Ukrainian war, the Union should be prepared to go through it in the best of ways should the need arise. Evidently, an enlarged European Union would necessarily require a revision of the mechanisms that govern it, including decision making. This would require to contemplate a shift to QMV in key-areas of action such as the CFSP and the CSDP, in order to avoid paralyses in a Union made of 30 or more¹² Member States with very different demographic compositions¹³. On the point, the issue opens a reflection on the EU's future role in eastern Europe, and more specifically in the so-called "post-soviet states".

In the third place, the debate gained urgency also in consideration of the complex challenges that the ongoing conflict in Ukraine unleashed for the EU. In fact, Russia's invasion of Ukraine represents a "tectonic shift in European history"¹⁴ due to the huge implications it has on the EU security and defence, energetic, as well as economic sector. The hope is that the event will push towards the beginning of a process of introspection and self-review on the part of the Union, in the framework of which particular focus should be placed on the necessity to speed-up decision-making practices in the EU. In the context of the March 2022 Versailles summit, awareness seems to have

⁹ Cfr. RANKIN, *supra note* 109, Chapter III.

¹⁰ TAMMA, P., "Hungary vetoes Ukraine aid, EU seeks alternative solution", *Politico*, 6 December 2022.

¹¹ See "Hungary will veto EU sanctions on Russian nuclear energy, Orban warns", *Euractiv*, 27 January 2023.

¹² In fact, such an event implies that the accession process for the states of the Western Balkans is being revived, as well. Cfr. MINTEL, VON ONDARZA, *op.cit.*, p. 2.

¹³ In fact, with the exception of Ukraine – and Turkey – the accession candidates are mainly small to very small states. This would make the discrepancy between veto power and population size or economic power to increase further. Cfr. *ibid.*

¹⁴ Cfr. *Informal meeting of the Heads of State or Government. Versailles Declaration 10 and 11 March 2022*, 11 March 2022, p. 3.

been raised on the need for the Union to take “further decisive steps” towards building a European sovereignty¹⁵. This entails bolstering defence capabilities, reducing energy dependencies, as well as building a more resilient economy. These are all steps that require cohesiveness in adopting decisions and implementing them. Ultimately, they call for a unity “of purpose and capabilities” to pursue European political goals on the world stage¹⁶, and a shift to QMV in CSDP matters in order to pursue the strengthening of existing defence instrument and the construction of a European defence policy and European defence.

In general, the European Union finds itself confronted with a brand-new strategic and geopolitical context, in which new and old blocs will not hesitate to take advantage of the Union’s internal divisions to disturb, slow down, or interrupt its integration process. As a matter of fact, a similar attempt was carried out by Russia in pursuing a full scale attack in a EU’s bordering country, hoping for the Union to break on internal discord on how to address the war as well as on existing economic and energetic dependencies. Until now, this did not happen. Rather, the EU has shown general unity in its response, putting the condemnation of breaches of international law and human rights’ violation at the first place in fighting Russia’s action. However, a common strategic vision still cannot be said to exist. As the 2022 document on Strategic Compass outlines, it is precisely that political will that represents the missing element for a EU that is faster, more capable and effective in its ability to decide and act¹⁷. In this author’s opinion, Member States should make every effort to build and merge that political will to bring the European integration process to the next level of development.

Given the current global and regional framework, the shift from unanimity to QMV in CFSP/CSDP is necessary and should not be delayed. Therefore, for the immediate future the Member States should seize the current window of opportunity to explore existing shortcuts under the Treaties. At the same time, the path should be prepared in advance for a medium to long-term scenario, for example, by establishing a group of experts tasked with producing recommendations on the steps to walk to embrace an extension of QMV in CFSP/CSDP. For the immediate term, the EU should explore the full potential of flexibility clauses within the Treaties, and at the same time should try to recur to them. Namely, Member States could try to recur more often to constructive abstention under Article 31(1)(2) TEU when not in agreement with a decision falling under CFSP/CSDP, rather than to veto it.

In the short to the medium term, the most committed institutions such as the Parliament and the Commission should continue to push for the gradual extension of QMV in CFSP through the

¹⁵ *ibid.*

¹⁶ Cfr. BORRELL, *Europe in the Interregnum: our geopolitical awakening after Ukraine*, *op.cit.*

¹⁷ Cfr. *A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security*, *op.cit.*, p. 3.

activation of the passerelle or enabling clauses¹⁸. It must be noted that passerelles do not apply to issues having military or defence implication, therefore their applicability in CSDP is not viable. At the same time, enabling clauses only apply to CFSP. Concerning CFSP, the use of existing instruments of flexibility under the Treaties should be promoted for sanctions' adoption and human rights' protection, where Member States could be more available to a transition to QMV due to recent experiences in the framework of the EU response to Russia following the invasion of Ukraine¹⁹. Therefore, in spite of previous failed attempts²⁰, the Commission should try to bring forward a similar proposal one more time²¹. As some have argued, in order to promote and facilitate to the maximum extent the use of flexibility elements implying the switch to QMV, the rise of concerns on the side of smaller Member States could be prevented by combining the transition to QMV with an "emergency brake"²². For example, on the point Mintel and Ondarza suggest that a small number of Member States²³ could oppose together to ensure that a decision taken by QMV that would affect their vital national interests is not adopted and submitted to the European Council. After that, an agreement should be try to be reached by consensus. However, in case of non-agreement, a decision should ultimately be adopted by QMV.

Finally, in the long term, a revision of the Treaties should be contemplated through the ordinary legislative procedure²⁴. This option is the one that can better guarantee an appropriate redefinition of the matter of extension of QMV in CFSP and in particular in CSDP. In view of such a possibility, a group of selected individuals should be composed, tasked with identifying the elements that could be part of a possible package-deal, and therefore prepare the way to reform.

A shift from unanimity to QMV in CFSP/CSDP would ultimately represent a first step towards the establishment of a supranational model based on real integration. In fact, the current intergovernmental method in CFSP/CSDP does not entail a transfer of certain powers to a higher level of government which is independent of the states themselves. This transfer would rather progressively be initiated with a shift to QMV in CFSP/CSDP, a step to be accompanied to the conferral of greater powers to EU institutions other than the Council and the European Council, namely and foremost the European Parliament, but also the Commission and the Court of Justice of the EU.

¹⁸ Respectively Articles 31(3) TEU and 31(2) TEU. The "general passerelle" clause is included under article 48(7) and still does not apply to decisions having military or defence implications. Please refer to Chapter II.

¹⁹ Cfr. KOENIG, *op.cit.*, p. 8.

²⁰ Please refer to Chapter IV.

²¹ See POMORSKA, WESSEL, *op.cit.*, p. 357.

²² Namely that each Member State could oppose the adoption of the decision by QMV for vital and stated reasons of national policy. Cfr. MINTEL, VON ONDARZA, *op.cit.*, p. 8.

²³ *ibid.* To be defined. Mintel and Von Ondarza suggest 10 per cent. This would be equal to three states in the case of an Europe counting more than 30 Member States.

²⁴ Article 48(2) to (5) TEU.

Some state that a shift to QMV in CFSP/CSDP would not bring the desired advantages to the Union's ability to take faster and decisive decisions²⁵. This view is backed by the fair assumption that the ultimate effectiveness of adopted decisions rests on Member States' willingness to correctly implement them. Therefore, if a decision is adopted with QMV but opposing Member States exist that are decided, despite the voting results, not to proceed to its implementation at the national level, the efficiency of the decision would be lost and with it the advantage of deciding by QM. This represents a concrete risk, as the events of the 2015 migration crises and the issue of migrants redistribution amply demonstrated. However, in this author's opinion, similar behaviors – namely the non-implementation of decisions and indeed the Member States' preference for unanimous agreement – are attributable not to the logic and dynamic of the QMV mechanisms itself, but rather to the lack of a common strategic culture among the Member States. This ultimately prevent them to share the same geopolitical interests. In turn, existing divergencies of interests push the Member States to stand up for the existence of the right of veto that allows them to always have a “last say” on the decisions that are adopted in the Union.

Of course, it would be ideal if the interests of the Union would incarnate the interests of each and every individual Member State, and vice versa, if the interest of one Member State would incarnate those of the Union as a whole. The achievement of a similar goal to a greater or lesser extent indeed represents the very main objective, however utopic, of the integration process. Regrettably, to date this “wholeness”, that is, this level of “unity”, has not yet been achieved. This is due to the deeply diverse nature of societal, cultural, economic and historical backgrounds of the 27. But most of all, this is due the lack of willingness to sacrifice sovereignty for the sake of common interests, overall in foreign policy. This original sin can be traced back to the very beginning of the integration process and is rooted in its history, when politics and foreign policy, including its security and defence dimensions, were relegated outside of the institutional framework of the European project, and therefore were not granted the chance to grow within a supranational framework governed by the community method. Ultimately, Member States were never forced to try to construct a common strategic culture because of the existence of a “safety valve” represented by the unanimity requirement. If consensus was often the aimed goal in decision-making, the threat of potential vetoes nonetheless always governed the European dynamics in CFSP/CSDP, therefore preventing a sincere, deep-rooted and farsighted cooperation in those domains.

Once this has been clarified, it is maybe easier to understand how a shift to QMV in CFSP/CSDP would facilitate the development of a common strategic culture among the Member States. This is true inasmuch a decision-making governed by qualified majority implies a level of

²⁵ See ROSSOLILLO, G., “Abolire il diritto di veto. La riforma del sistema di voto nel Consiglio e nel Consiglio europeo”, *Movimento Federalista Europeo*, in I Quaderni Federalisti 2021, Quaderni per la Conferenza sul Futuro dell'Europa, 2021.

compromise and understanding among the Member States that unanimity simply lacks. If in both QM and unanimity voting the Member States are encouraged, or forced, to start a debate on every matter of disagreement, the difference lies in the fact that in the first case the agreement would produce a constructive outcome, namely by achieving a position which most likely represents the interest of the majority of the Union. On the other hand, unanimous agreement often lead to an unconstructive compromise, inasmuch in trying to welcome the vetoer request, the remaining Members States are forced to approve a decision which they do not fully share in order to unlock the situation. In this way, a single Member State often blocks or substantially alters the action of the remaining ones. The result of this is the watering down of European positions or measures, which in the last instance is detrimental to the Union as a whole.

If the process of shifting to QMV in CFSP/CSDP may have the downside of being slow and uneasy to achieve, a path toward it must be taken. Moreover, even considering its potential downsides, a similar shift would nonetheless represent a symbolic achievement charged with a great political meaning. Indeed, it would signify the practical expression of an original and truly unprecedented political will from Member States to more closely cooperate on CFSP/CSDP by surrendering part of their national sovereignty on those domains to construct a common strategical view which will lead to the progressive construction of a really European foreign, security, and defence policy. The existence of a common strategic culture indeed represents a fundamental feature of a successful European foreign policy and will positively affect the role of the EU as a global actor by fastening decisions in foreign policy and defence matters. In particular, extending QMV to CFSP/CSDP would push EU Member States to view foreign-policy challenges from a “European” point of view, meaning from a common perspective rather than from 27 national ones, with evident potential benefits for cohesiveness and solidarity among the states.

What also encourages a shift to QMV in CFSP/CSDP matters is that the construction of a common strategic culture is made ever-more urgent by the fact that in recent years the culture of consensus that developed within the European Political Cooperation has been eroded given rising tensions between Southern and Eastern members, as well as Northern and Southern ones, over controversial issues such as immigration, rule of law, and CFSP/CSDP priorities. In a similar context, the use of the unanimity principle in CFSP/CSDP highlights one of the main problems on the matter, namely, as stated above, the issue for which Member States that do not have interest in common EU action on a given matter have no interest in compromising and therefore can easily start deadlocks and water down decisions. This in turn contributes to make EU foreign policy slow or non-existent. Furthermore, this aspect is directly linked to the fact that very often unanimous decision-making in CFSP/CSDP represents an indirect avenue for influential third countries with close economic and political ties with certain Member States to influence them and drive them away from European positions, ultimately preventing the Union’s effective action. Therefore, QMV

would help the Union to become a more effective foreign policy actor also by means of combatting “divide-and-rule tactics” employed by competitors or adversaries states.

Along with explanations having a moral or existential nature, the shift to a QMV decision-making in CFSP/CSDP is made not delayable by the nature of the contemporary crises the EU finds itself confronted with. This ultimately urges for the construction of a new avenue to address crises in CFSP and CSDP matters, one that is fast, efficient, and decisive. Indeed, the challenges the EU has been confronted with for a few years now can only be addressed collectively. For this to have any efficiency, cohesiveness and a common strategic culture among the Member States must be built, also through the introduction of QMV in CFSP/CSDP matters. As the threats to the EU’s security have become borderless, unpredictable and highly volatile, cohesiveness and the existence of a common strategic culture will in fact be fundamental to the survival of the European project.

Ultimately, the issue of shifting from unanimity to qualified majority voting in CFSP/CSDP matters is an issue that lies at the very center of the debate on the future of Europe. The capacity to achieve such a shift will significantly influence the future of the European project. If this may seem a bold statement, let us just think about the fact that the acceptance to recur to such a shift in issue concerning some of the core interest of national sovereignty would have an invaluable symbolic significance. In fact, it would mean the concretization of a political will among the 27 Member States to walk together toward a brand new model of cooperation on matter which have historically been relegated to the intergovernmental method, namely CFSP and CSDP.

As interdependency and the intertwined nature of contemporary crises will push foreign policy toward a process of normalization, and given the fact that contemporary crises will most likely be played in the framework of foreign policy, including security and defence, decision-making in those areas must evolve in order to reflect the current needs of the European Union as well as to best prepare the EU to achieve its future goals in terms of global power presence, independence from third countries, and resilience to crises. In this author’s opinion, a shift from unanimity to QMV in CFSP/CSDP would represent not only an avenue to construct a much needed common strategic culture, but also a first demonstration of political will from the Member States, and therefore an imperative first step towards the “Europe” of the future. One that possess the necessary engagement – an element that only the sharing of vital common interests can produce– to deepen its cooperation in all domains of competencies, and in particular in foreign, security, and defence policy.

In a world governed by complex dynamics of interdependence and increasingly characterized by crises of an extraordinary nature, the European Union as a regional entity and as an aspiring regional and potentially global power must undergo a process of self-review, which will most likely point it towards a re-drawing of priorities and ways of acting, in pursuing an autonomy

and independency that only credibility on the world stage can give it. In turn, credibility is gained through the adoption of fast, decisive and cohesive actions based on a common view and sincere engagement. This passes through qualified majority voting in decisions on CFSP/CSDP.

In conclusion, the shift from unanimity to QMV in CFSP/CSDP matters really represents only the spark to some bigger transformation which will inevitably redraw the Union's as an entity in its original connotations. The alternative is its disappearance, or either way the irreversible downsizing of the European project. The Member States will in the near future need to take into careful consideration the fact that if they renounce to develop a strategic autonomy under the Union's structure, they will find themselves being autonomously dependent from others. It is a matter of morals and visions of the world, other than of strategic convenience.

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Summary

Since its very origin the European integration process has been riddled with obstacles that the Member States managed through time to overcome, more or less cohesively, through compromise and downsizing. As a matter of fact, in the first years of the integration process, the initial ambitious initiative to build a European Defence Community was abandoned and its potential redirected, albeit impoverished, to economic cooperation, a domain in which it then stabilized. In fact, it took a long time for foreign policy and its defence dimension to be included as independent policies within the institutional and legal framework of the Union, with the process being finalized only in 1993 with the Maastricht Treaty, and in 2009 with the Lisbon Treaty, when a CFSP and a CSDP were respectively formally included in the Union's legal framework. This in the first place prevented the construction of a strong and coordinated European foreign policy.

Next to the delay in introducing a dedicated space within the constitutive treaties to matters concerning foreign policy, security and its defence dimension, the second element that prevented the construction of a strong European foreign policy were the legal provisions determining its decision-making. In fact, when foreign policy, and then defence, finally made it at entering the institutional framework of the European Union under the CFSP, and later under the CSDP, the Member States accurately kept the matter under the intergovernmental method characterized by unanimity, under which, to date, it largely remained.

Indeed, whereas since the entry into force of the Single European Act QMV was firstly introduced and progressively extended, out of evident necessities – enlargement, to name one –, to most of the areas of Union's competence, certain key domains pertaining to the core areas of national sovereignty remained dependent on the unanimous agreement of the Member States. Among these, issues falling within CFSP/CSDP. Moreover, if some elements of flexibility do exist under Title V of the Treaty on the European Union (TEU) and specific Articles of the Treaty on the Functioning of the European Union (TFEU) that permit to derogate from unanimity to QMV in CFSP/CSDP matters, they have by choice never or rarely been resorted to.

Over the years, the unanimity requirement has repeatedly slowed down the EU's action, often undermining its credibility on the international stage. Indeed, the existing unanimous decision-making mechanism unveiled its fallacies in several occasions where the Union was called to provide a smooth and decisive response on foreign policy matters of international strategic relevance, namely human rights protection, political statements' adoption, sanctions' adoption, or the beginning of CSDP missions. Since 2016, at least eight EU Member States – namely Hungary, Greece, Czechia, Romania, Italy, France, Cyprus, and Poland – used their right to veto to block or stall CFSP/CSDP decisions, producing deadlocks that have been detrimental to the Union's reputation as a global actor and power, but most importantly to its ability to act swiftly on major

issues on the international arena. The result was that far too many times the unanimity requirement resulted in inaction and collective silence on the EU's side, or, in the best scenarios, in late compromises being agreed among the member States on the basis of a minimum common political denominator.

Some cases when the Union lacked cohesiveness due to the use of veto by the Member States are those of July 2016, when Hungary and Greece delayed and watered down the EU statement on the dispute between China and the Philippines on territorial claims in the South China Sea; June 2017, when the EU could not adopt a statement on China's human rights records at the United Nations Human Rights Council, and the imposition of targeted EU sanctions against Venezuela was delayed, in both cases due to Greece's opposition; February 2017, when Hungary stalled the renewal of arms embargo against Belarus until the other Member States agreed to exempt a certain category of small arms; May 2018, when three countries, namely Hungary, Czechia and Romania blocked the EU statement on the relocation of the US Embassy to Jerusalem; February 2019, when Italy blocked the EU statement recognizing Juan Guaidó as Venezuela's interim president, Greece and Cyprus blocked the EU statement regarding Russia's failure to comply with INF Treaty, and Hungary and Poland blocked the Declaration of the EU-Arab League Summit due to some provisions on migration; April 2019, when France blocked the EU statement condemning Khalifa Haftar's military offensive on Libya's capital; October 2019, when Hungary blocked the EU statement condemning Turkey's operation in Syria; November 2019, when Hungary blocked the EU statement condemning US position to no longer consider Israeli settlements as illegal; September 2020, when Cyprus delayed sanctions against Belarusian officials accused of brutal repression after falsified election unless EU sanctions against Turkey were passed; April 2021, when Hungary blocked the EU statement criticizing China's new security law on Hong Kong.

By latest, the detrimental nature of unanimity to the Union's action proved itself again following Russia's full-scale invasion of Ukraine, which occurred on 24 February 2022. Indeed, if in the months following the event the EU was able to impose nine packages of sanctions towards the aggressor country, several decisions on sanctions' adoption have been slowed and watered down by some Member State's action. In particular, in May 2022 Hungary delayed the adoption of the sixth EU sanctions package against Russia, holding up the sixth sanctions package for 26 days, until it secured an exemption from the oil embargo on Russia, and then in June 2022 withheld the agreement by refusing to include the Patriarch of the Orthodox Church in the EU's sanctions listing. Moreover, in September 2022 Hungary threatened to derail the six-month renewal of the whole EU sanctions package and demanded for three oligarchs to be removed from the listing of sanctions. Also, the country vetoed a European proposal to ask the U.N. Human Rights Council for a special rapporteur on Russian human rights violations, blocking the Union's action and leading the 26 remaining Member States to call for the rapporteur through their national delegations.

It is within the framework of this and previous crises that the necessity arises for the EU to construct a stronger Common Foreign and Security Policy and to strengthen its Common Security and Defence Policy. This necessarily passes through a revision of the existing decision-making mechanisms for CFSP/CSDP, and namely through the extension of qualified majority voting to decisions adopted in the framework of those policies.

Given this general framework, an historical excursus of the EU foreign, security, and defence policy is required in order to understand the general evolution of the matter among the Member States and the historical dynamics that led CFSP/CSDP to being still dependent on a unanimous agreement among the EU “at 27”. The first chapter carefully analyzes the historical development of the EU’s foreign, security and defence policy and its evolution in an institutionally recognized policy under CFSP, and later under CSDP, by looking back at the historical stages that contributed to its construction. In particular, the European integration process finds its roots in Cold War years and the evolution of European foreign policy, including its security and defence dimension, has been deeply influenced by the defensive necessities of those years.

On this note, it is significant to see how after the failure of the project for a European Defence Community in 1954, foreign policy intended through its defensive dimension was set aside by the Member States of the then European Coal and Steel Community (ECSC), and developed marginally within the framework of the Western European Union as European defence was mostly integrated within NATO. If economic and industrial cooperation evolved in a more coordinated and cohesive fashion under the framework of ECSC and then the European Communities (EC) established by the 1957 Treaties of Rome, foreign policy, perceived as “high politics”, evolved outside the institutional framework of the then Communities. In particular, it did so within the so called European Political Cooperation (EPC), an intergovernmental forum established through the 1970s under which heads of State and government gathered to discuss, indeed, foreign policy issues, including security and defence matters.

Therefore, European foreign policy evolved very slowly through the adoption of three reports, respectively in 1969, 1973, and 1981, which led the Member States to progressively frame, through the consolidation of the habit of ministerial meetings and the continuous study of the path to be walked to reach an ever better political integration, a common foreign policy. In particular, in those years the Member States acknowledged that the economic union must have been followed up by a political union, this latter being the ultimate long-term goal of the Community. Following the last report adopted in London in 1981, the practice of political cooperation was finally included within the institutional framework of the EC with the signing in 1987 of the Single European Act (SEA), whose Title III, made up of a single yet extended Article, established that the European Political

cooperation included any foreign policy matters of general interest, directly including security, while omitting defence.

After SEA, the Treaty on the European Union signed in Maastricht on 1992 established a European Union, providing it with a pillar-structure of which the Common Foreign and Security Policy represented the second pillar. Under CFSP, the member states were resolved to implement a CFSP including the “eventual” framing of a common defence policy. The CFSP then evolved through several treaty amendments. In particular, at Amsterdam the TEU was amended for the first time, with a step further being made towards a stronger security and defence policy by revising the wording on common foreign and security policy and its reference to defence. Indeed, among the aims of the European Union, as amended by the Amsterdam treaty, the one concerning CFSP read that the Member States were now resolved to implement a common foreign and security policy including “the progressive framing” of a common defence policy, which “might lead” to a common defence.

In the context of the escalation of hostilities in the Yugoslavian province of Kosovo and the burst of the war in 1998-1999, a moment of great significance for the European common defence was finally marked by the signing of a “Joint Declaration on European Defence” in Saint Malo, on 1998, between the UK and France. The short document was wide in its scope and ambitious in its objectives, starting by pointing out the European Union’s need to be in a position to play its full role on the international stage. The December 1998 Saint-Malo Summit paved the way for the landmark EU Cologne Summit of June 1999, and for the subsequent Helsinki summit, which marked the Member States determination to launch a new step in the construction of the European Union with the production of a “Declaration on strengthening the Common European Policy on Security and Defence”. Moreover, the determination emerged to develop an autonomous capacity to take decisions and to launch and conduct EU-led military operations in response to international crises to be resorted to whenever NATO as a whole was not engaged in the crisis-management.

On 1 February 2003, the Nice Treaty entered into force. The Treaty of Nice proved useful and meaningful with regard to the fifth and sixth enlargement that the EU would have witnessed a few years later, in 2004 and 2007, since it established the place of the new Member States within the EU institutions. However, it did not address the major issues surrounding the future of the Union. Most importantly, it highlighted, once again, the inadequacies of the method of intergovernmental negotiation.

This led to the signing, on 29 October 2004, of the Treaty establishing a Constitution for Europe, which included several aspects of innovation for the EU, but never entered into force. For what regards the previous common European security and defence policy as defined from Cologne to Nice, it finally found its own place in the 2009 Lisbon Treaty within the framework of the Common

Foreign and Security policy under the appellation “Common security and defence policy”. Under the Lisbon treaty, Title V TUE points out the general provisions on the union’s External Action and specific provisions on the Common foreign and security policy. In particular, Title V Chapter I TUE (Articles 21 and 22) deals with the general provisions on the Union's external action, while Chapter II (Articles 23 to 46) deals with the specific provisions on CFSP (Articles 23 to 42) and lays down the provisions on the Common Security and Defence Policy (Articles 42 to 46) , which for the first time is given its own dedicated space under an explicitly designated section of the Treaty .

An evolution of the treaties’ legal provisions concerning decision making in CFSP/CSDP is also necessary to understand both the past and current functioning of decision-making in the EU’s foreign, security, and defence policy. The second chapter is therefore devoted to a thorough analysis of the legal evolution of CFSP and CSDP under the treaties that succeeded over the years, with a particular attention to the evolution of unanimous decision-making under those treaties. Attention is paid to some elements of flexibility that were introduced in the legal framework of the Union and that allow to derogate from unanimity to QMV under specific conditions.

Some elements of flexibility have indeed been established and have evolved within the framework of EU treaties throughout the years, which were the result of political efforts by the Member States and often stemmed from the willingness to facilitate EU integration in more sensitive areas, namely those in which national sovereignty is particularly eradicaded. Naturally, CFSP and CSDP falls within such areas. As it has been seen above, it took decades for Member States to transfer part of their own sovereignty to the Community structure and then to the Union, and countless attempts for them to accept to place foreign policy’s core features, namely security and defence, under the Union’s set of policies. To speak the truth, such passage cannot be said to be completed to this day. This is well detectable from the fact that a lot of decision-making processes affecting core areas of national-sovereignty as CFSP and CSDP still requires unanimity voting as a general rule. This holds great value if we think about how QMV evolved and extended its scope within the Treaties on policies others than CFSP and defence and military matters.

Therefore, it can be said that CFSP still nowadays represents an exception, or one of the exceptions in the general framework of EU policies. Despite this, some provisions exist to regulate the use of unanimity when a decision falling under the scope of CFSP and CSDP must be adopted by the Council, thus allowing under certain circumstances to pass from the latter method to qualified majority voting, or to abstain in order not to prevent an important decision to be adopted. This is possible through so called “passerelle clauses”, included in Articles 48(7) TEU, 31(3) TEU, and 333(1) TFEU, and “constructive abstention”, included in Article 31(1)(2) TEU. On one hand, these elements of flexibility were progressively inserted to simplify the process of adoption of the decision in object, and to allow Member States to conclude actions on CFSP and CSDP at a faster-

pace, without necessarily having to put everyone to an agreement, that is, to achieve everyone's approval of the measure. Indeed, these provisions have solid roots in historical events of various magnitude during which the European Union was not able to take quick and decisive action due to deadlocks in decision-making processes, thus undermining its own role as a global actor and power.

On the other hand, flexibility elements have in the first place been equipped with strong counter-balances, or built-in-limits, that virtually and practically undermine their very objective and hinder the full disclosure of their potential. This is demonstrated by the number of times they have been recurred to. Furthermore, similar in their aim however differing in their substance, provisions exist in the Treaties that allow for more flexible processes to be applied to CFSP and CSDP to allow willing Member States to pursue a closer cooperation in CFSP and CSDP matters. This is possible through means of enhanced cooperations (Articles 20 TEU and Articles 326-334 TFEU) or permanent structured cooperations, these latter having been established purposely in the field of CFSP.

Once the historical and legal framework of CFSP/CSDP has been looked at, it is important to contextualize the need for an extension of qualified majority voting to decisions falling under CFSP/CSDP by taking into consideration current challenges that confronts the EU. The third chapter explores a very recent praxis through the analysis of EU CFSP instrument of sanctions in the framework of the Russian invasion towards Ukraine, occurred on 24 February 2022. In particular, the chapter delineates an overview of the challenges that the EU is confronted with following the breakout of the war, namely the necessity to build a common defence policy and common defence as foreseen under Title V TEU. Moreover, the cohesiveness shown by the 27 Member States in the framework of the Union's response toward Russia is analysed, paying attention to the sanctions packages adopted against Russia in this last year of war.

In that context, as it has been argued by many, the EU was able to bring forward fast response to the threat posed by Russia following the invasion of Ukraine. According to estimates as of February 2023 the EU and its Member States, together with the European financial institutions have collectively provided Ukraine with €37.8 billion in financial, humanitarian, and emergency assistance. In terms of sanctions, from 23 February 2022 to 16 December 2023 the EU has adopted nine packages of sanctions, which mostly built on and broadened the scope of previous restrictive measures introduced by the EU against Russia on the occasion of the 2014 annexation of Crimea and Sevastopol and the deliberate destabilization of Ukraine. Such sanctions range from individual restrictive measures in the form of asset freezes and travel restrictions, to economic sanctions targeting the financial, trade, energy, transport, technology and defence sectors, bans on media outlet, as well as diplomatic measures and visa measures.

If the European Union response to the Ukrainian crisis has been labelled as unprecedented, nevertheless some obstacles were encountered in the adoption of some sanctions due to the right of veto of Member States. In particular, on 3 June, a sixth package of sanctions was adopted and extended restrictions to crude oil, refined petroleum products and Russian-origin gold, SWIFT ban for additional Russian and Belarusian bank, the suspension of broadcasting in the EU for several Russian media outlets, as well as the addition of 65 individuals and 18 entities to the sanctions' list. However, this came with some obstruction on the part of some Member States, namely Hungary, which held up the sixth sanctions package for 26 days in order to secure an exemption from the oil embargo on Russia, and then withheld agreement by refusing to include Orthodox Church Patriarch Kirill in the EU's sanctions listing. Moreover, in September Hungary threatened to derail the six-month renewal of the whole EU sanctions package and demanded for three oligarchs to be removed from the listing of sanctions. Also, the country vetoed a European proposal to ask the U.N. Human Rights Council for a special rapporteur on Russian human rights violations, blocking the Union's action and leading the 26 remaining Member States to call for the rapporteur through their national delegations.

Objectively invalidating the EU smooth and decisive action in international fora, from now and then the ineffectiveness of the mechanism resurfaced from the official circles of the EU to draw the attention of the European public opinion. The fourth and final chapter gives an overview of the state of the debate concerning the extension of QMV in matters falling under the scope of CFSP/CSDP, and explores the possible legal avenues to achieve a similar extension. Furthermore, it takes into account the positions and proposals of European actors on the matters.

Indeed, the issue emerged almost continuously starting from the Juncker Presidency of the Commission, back in 2017, when the topic was thoroughly addressed and discussed, although without producing any practical outcome. In very recent times the debate has been revived and taken to the next level through the ambitious proposals of the Conference on the Future of Europe (CoFoE), thus demonstrating the European citizens' eagerness for a more cohesive and responsive Union on the international scene. This happened almost concurrently with the breakout of the Ukrainian war. Ultimately, the discourse on a shift from a decision-making by unanimity to one by QMV in CFSP/CSDP gained momentum following Russia's invasion of Ukraine on 24 February 2022, and lies at the very core of the current European debate.

Several legal avenues exist to switch from unanimity to QMV decisions in CFSP/CSDP. One possible avenue to achieve an extension of QMV to CFSP/CSDP matters is through a review of the treaties under the ordinary revision procedure. In the debate concerning the extension of QMV to CFSP and CSDP matters, this latter can be considered as the best available option inasmuch it would permit a real deepening of the integration process by directly amending the legal basis of provisions

on the use of unanimity in CFSP/CSDP matters. At the same time, this would be the longer, trickier, and, to date, the less likely path to be walked, due to divided positions of the Member States on the matter. As a matter of fact, the main obstacle would be triggering the process, that requires the achievement of a simple majority in the European Council. Indeed, this would mean that at least 14 member States out of 27 should decide to support the examination of the proposal for amendment of the Treaties. In the second place, whereas a simple majority would be formed in the European Council, another difficulty would be the convening of a Convention composed of representatives of the national parliaments and the institutions.

The faster avenue to extend QMV to CFSP/CSDP decisions is offered by the prospect to exploit existing elements of flexibility as envisaged under the Treaties to their full potential. Indeed, the special CFSP passerelle clause included under Article 31(3) provides that the European Council may unanimously decide that the Council should act by qualified majority in fields falling within CFSP. The European Council can thereby unanimously decide to extend QMV to specific fields within CFSP. However, the clause comes with two limitations. In the first place, under Article 31(4) TEU, it does not apply to decisions with military or defence implications. Therefore, a revision of the Treaties would be necessary in order to vote by QMV on issue having military and defence implications. Secondly, an “emergency brake” exists under Article 31(2) TEU for which any member state can object to a decision being taken by QMV for vital and stated reasons of national policy. An additional limitation is given by the fact that the passerelle clause in turn needs a unanimous vote by the European Council for its potential to be deployed.

Furthermore, the special passerelle on enhanced cooperation, included in Article 333(1) TFEU, can also be used as a way to pass from unanimity to qualified majority voting in the framework of enhanced cooperations established under CFSP. An alternative avenue to extend QMV to CFSP/CSDP which is already included in the Treaties is the one under Article 31(2) TEU. The clause contained within the mentioned Article explicitly allows for the Council to act by qualified majority in specific cases falling under CSFP.

The alternative to the specific passerelle clause under Article 31(3) TEU which generates less controversy among Member States is constructive abstention. Under Article 238(4) TFEU, Member States are as a general rule allowed to abstain in a unanimous Council vote. Under Article 31(1) TEU, constructive abstention allows them to qualify their abstention by making a formal declaration. Constructive abstention translates in the fact that the abstaining Member is not obliged to apply the decision, but must accept that it commits the Union and must refrain from any action that would impede or conflict with the decision. Therefore, the constructive abstention seems like a potentially very useful tool in the hands of those states who would otherwise be constricted to veto a decision. Yet, it has only been used twice, both times in the context of the CSDP.

To sum up, recently the debate to overcome unanimity in CFSP/CSDP has gained momentum after the breakout of the Ukrainian war following Russia's "unprovoked and illegal" invasion of the country on 24 February 2022. The reasons for this are multiple. In the very first place lies the EU's response to Russia in the months following the war. Indeed, to defend itself from the economic repercussions of the conflict as well as to discourage Russia from taking its activity in Ukraine further, the EU adopted to date nine packages of sanctions, in accordance with provisions under Article 29 TEU. Being sanctions an instrument of CFSP, they require unanimity to be adopted. In May 2022, this caused weeks of stall due to the lack of unanimous agreements among the Member States. In particular, Hungary posed its veto on the sixth package of EU measures in order to receive an exemption from Russian oil embargo, and pursued its position by blocking the adoption of targeted sanctions toward a religious personality of the Russian Orthodox Church. The episode caused reprehension within the Union and among other Member States, raising awareness on the detrimental impact the unanimity requirement has on the Union's ability to adopt fast and decisive action, in particular in the event of complex and urgent circumstances like the one given by the war in Ukraine. Furthermore, the country continues to threaten its use of veto for further measures that should be included in the tenth package of EU sanctions against Russia

In the second place, the issue of extending qualified majority voting to CFSP/CSDP is made ever-more urgent by one of the main implications the Russian attack of Ukraine produced for the EU, namely the prospect of enlargement. Indeed, Russia's invasion of Ukraine accelerated the widening of the integration process by drawing nearer a further enlargement of the EU, and making it a realistic option. This is true inasmuch Ukraine, Georgia and Moldova applied for EU membership in the days immediately following the attack, respectively on 28 February and 3 March 2022. Although it is unlikely that any enlargement will occur any time soon before the end of the Ukrainian war, the Union should be prepared to go through it in the best of ways should the need arise. Evidently, an enlarged European Union would necessarily require a revision of the mechanisms that govern it, including decision making. This would require to contemplate a shift to QMV in key-areas of action such as the CFSP and the CSDP, in order to avoid paralyses in a Union made of 30 or more Member States with very different demographic compositions.

In the third place, the debate gained urgency also in consideration of the complex challenges that the ongoing conflict in Ukraine unleashed for the EU. In fact, as HR/VP Borrell repeatedly stated, Russia's invasion of Ukraine represents a "tectonic shift in European history" due to the huge implications it has on the EU security and defence, energetic, as well as economic sector. The hope is that the event will push towards the beginning of a process of introspection and self-review on the part of the Union, in the framework of which particular focus should be placed on the necessity to speed-up decision-making practices in the EU.

In general, the European Union finds itself confronted with a brand-new strategic and geopolitical context, in which new and old blocs will not hesitate to take advantage of the Union's internal divisions to disturb, slow down, or interrupt its integration process. As a matter of fact, a similar attempt was carried out by Russia in pursuing a full scale attack in a EU's bordering country, hoping for the Union to break on existing economic and energetic dependencies. Until now, this did not happen. Rather, the EU has shown general unity in its response, putting the condemnation of breaches of international law and human rights' violation at the first place in fighting Russia's action. However, a common strategic vision still cannot be said to exist. As the 2022 document on Strategic Compass outlines, it is precisely that political will that represents the missing element for a EU that is faster, more capable and effective in its ability to decide and act.

In conclusion, given the current global and regional framework, the shift from unanimity to QMV in CFSP/CSDP is necessary and should not be delayed. Therefore, for the immediate future the Member States should seize the current window of opportunity to explore existing shortcuts under the Treaties. At the same time, the path should be prepared in advance for a medium to long-term scenario, for example, by establishing a group of experts tasked with producing recommendations on the steps to walk to embrace an extension of QMV in CFSP/CSDP. For the immediate term, the EU should explore the full potential of flexibility clauses within the Treaties, and at the same time should try to recur to them.

Moreover, in the short to the medium term, the most committed institutions such as the Parliament and the Commission should continue to push for the gradual extension of QMV in CFSP through the activation of the passerelle or enabling clauses. It must be noted that passerelles do not apply to issues having military or defence implication, therefore their applicability in CSDP is not viable. At the same time, enabling clauses only apply to CFSP. Concerning CFSP, the use of existing instruments of flexibility under the Treaties should be promoted for sanctions' adoption and human rights' protection, where Member States could be more available to a transition to QMV due to recent experiences in the framework of the EU response to Russia following the invasion of Ukraine.

Finally, in the long term, a revision of the Treaties should be contemplated through the ordinary legislative procedure. This option is the one that can better guarantee an appropriate redefinition of the matter of extension of QMV in CFSP and in particular in CSDP. In view of such a possibility, a group of selected individuals should be composed, tasked with identifying the elements that could be part of a possible package-deal, and therefore prepare the way to reform.