

# “EU IN CRISIS: CURRENT CHALLENGES IN THE AREA OF CFSP”/ A LEGAL PERSPECTIVE

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## Abstract

*The paper aims to capture - from a politico-institutional and legal point of view - the current challenges that the European project is facing with in the field of Common Foreign and Security Policy (CFSP) / Common Security and Defence Policy (CSDP).*

*In this context, it has been assessed the consistency and credibility of the EU profile in the crisis management both in its Southern and Eastern neighbourhoods as well as the perspectives of EU - NATO Strategic Partnership and cooperation.*

*Moreover, the paper critically examines the legal mechanisms and procedures in force in the field of CFSP / CSDP, putting forward, at the same time, some concrete suggestions and proposals for possible improvements.*

**Keywords:** *Lisbon Treaty; Common Foreign and Security Policy; Common Security and Defence Policy EU - NATO Strategic Partnership; Intergovernment Cooperation.*

## 1. Introduction

Over the last years, the international security environment has progressively suffered an increased deterioration in the EU Neighbourhood - with older or newer crisis situations - both in the South (the endless Israeli – Palestinian conflict / the Middle East Peace Process; the Syrian crisis; the Iranian nuclear file; the highly fluid post-war situations in Iraq, Afghanistan and Libya) and in the East (with the dramatic events in the South-eastern Ukraine over the last year and the annexation of Crimea by Russia in March 2014 as well as with self-proclaimed breakaway regions and frozen crisis in the Republic of Moldova (Transnistria), Georgia (South Ossetia / the Russo-Georgian war; Abkhazia) and Azerbaijan (Nagorno-Karabakh).

As a direct consequence of Russia's increasingly aggressive behavior, with obvious and brutal violations of international law, including its military intervention in Crimea, followed by the annexation of this territory as mentioned before, the relations between Brussels and Moscow have experienced a less “happy” period and have progressively become more and more strained with the subsequent sanctionary regime imposed by the EU to Russia.

All this resulted in an increased concern of the EU and of its Member States towards a better use of the Union's toolbox – both institutional and legal - aimed at increasing the EU profile and efficiency in managing its CFSP/CSDP.

From this perspective, the article seeks, to a lesser extent, to make an inventory of the geopolitical and security challenges faced by the EU foreign policy, focusing mainly on an assessment of the legal instruments offered by Lisbon Treaty in the field of the CFSP / CSDP. At the same time, some concrete proposals and suggestions are advanced aimed at

possible improvements or adjustments that could be made in the field.

In terms of **research methodology**, the article **put in mirror, on the one hand, the legal instruments available to the EU within CFSP / CSDP**, and the **specific requirements needed in order to allow the EU to act as a genuine global actor and to efficiently manage the challenges that the Union is facing on the international arena**, on the other hand.

## 2. Content

### 2.1. The Political Challenges

Since the very moment of the CFSP's launching as a specific dimension of EU external action (in the context of the entry into force of the Maastricht Treaty<sup>1</sup>), the EU Member States have expressed nuanced approaches as regards the perspectives and objectives of the EU foreign policy. Thus, while some Member States have constantly endeavoured to strengthen the EU's CFSP pillar, other Member States, especially those having a very pro-Atlanticist orientation have been sceptically as regards such a possibility, fearing the weakening or even the undermining of NATO's relevance with the development of CFSP.

In addition, some Member States have openly expressed growing concern about the fact that the development of CFSP will lead to a gradual transfer of power from the national level to Brussels with direct and clear implications in terms of loss - at least partially - of their sovereignty.

As a result of such diverse approaches, the CFSP has remained a privileged domain of the

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<sup>1</sup> February 1993 / <http://www.eurotreaties.com/maastrichttext.html>.

intergovernmental cooperation<sup>2</sup>, with direct consequences on the preservation of "unanimity" voting rule as the main voting system within the second EU pillar at the expense of qualified majority voting. At the same time, the unanimity has caused constant and significant difficulties in getting common positions and promoting joint actions as regards important issues of the EU foreign policy.

One of the most striking examples of the difficulties faced by the EU in identifying a common approach or position in the field of the EU foreign policy is unfortunately represented by the Ukrainian crisis.

Thus, since the Ukrainian crisis has entered its military phase, through the annexation of Crimea by Russia, the EU Member States have expressed quite diverse positions, giving the impression of being concerned first and foremost by the protection of their national interests and only to a smaller extent by the promotion of their common interest as EU Member States. Subsequently, despite the sanctions regime imposed to Russia, which repercussions for Moscow can not be underestimated, the Member States have quite often had difficulties in speaking with one voice on the EU foreign policy and, in particular, in terms of the Ukrainian crisis management. Unfortunately, such controversial situation has eloquently been illustrated by the two rounds of negotiations with Russia hosted by Belarus – Minsk I and Minsk II - which outcomes have clearly pointed out once more a rather hesitant Europe having difficulties in defining a common position.

In addition, the format in which the negotiations in Minsk were conducted has raised some controversies due to the fact that the Franco-German tandem spoke on behalf of Europe without an explicit mandate from the EU – namely the European Council (possibly at the EU Council proposal). Against this situation, one may put the question - with all the due respect for the contribution of the two founding members of the European Communities /EU to the progress of the European project - whose interests did they defend in Minsk in the two rounds of negotiations? And wouldn't it have been more appropriate to invite the President of the European Council and the High Representative of the Union for the Foreign Policy and the Security Policy to take part to negotiations and to bring their own contributions to the peaceful settlement of a crisis involving the not only Germany and France but the interests of EU as a whole.

At the same time, we do consider that the format of discussions in Minsk would have been much more balanced if the North Atlantic Alliance were present

on its behalf – together the EU - at the negotiations taking into account the community of values and interests of the two organizations. Last but not least, the United States - as the main guarantor for the peace and security of the European and Euro-Atlantic community - should have been invited to take part and to directly engage in any negotiation process related to the Ukrainian crisis.

Of course, one could argue - rightly - that the difficulties in achieving a consensus amongst the Member States on a common EU approach with respect to the situation in Ukraine as well as the complexity of decision-making procedures involved prevented the EU from being represented and not the least from shaping a unitary position at the talks in Minsk.

In this respect, there are still difficulties for the EU Member States to get a common vision and to speak with a single voice with its international partners as well as to efficiently manage the crisis / conflicts in the EU Neighbourhood - both to East and to South - despite the fact that the peace and security of the EU as a whole obviously depends on the peace, security and stability of the ENP region<sup>3</sup>.

Actually, the rationale behind the current ENP reform process has been sourced from the need to improve the coherence and efficiency of EU action in its Neighbourhood and has focused – amongst other specific issues<sup>4</sup> - on some priority directions, such as: the need to enhance the ENP political and strategic profile; an increased EU involvement in the peaceful settlement of the frozen conflicts; an enhanced complementarity of the ENP tools with the Lisbon Treaty 's tool box in the fields of CFSP / CSDP as well as other sectors of the EU external action (namely development cooperation, humanitarian assistance; scientific and technological cooperation).

In the same logic, the EU aims at rethinking and adapting the European Security Strategy in order to better address the new risks for peace, security and stability of the European Union. In this respect, a strategic reflection process has already been launched amongst the EU Member States and the EU institutions aimed at updating the basis for a new European Security Strategy<sup>5</sup> in order to make it compatible with the new realities of continuously changing political and security international context. Such a debate represent a useful and necessary step in order to get a common approach from the Member States and the EU institutions including the European Parliament despite the fact that the latter – under the Lisbon Treaty - is still missing significant competences on the EU foreign policy.

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<sup>2</sup> "Unanimity" voting system is also used in the "Freedom, Security and Liberty" area (former third pillar of Nice Treaty / judicial cooperation in criminal matters and police cooperation).

<sup>3</sup> Either it speaks about some breakaway regions in the East (Republic of Moldova, Georgia, and Azerbaijan) or about some frozen conflicts in the South (Middle East peace Process; the Syrian crisis).

<sup>4</sup> Increased differentiation amongst the ENP partner countries; ownership; flexibility; a more focus and tailor made approach.

<sup>5</sup> The previous ESS is dated 2003, with an updated version in 2008.

The strengthening and deepening of the EU - NATO Strategic Partnership has constantly had a special place in EU foreign policy, given the fundamental role played by the Alliance in ensuring the security of the Euro-Atlantic community. But again, we notice some residual stumbling blocks faced by the two organizations in terms of developing their institutional cooperation due to the still unresolved "participation issue" i.e. the dispute between Turkey and the Republic of Cyprus on the situation in the Northern Cyprus.

In our view, the existing blockage in the peaceful settlement of the "Cyprriot file" is likely to create difficulties both the EU and NATO, with direct consequences on the efficiency of cooperation between the two organizations.

## 2.2. The legal framework on CFSP /CSDP

### &.1. The Lisbon Treaty and the CFSP

The main improvements brought by the Lisbon Treaty in the field of CFSP / CSDP should be considered from a double perspective, both politico-institutional and legal.

In terms of **political and institutional reforms**, the Lisbon Treaty has created and consolidated new institutions and structures with relevant prerogatives in the field of the EU Foreign Policy namely the European Council, the Foreign Affairs Council and the High Representative for Foreign Affairs and Security Policy.

As for the **European Council**, it has been formalized as a permanent EU institution, headed by a President with a term of two years and six months, renewable once. This institution brings together the Heads of State or Government of the EU Member States, the President of European Commission as well as the High Representative for Foreign Affairs and Security Policy<sup>6</sup>. The European Council's role consists in "providing the Union with the necessary impetus for its development", including in terms of shaping and defining "the general political directions and priorities"<sup>7</sup> for the EU's foreign policy.

When it comes to the **Foreign Affairs Council**, we can't speak about the establishment of a new institution as such, taking into account that, up to the moment of entering into force of the Lisbon Treaty, the foreign ministers of the EU countries used to meet in

specialized meetings of the Council, regardless of the formal name of the respective structure.

As regards the **High Representative of the Union for Foreign Affairs and Security Policy**<sup>8</sup>, given the restrictive nature of the provisions of Article 13 / TEU, it can not formally be considered as representing an EU institution as such, but rather an office. Despite this, the HR, assisted by the **European External Action Service**, has obviously been meant to play a relevant role in shaping the CFSP, including in terms of "right of initiative" in the CFSP, together the Member States and the European Commission.

At the same time, it's worth mentioning that the HR is acting as a "triple-hatted" body, covering the responsibilities of three former or current Union's high officials: the former High Representative for CFSP/Secretary General of the Council<sup>9</sup>; the President of the Foreign Affairs Council<sup>10</sup>; the Vice-President of the European Commission and Commissioner for External Affairs<sup>11</sup>.

As far as the **EU legal framework** is concerned, the Lisbon Treaty has preserved the intergovernmental feature<sup>12</sup> of the CFSP / CSDP - i.e. the unanimity as the main rule<sup>13</sup> in the decision-making procedures while slightly extending - by derogation from the provisions of the above-mentioned rule - the situations where the qualified majority voting is considered to be applicable when adopting a decision based on the following circumstances<sup>14</sup>:

- "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;
- "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
- "implementing a decision defining a Union action or position;
- "appointing a special representative".

In addition, a decision of the Council, by a qualified majority, can be adopted on the basis of an initiative of the HR establishing "the procedures for setting up and financing the start-up fund, in particular the amounts allocated to the fund"<sup>15</sup> for rapid funding

<sup>6</sup> Without having – in the case of the HR - the right to vote.

<sup>7</sup> Official Journal of the European Union, Consolidated versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union C 115, Volume 51, 9 May 2008.

<sup>8</sup> Official Journal of the European Union, Consolidated versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union C 115, Volume 51, 9 May 2008, art. 18 (1).

<sup>9</sup> Function created by the Amsterdam Treaty, in force since 1999.

<sup>10</sup> With the Lisbon Treaty, the EU Council's powers have been divided between the General Affairs Council (which responsibilities are related to the preparation of the European Council's activity and the management of sectoral formations of the Council, with the exception of the Foreign Affairs Council) and the Foreign Affairs Council.

<sup>11</sup> With clear prerogatives

<sup>12</sup> Paul Craig, Grainne de Burca : "EU Law. Text, Cases, and Materials", Oxford University Press, Fifth Edition, 2011, pag 329-333.

<sup>13</sup> 9.5.2008 EN Official Journal of the European Union C 115/37, TFEU, Article 31, paragraph 1.

<sup>14</sup> 9.5.2008 EN Official Journal of the European Union C 115/33, Treaty on the European Union, Chapter 2 / Specific provisions on the Common Foreign and Security Policy, Article 31(2).

<sup>15</sup> 9.5.2008 EN Official Journal of the European Union C 115/37, TFEU, article 41, paragraph 3.

from the EU budget of actions to be promoted under the aegis of Common Foreign and Security Policy.

In this context, it is worth mentioning here that in accordance with the provisions of article 31, paragraph 1 / Treaty on the European Union a Member State has the possibility to invoke its **“abstention” or “constructive abstention”** when it comes to vote, meaning in concrete terms that the Member State is not obliged to pass to the implementation of the decision taken by its partners, despite the fact that the decision retains its significance for the Union as such, on the one side, and the Member State that has invoked its constructive abstention should avoid or refrain themselves from acting contrary to the provisions of the decision in question, on the other side.

Of course, there are some limitations imposed by the EU Treaties in connection with the "constructive abstention", i.e. if the Member States making use of constructive abstention - including by making a formal statement to this effect - represent at least 33% of the EU Member States representing at least 33% of the Union's population then the decision can not be adopted. We remark here an increased affordability that has been offered by the Lisbon Treaty when it comes to adopt a decision despite the existence of the "constructive abstention" compared with the Treaty of Nice in the sense that under the previous voting system in order to block the adoption of a CFSP decision it would have been enough to have constructive abstention of the Member States representing 33% of the weighted votes necessary for getting the qualified majority.

At the same time, we can remark that **the adoption of legislative acts as such has explicitly been excluded from the scope of applicability of the Common Foreign and Security Policy as well as for the Common Security and Defence Policy**<sup>16</sup>.

Among the most important innovations introduced by the Treaty of Lisbon with direct implications in the field of EU foreign policy, including the implications of the Common Security and Defense, we have to mention **the “solidarity clause”**<sup>17</sup> and the **“mutual defense clause”**<sup>18</sup> respectively. The provisions of the two above-mentioned clauses are likely to strengthen the solidarity between the Member States while enhancing their involvement and participation in terms of countering any armed aggression or terrorist attack against a Member State from a third country, along with providing the necessary assistance in case of natural disasters or man-made disasters.

Last but not the least, we also notice another significant change made by the Treaty of Lisbon - with purely cosmetic appearance - namely **the replace of syntagma "European Security and Defence Policy" with "Common Security and Defence Policy"**. Such

a change seems to have only a purely cosmetic effect, as long as, in substance, the mechanism of decision-making process in the field of CSDP remains practically the same. However, politically speaking, the overall demarche of renaming / “rebaptizing” the security and defence policy from "European" to "Common" **has or should have the meaning of a fundamental political commitment**: the passage - somewhere in the future, when appropriate - **to the “communitarization” of the security and defence policy** and subsequently a **possible effective application of the qualified majority voting system** on such matters.

## **&.2. The way ahead / Proposals for improving the coherence of EU Foreign Policy**

Against this background, we can raise the question to what extent the legal framework provided by the Lisbon Treaty can meet the politico-strategic and security challenges faced by the EU on the international scene, including in terms of coherence and efficiency of its external action?

Obviously, the EU cannot have a significant performance on the international scene - as a credible global player - as long as its performance in the field of CFSP often seems similar to that of a car with the brake pedal pressed down.

In our view, an in-depth assessment and reflection on Common Foreign and Security Policy / Common Defence and Security Policy is still needed in order to make full use of Lisbon Treaty's toolbox while trying to adjust and improve where necessary the current strategies and policies on such matters.

The EU **cannot further ignore its inability to speak with a single voice on CFSP/CSDP issues as if nothing had happened**. As a direct consequence, **the EU cannot simply preserve the current decision-making system in the field, if it really wants to count as a credible player in the world affairs**.

In this respect, some improvements are needed in order to facilitate the consensus or at least the EU common positions on most important dossiers.

Amongst the **possible solutions**, we suggest:

- **improving the convergence, coherence and coordination amongst the Member States** in terms of **strategic vision and shaping** the EU foreign policy priorities through a wide-ranging debate, involving the EU institutions, the Member States, including the public opinion in the Member States / the European citizens; in order to reach such a crucial goal, the **Europeans need much more solidarity and a clear-cut and shared awareness of the EU common values and interests**; in this respect, the Member States should not be reluctant in asserting their political will to strengthen the EU role as a global actor; at the same time, the political leaders should act at national level as opinion leaders in order to better explain and shape their public opinion about the importance of CFSP for

<sup>16</sup> 9.5.2008 EN Official Journal of the European Union C 115/37, TEU, article 31, paragraph 1.

<sup>17</sup> 9.5.2008 EN Official Journal of the European Union C 115/37, TFEU, article 222.

<sup>18</sup> 9.5.2008 EN Official Journal of the European Union C 115/37, TEU, article 42(7).

their own welfare and security;

- **better use and implementation of "common strategies"**<sup>19</sup> which should be **better suited to geographical regions, strategic partners, groups of states, partner countries and, not the least, outbreaks of crisis**; as a direct consequence, such targeted "common strategies" **should allow the use of the QMV** when it comes to implement "common positions" and "joint actions" previously approved by unanimity within the European Council and / or the EU Council;

- **extension of the scope and applicability of article 31(2) / TEU** related to the use of qualified majority voting system in the field of CFSP, except for decisions with military or defense relevance;

- in addition, **the effective use of the provisions of article 48 (7) / TEU** concerning the "simplified revision procedures"; in this respect, under the provisions of the above-mentioned article the European Council can decide by unanimity - having the consent of the European Parliament and provided that no national parliament expressed its opposition to such a decision - to "switch from unanimity to qualified majority voting system"<sup>20</sup>; again, such a procedure does not apply to "decisions with military implications or those in the area of defense";

- **further development of "battle groups"**<sup>21</sup> **concept** using the provisions of the Protocol on the "Permanent Structured Cooperation in Defense" annexed to the Lisbon Treaty, as a genuine embryo of a future EU enhanced operational capabilities in the field of security and defense;

- **more active role for the European Defense Agency** in terms of **supporting the development of a genuine European defense industry** monitoring and promoting the;

- not the least, **increased efforts aimed at overcoming the current institutional blockage** caused by the "participation problem" while

**improving and upgrading the current bilateral legal and institutional cooperation framework between the EU and NATO**; successful demarches on the above-mentioned issues would result in a **more active involvement of the EU in the theatres through the EU-led missions using NATO military assets** (including in terms of strategic command, consultation and communication)<sup>22</sup> as well as through the EULEX Missions in close cooperation with NATO.

### 3. Conclusions

The **rapid-shifting nature in the current geopolitical and international security context**, with a **more and more aggressive and revanchist Russia**, eager to regain its influence and status at global level, **strongly demands** – as a **top priority for the EU foreign affairs** - for a **rapid rethinking and reconsideration of the EU's tool-box in managing its foreign policy** aimed at **enhancing the EU engagement and profile on the international scene**.

From this perspective, despite some significant improvements brought by the Lisbon Treaty, mainly in institutional terms, the EU **needs faster and more flexible decision-making procedures in the field of CFSP / CSDP** and, why not, **even a reconsideration of the intergovernmental "hardcore"** of its foreign policy.

In our view, the achievement of such an objective demands a **clear-cut political will of the Member States** - as an **essential prerequisite** - to **deepen their integration on these matters**, along with the awareness by the Member States and the Union's political leaders of the fact that a **more credible and stronger EU's security and defence policy** can **better protect and promote the interests of their citizens and the EU values worldwide**.

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<sup>19</sup> Stephan Keukeleire, Jennifer MacNaughtan: The Foreign Policy of the European Union, Palgrave macMillan, 2008, pag. 107.

<sup>20</sup> Jean Claude Piris : « The Lisbon Treaty. A Legal and Political Analysis », Cambridge University Press, 2010, pag. 108-109.

<sup>21</sup> Sven Biscop, Jo Coelmont: "Permanent Structured Cooperation for Effective European Armed Forces", Royal Institute for International Relations, Security Policy Brief, March 2010, #9, pag. 1-3.

<sup>22</sup> In accordance with the provisions of EU – NATO Strategic Partnership (December 2002) and "Berlin Plus" arrangements in place since March 2003.