

# JOGI FÓRUM PUBLIKÁCIÓ

**Development of the Common Foreign and Security Policy in the aspect of its history, legal nature and decisions**

Szerző:

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## **I. Introduction**

The principles and objectives of the Common Foreign and Security Policy are to safeguard the common values, fundamental interests, integrity and independence of the Union, in conformity with the principles of the United Nation Charter; to strengthen the security of the European Union in all ways; to preserve peace and strengthen the international community, in accordance with the principles of the United Nation Charter; to promote international cooperation; and to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms. In the field of the Common Foreign and Security Policy, the Political and Security Committee (PSC) helps define policies by drawing up opinions for the Council, without prejudice to the role of the Permanent Representatives Committee (COREPER) in preparing Council sessions. The PSC also exercises, under the responsibility of the Council, political control and strategic direction of crisis management operations.

## **II. The history of the common foreign and security policy**

In the Treaty of Rome the ideas for cooperation in the field of international policy were already in evidence. For almost 40 years of European construction the expression such as common foreign policy found no place in the Treaties. First, it was just at intergovernmental level in the context of European political cooperation. The Single European Act was signed in 1986 which formalised this intergovernmental cooperation without changing its nature or methods of operation. The change came at Maastricht Treaty in 1992 where, for the first time, Member States incorporated in this Treaty the objective of a „common foreign policy”. Since this time, the European Union as such can make its voice heard on the international stage, express its position on armed conflicts, human rights and any other subject linked to the fundamental principles and common values of the European Union and which it is committed to defend.

The provisions on the common foreign and security policy were revised by the Amsterdam Treaty in 1999. Articles 11 to 28 of the Treaty on European Union are now devoted specifically to the CFSP.

“An important decision in terms of improving the effectiveness and profile of the Union’s foreign policy was the appointment of a High Representative for the CFSP (an innovation of the Treaty of Amsterdam), Mr Javier Solana Madariaga, who took up the post in 18 October 1999 for a period of five years.”<sup>1</sup>

### ***1. The Evolution of the Common Foreign and Security Policy***

The CFSP serves the interests of individual state in so many ways, since they can opt in and opt out of such a loose framework, and use the collective processes as a platform or a cover for their particular needs, as occasion demands. “Some member states have in fact developed more of a national foreign policy through these means than they ever had before.”<sup>2</sup>

The 33 years of the European Community and the European Union foreign policy co-operation represents the most sustained and impressive attempt at diplomatic coordination ever seen. The CFSP is protective, in the sense that an unpopular position is more easily pursued if shared with others. It is also a positive side of the CFSP that a collective European position will always have a higher profile than even the strongest individual foreign policy can project while making possible the mobilisation of greater resources to influence events. “Another advantage is the economies of scale made possible by the sharing of information and other forms of co-operation between national diplomatic services.”<sup>3</sup> This is particularly important for the smaller Member States with littler tradition of foreign policy matters, and relatively few embassies, especially in difficult third country capitals.

It must be accepted that the European Union is in a unique situation, it has the advantages of a regional presence to add to the 27 Member States, but it suffers from the confusions and collective action problems which go with it. We have to live and work with a complex, dialectical and unpredictable pattern of interactions between states and common institutions, between areas of policy and between various kinds of cross-cutting policy groups, some of which involve actors from outside the European Union.

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<sup>1</sup> Council of the European Union General Secretariat: The Common foreign and security policy (Luxembourg , Office for Official Publicatory of the European Communities, 2002) p. 4.

<sup>2</sup> Christopher Hill: The Evolution of the Common Foreign and Security Policy of the European Union (Diplomatic Academy Vienna Favorita Papers 02/2003) p. 7.

<sup>3</sup> Christopher Hill: The Evolution of the Common Foreign and Security Policy of the European Union (Diplomatic Academy Vienna Favorita Papers 02/2003) p. 9.

It is necessary to emphasise that the Common Foreign and Security Policy has been traditionally regarded a weak policy of the Union because it is based on the co-ordination of foreign policy among the Member States and it is generally thought misleading to regard it a “common” policy. “It has been successful in cases when the Member States had critical common interests, as in case of the former Yugoslavia, and has failed largely when they have been diverse, as in case of the recent crisis concerning Iraq.”<sup>4</sup> So it is better to speak about the coincidence of foreign policies of the Member States. In case the CFSP becomes more of a common policy based in a common strategy, it must emphasise that the accession countries will have to adapt to it.

The CFSP has appeared as important but not decisive matters of EU integration over the last years. In preparation for membership the accession countries have identified the following priority areas where it intends to promote its special interest: strengthening the Transatlantic relationship, the formation of the Eastern neighbourhood policy of the EU, the role of the EU in the Balkan and the formation of the relationship of the Union with Russia. The accession countries have to play a particularly active role in these matters.

## ***2. Historical background***

On 7 February 1992 in signing the Treaty on European Union the Member States officially embraced the foreign and security cooperation. The CFSP was to be seen as one of the areas that would serve as the justification for the establishment of that Union, from the entry into force of the Treaty on 1 November 1993. The CFSP did not, however, appear out of the blue because its origins date back to the 1950s. “In 1950 the Korean conflict triggered a number of politicians to come up with proposals for European defence cooperation. In August of that year, Winston Churchill launched the idea of a European Army under a European Minister of Defence.”<sup>5</sup> The European Coal and Steel Community Member States signed the Treaty establishing the European Defence Community (EDC) on 27 May 1952. The Community would have a supranational character according to the first Article of the EDC Treaty, moreover it would have common institutions, common armed forces and a common budget.

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<sup>4</sup> Pál Dunay: Hungarian Foreign Policy after EU accession: Substance and Process (Diplomatic Academy Vienna Favorita Papers 02/2003) p. 70.

<sup>5</sup> Romses A. Wessel: The European Union’s Foreign and Security Policy (A Legal Institutional Perspective), (Kluwer Law International 1999) p. 2.

In March 1953 under the leadership of Paul Henri Spaak the ad hoc Assembly produced the Statute for a European Political Community (EPC). The EPC Statute included provisions on a coordinated foreign policy, which might in time become a common policy. “However, on 30 August 1954 the French Assemblée Nationale resolved to adjourn the debate on the acceptance of the EDC Treaty, which also meant the end of the Statute on an EPC.”<sup>6</sup> After that the Brussels Treaty on Economic, Social and Cultural Collaboration and Collective Self-Defence (signed at Brussels on March 17, 1948) between the United Kingdom, the Benelux countries and France was modified (in Paris on 23 October 1954), which provided inter alia for the creation of the Western European Union (WEU) and the accession of Italy and Germany.

At the Strasbourg Meeting on 23 November 1959, the European Economic Community Foreign Ministers agreed to hold regular meetings every three months “on matters of international policy”, covering both the political implications of the activities of the European Communities and other matters.

### ***3. From European Political Cooperation to a Common Foreign and Security Policy***

The meeting of the Heads of State and Government in The Hague on December 1969 decided that their Foreign Ministers should again investigate the possibilities for closer political cooperation. “On 20 July 1970 this resulted in the Davignon Report, which was adopted by the European Council in Luxembourg on 23 October 1970. This Luxembourg Report is usually seen as the constitutive document of the European Political Cooperation”<sup>7</sup>. Its main purpose was to intensify political cooperation by introducing meetings of the Foreign Ministers twice a year and of a Political Committee.

In February 1986 the Single European Act, the result of the Intergovernmental Conference, mirrored the traditional diverging views of the Member States on European integration. “On the one hand, the EPC was placed with the Community within one single document, but on the other hand it remained clearly separated from the Community legal order.”<sup>8</sup>

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<sup>6</sup> Romses A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 3.

<sup>7</sup> Romses A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 5.

<sup>8</sup> Romses A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 8.

The concept of a CFSP as initially formulated by Chancellor Kohl and President Mitterand, was included in the Treaty on European Union (TEU) signed on 7 February 1992, without any in-depth discussion of its meaning and its implications. It has to be mentioned that CFSP was not included as part of the Community legal order. “The three-pillar structure, placing the common foreign and security policy in a separate (second) “pillar”, apart from the three European Communities in the first pillar and the provisions on Cooperation in the field of Justice and Home Affairs (CJHA) in the third”<sup>9</sup>. “Title V of the TEU presents the CFSP as a more or less autonomous set of rules, meant to lead to a policy which, prima facie, is not by definition connected to the external policy of the Community, which is clearly not to be equalled with the national policies of the member states, but which is nevertheless part of a new European Union.”<sup>10</sup>

The CFSP is an unusual form of cooperation, which is the result of the incremental process that has been going on since 1950s, and which seems separated, but at the same time inseparable from the legal orders of the Member States and the Communities, while simultaneously forming part of an overarching European Union.

The Treaty of Maastricht relaunched the process with a fanfare as the Common Foreign and Security Policy, pretending that there was a new element of supranationalism and that the CFSP represented an integration of the European Union’s external policies. New terms and instruments were introduced such as common position and joint actions, to be followed by common strategies in the Treaty of Amsterdam in 1997.

Any new structure creates its own difficulties, for example “the Commission even if it has never had a prominent role in classical foreign policy, and has only had an equal right of initiative since 1993, still represents a major source of expertise on external relations, with a near-monopoly on representation in third countries.”<sup>11</sup> The Council Secretariat has steadily expanded its expertise and its staff as governments have asserted their control over the European Union in general.

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<sup>9</sup> Romses A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 9.

<sup>10</sup> Romses A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 10.

<sup>11</sup> Simon Nuttall: *European Foreign Policy* (Oxford: Oxford University Press, 2000) p. 255.

It is very important to give the European Union legal personality by the Lisbon Treaty because the Union, therefore, have the right to conclude international agreements without having so often to resort to the Commission and Member States agreeing, according to their various procedure.

The European Union is the most solidaristic regional grouping in the world but involves no commitment on the part of its Member States to defend each other in the event of armed attack. "Defence and defence are left to a combination of NATO, the Western European Union and ad hoc arrangements."<sup>12</sup>

#### ***4. The European Security and Defence Policy***

The common security policy covers all matters relating to its security, including the gradual formulation of the European security and defence policy. "The ESDP does not, however, affect the specific nature of the security and defence policies of certain Member States, and is also compatible with the policy conducted in the framework of the North Atlantic Treaty Organisation."<sup>13</sup>

#### ***5. The necessity of a common foreign and security policy***

The European Union's economic development has been accompanied by substantial contributions to other countries and regions in terms of development cooperation, humanitarian and reconstruction aid. The Union and its Member States nowadays provide more than half the funds for international development aid and more than 50 per cent of world humanitarian aid. The substantial aid is now supplemented by a political aspect, a contribution to international peacekeeping, the promotion of international cooperation, democracy and human right and using military force where it is appropriate.

The European Union is a major economic and political player on the international stage. "The disintegration of the former Soviet Union and the end of the Cold War eliminated the danger of a

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<sup>12</sup> Christopher Hill: The Evolution of the Common Foreign and Security Policy of the European Union (Diplomatic Academy Vienna Favorita Papers 02/2003) p. 15.

<sup>13</sup> Council of the European Union General Secretariat: The Common foreign and security policy (Luxembourg , Office for Official Publicatory of the European Communities, 2002) p. 5.



massive attack in Europe. However, the conflict in the former Yugoslavia has made us more aware of the dangers of a major conflict on our doorstep.”<sup>14</sup> These events have enabled the Union to identify the danger that regional conflicts represent for the countries in the neighbourhood and for peace and international security and stability. Because of these reasons the Union has decided to take responsibility for its own security increasingly into its own hands. “The Union has therefore decided that it should be capable not only of acting independently in crisis management but also of intervening to prevent conflict, by endeavouring to address the causes, as well as contributing to reconstruction and stabilisation, an area in which the Member States were already taking significant measures.”<sup>15</sup>

## **6. After the Treaty of Lisbon**

Europe is not the same place as it was 50 years ago, and nor is the rest of the world; in a constantly changing, ever more interconnected world, Europe is grappling with new issues: climate change, globalisation, demographic shifts, the need for sustainable energy sources and new security threats, these are the challenges facing Europe in the 21st century.

Borders count for very little in the light of these challenges and the Member States of the European Union cannot meet them alone but acting as one, Europe can deliver results and respond to the concerns of the public. For these reasons, Europe needs to modernise. The European Union has recently expanded from 15 to 27 members, that’s why it needs effective, coherent tools so it can function properly and respond to the rapid changes in the world and that means rethinking some of the ground rules for working together.

The treaty signed in Lisbon on 13 December 2007 sets out to do just the above. When European leaders reached agreement on the new rules, they were thinking of the economic, social and political changes going on, and the need to live up to the hopes and expectations of the European sphere. The Treaty of Lisbon defines what the Union can and cannot do; it alters the structure of the institutions of the Union and how they work. As a result, the European Union can be more democratic and its core values are better served.

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<sup>14</sup> Council of the European Union General Secretariat: The Common foreign and security policy (Luxembourg , Office for Official Publicatory of the European Communities, 2002) p. 8.

<sup>15</sup> Council of the European Union General Secretariat: The Common foreign and security policy (Luxembourg , Office for Official Publicatory of the European Communities, 2002) p. 9.

This treaty is the result of negotiations between the Member States of the EU in an intergovernmental conference, in which the European Commission and the European Parliament were involved as well. The treaty was ratified by each of the 27 Member States of the Union. It was up to each state to choose the procedure for ratification, in line with its own national constitution.

The Treaty of Lisbon entered into force on 1 December 2009, in accordance with its Article 6. It provides the Union with modern institutions and optimised working methods to tackle both effectively and efficiently today's challenges in today's world. The Treaty of Lisbon reinforces democracy in the European Union and its capacity to promote the interests of its citizens on a day-to-day basis.<sup>16</sup> Following the entry into force of the Treaty of Lisbon, the European Council appointed Catherine Ashton as the High Representative of the Union for Foreign Affairs and Security Policy; she chairs the Foreign Affairs Council and conducts the Common Foreign and Security Policy. Drawing on her role as Vice-President of the European Commission, she ensures the consistency and coordination of the Union's external action; the High Representative will be assisted by the European External Action Service (EEAS) as well.<sup>17</sup> The High Representative of the Union for Foreign Affairs and Security Policy plays a key role in the formulation, preparation and implementation of the CFSP as well.

The High Representative exercises, in foreign affairs (the functions which, so far, were exercised by the six-monthly rotating Presidency) the High Representative for CFSP and the Commissioner for External Relations. According to Articles 18 and 27 of the Treaty on the European Union, to specify the High Representative's duties, these are the following, she:

- conducts the Union's common foreign and security policy;
- contributes by her proposals to the development of that policy, which she will carry out as mandated by the Council, and ensures implementation of the decisions adopted in this field;
- presides over the Foreign Affairs Council;
- is one of the Vice-Presidents of the Commission;

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<sup>16</sup> [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm)

<sup>17</sup> <http://eeas.europa.eu>

- moreover, ensures the consistency of the European Union's external action and is responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action;
- represents the Union for matters relating to the common foreign and security policy, conduct political dialogue with third parties on the Union's behalf and expresses the Union's position in international organisations and at international conferences;
- exercises authority over the European External Action Service and over the Union delegations in third states and at international organisations.<sup>18</sup>

The European External Action Service (EEAS) will help the High Representative ensure the consistency and coordination of the European Union's external action as well as prepare policy proposals and implement them after their approval by the Council. It will also assist the President of the European Council and the President as well as the Members of the Commission in their respective functions in the area of external relations and will ensure close cooperation with the Member States. The EEAS should be composed of single geographical - which is covering all regions and countries - and thematic desks, which will continue to perform under the authority of the High Representative the tasks currently executed by the relevant parts of the European Commission and the Council Secretariat. Development and trade policy as defined by the Treaty should remain the responsibility of relevant Commissioners of the European Commission.<sup>19</sup>

### **III. The Union's Single Institutional Framework**

In accordance with Article 3 TEU “the single institutional framework which shall ensure the consistency and the Continuity of the activities carried out”, the decisions on CFSP are taken by the same institutions with functions in other areas of the Union. In “CFSP we are dealing with the same institutions as the ones we know in the Community may be found in Article 28. This article lists a number of EC provisions dealing with the institutions which shall apply to CFSP as well.”<sup>20</sup>

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<sup>18</sup> <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:en:HTML>

<sup>19</sup> [http://www.consilium.europa.eu/uedocs/cmsUpload/Background-HighRepresentative\\_EN.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/Background-HighRepresentative_EN.pdf)

<sup>20</sup> Romes A. Wessel: *The European Union's Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 75.

The agents of the CFSP are the European Council, the Council of the European Union, the Presidency, The Secretary-General of the Council/High Representative for the CFSP, the European Commission and the special representatives.

### ***1. Competences of the Institutions regarding the financing of CFSP***

Keeping in mind the unity in the institutional structure foreseen by the Treaty, it will not come as a surprise that a distinction is made between CFSP issues and Community issues regarding the administrative expenditure of the institutions; all administrative costs incurred by the institutions in the field of CFSP shall be charged to the budget of the European Union. The provisions on the financing of CFSP actions not only strengthened the link between CFSP and the Community, but that they were equally the source of a large number of conflicts. In the past, regardless of the hesitations on the side of some Member States during the negotiations on the TEU, Member States soon accepted financing of CFSP operations out of the EC budget as the norm. "An exception to this rule was the financing of national diplomats or official participating in EU actions. Salary, transport and other costs were in most cases paid by the state of which the official was a national."<sup>21</sup> These conflicts were the reason for the Interinstitutional Agreement on the Financing of the Common Foreign and Security Policy in the margin of the Amsterdam European Council in 1997; it was signed between the Council, the European Parliament and the Commission. In this Agreement the European Parliament was successful with regard these points: the CFSP costs remain non-compulsory expenditure; the operational CFSP budget is fixed by the European Parliament and the Council on the basis of the draft budget made by the Commission; and the Council presents a financial memorandum with the estimated costs to the EP every time CFSP decisions result in expenditure to be charged to the budget of the European Union. In every three months the Commission has to report to the Council and the European Parliament on the implementation of CFSP operations and their financial implication. In this way the 1998 budget for the first time contained finances for ongoing and possible new CFSP actions, instead of only including a reserve for these expenditures. In the Interinstitutional Agreement of 6 May 1999 the institutions among others agreed on a conciliation procedure, which will also apply to CFSP expenditure charged to the EC budget.

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<sup>21</sup> Romes A. Wessel: *The European Union's Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 100.

#### **IV. The Legal Nature of CFSP Decisions**

First of all we have to ask the following questions: are we dealing with legal norms in the field of CFSP; what is the binding quality of these norms; and is there a hierarchy between conflicting norms? It has to emphasise that norms are legally binding only when they are based on a legal source. Thus as long as the CFSP norms find their basis in Treaty norms, their legal validity is assured so this implies that whenever they contain binding elements, these norms are legally binding. “Provisions in a decision of the Council are legally binding when they can be regarded as certain types of speech acts, emanating from the Council on the basis of a valid competence-conferring norm in the Treaty.”<sup>22</sup>

The Council’s Legal Service had an opinion on the legal character of joint actions in the cooperation in the field of Justice and Home Affairs; in this report it was concluded that all joint actions are legally binding, but that the scope of this binding quality depends on the content and wording of each joint action. The Council’s Legal Service supported the approach of the legal nature of CFSP Decisions as announced.

##### ***1. The Common Foreign and Security Policy as a legal order***

At the beginning the CFSP was a political event rather than a legal order. To identify the legal nature of CFSP decisions it should be asked what way these decisions do bind the actors such as Member States as well as EU institutions.

##### ***2. The implementation of the Common Foreign and Security Policy***

This kind of policy is not implemented in the same way as Community policies such as the agricultural, environmental, research and transport policies. Implementation of the common foreign and security policy differs considerably from the implementation of Community policies. Because of the sensitive

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<sup>22</sup> Romes A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 151.

nature of questions affecting international relations, the Treaty naturally attaches great importance to the Member States and the Union's bodies.

The Common Foreign and Security Policy is part of a single institutional framework, the institutions are those which exist in the Community framework. "For example, the Commission is fully associated with the CFSP but does not have the exclusive right to submit initiatives. These come mainly from the Presidency, a Member State or the High Representative. The European Parliament is consulted by the Presidency on the fundamental choices of the CFSP and is briefed on how it is developing."<sup>23</sup>

#### **IV. Common Foreign and Security Policy instruments**

The CFSP has several instruments by the Treaty such as common positions, joint actions, decisions and the conclusion of international agreements. "In addition, common strategies involve and facilitate recourse to CFSP instruments. Declarations and contacts with third countries also continue to be important diplomatic tools for the CFSP."<sup>24</sup> I would like to introduce the common positions.

##### ***Common Positions***

###### ***1. Foreword***

To define the Union's approach to a particular geographical or thematic issue, vis-à-vis a third country or at an international conference, the Council can adopt common positions. Then the Member States should ensure that their national policies are in line with the common position.

###### ***2. The key provision of Article 15***

To define Common Positions Article 15 TEU provides the legal basis for the Council; common positions can be encountered in other parts of European law as well. The common position forms an element of the decision-making procedures in Article 251 and 252 EC in the Community, where it reflects the

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<sup>23</sup> Council of the European Union General Secretariat: The Common foreign and security policy (Luxembourg , Office for Official Publicatory of the European Communities, 2002) p. 10.

<sup>24</sup> Council of the European Union General Secretariat: The Common foreign and security policy (Luxembourg , Office for Official Publicatory of the European Communities, 2002) p. 15-16.

opinion of Council communicated to the European Parliament. It has to emphasise that the use of the term in this context is different from what it purports to be under CFSP. Common Positions are a familiar instrument in the history of CFSP, title III of the Single European Act listed “common positions” as one of the possible outcomes of European Political Cooperation.” However, taking into account the explicit function of Common Positions in CFSP, one is led to conclude that the fact that they bear the same name as a number of other instruments in EU law is probably most of the time coincidental”<sup>25</sup>. As laid down in the Treaty this is supported by a number of characteristics of CFSP Common Positions.

The starting point is that Member States shall ensure that their national policies conform to the Common Positions according to Article 15. On the one hand the Common Position commands the Member State to do something; while on the other hand, it demands that the state refrains from doing something. The term “position” is different from its popular meaning in this sense, in which it is usually presented as a state of affairs; it is meant to guide the future behaviour of the Member States within CFSP. The binding quality of Common Positions can partly be derived from the following sentence: “Member States shall ensure that their national policies conform to the common positions” (Article 15). “Regardless of the type or the content of the norms in the Common Position, their binding quality is to a large extent already defined by the fact that the provision formulated in Article 15 functions as the legal basis.”<sup>26</sup> Member States have declared their commitment to adapt their national policies to that decision, whatever the Council decides in a Common Position. It will have to be recalled that CFSP has a non-exclusive nature, whenever the actions of Member States are judged on the basis of adopted Common Positions. The adoption of a Common Position on a certain matter does not entirely rule out any individual national policy initiative in the same area; the scope of the adopted common positions is limited in most cases, and in other cases CFSP decisions explicitly refer to parallel national actions. The importance of the content of the norms is evidently in particular when the specificity of the norm is taken into account.

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<sup>25</sup> Romeses A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 171.

<sup>26</sup> Romeses A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 172.

### ***3. Defining the legal nature of Common Positions***

As a CFSP instrument the legal nature of Common Positions was already subject to considerable consensus at an early stage of the negotiations on the Maastricht Treaty. According to Article 19, paragraph 1: Member States shall co-ordinate their action in international organizations and at international conferences; they shall uphold the Common Positions in such fora; in international organizations and at international conferences where not all Member States participate, those which do take part shall uphold the Common Positions. So this provision adds an external dimension to the Member States' basically internal obligations. "This provision is of a "commissive" nature as well, as it establishes the self-committing norm that not only the individual national policies should conform to the Common Positions, but that this equally holds true for joint policies of two or more member states in their dealing with third states."<sup>27</sup>

Article 19, paragraph 2 stipulates that: Member States which are permanent members of the Security Council will, in the execution of their functions, ensure the defence of the positions and interests of the union, without prejudice to their responsibilities under the provisions of the United Nations Charter. In third countries and international conferences the same holds true for the consular and diplomatic missions of the Member States and the Commission Delegations, and their representations to international organisations; these missions shall cooperate in ensuring that the Common Positions are complied with and implemented according to Article 20. Another argument in support of the intrinsically binding nature of the legal basis of Common Positions may be found in the fact that the Council frequently employs "Declarations" instead of Common Positions.

### ***4. Adopted Common Positions***

The binding force of CFSP Decisions is not to be interpreted on the sole basis of their source or legal basis. It is important that Article 15 Decisions may be divided into three categories, Decisions establishing or adapting sanctions vis-à-vis third countries, Decisions on the policy of the European Union vis-à-vis third states and Decisions on the policy of the European Union regarding specific issues;

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<sup>27</sup> Romes A. Wessel: *The European Union's Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 173.



these three categories are dealt with in the analysis of the actual norms that make the Common Positions.

#### *4.1. Decisions on Sanctions*

“A substantive number of Article 15/J.2 Decisions relate to the imposition of arms embargoes or the reduction of economic and financial relations.”<sup>28</sup> Most Decisions on economic sanctions reiterate a resolution of the United Nations Security Council on the same topic; the texts of these decisions are often in equivalent terms. Additional Community measures are required on the basis of Article 301 EC and 60 EC in most cases, which results in subsequent EC or ECSC decisions. It may appear odd at first sight that binding United Nations Security Council (UNSC) resolutions are repeated in specific CFSP decisions; Of course, an eventual absence of a CFSP decision would not affect the binding force of the Security Council Resolution. The reason to adopt CFSP decisions is nonetheless to be found in the system of the TEU, in which, according to Article 301 EC, economic sanctions by the Community require a prior political CFSP decision. Since the individual Security Council Resolutions also need to be implemented in Community legislation, the adoption of Community Regulations is a necessary course to be followed on the basis of Article 301 EC or Article 60 EC.

The key operative provisions of the Common Positions are in all cases formulated unconditionally. In the case of decisions adopted subsequent to Security Council Resolutions, the operative formula reads in terms that: economic relations with third country shall be reduced in accordance with the relevant mandatory provisions of resolutions number if UNSC resolution; comparable formulas are used in the event of the suspension, extension or termination of economic sanctions.

Independent CFSP decisions on economic sanctions are possible as well, apart from decisions implementing Security Council Resolutions. “An example can be found in a Common Position on the imposition of an oil embargo against the Federal Republic of Yugoslavia which does not find a basis in a Security Council Resolution. These independent EU sanctions are of an equally unconditional

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<sup>28</sup> Romes A. Wessel: *The European Union's Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 175.

nature.”<sup>29</sup> These May impose a general arms embargo or introduce a diversity of measures such as visa restrictions or the suspension of development cooperation.

In the case of Common Positions related to certain UNSC resolutions on the establishment of sanctions, the required implementation measures are included in Article 301 EC. “In an exceptional case the CFSP decisions that are required to adopt the Community decision emphasise these measures, although this seems to be legally superfluous when a binding decision of the UNSC forms the basis and when detailed implementation measures are formulated in a subsequent EC Regulation.<sup>30</sup> Nonetheless, this situation occurred with the Common Position on the reduction of economic relations with Haiti, which stipulated that: Member States shall adopt without delay the laws, regulations or administrative measures necessary to freeze the funds and financial resource referred to in paragraph 4 of the resolution (according to Council Decision 94/315/CFSP of 30 May 1994, Article 1, paragraph 2). Whenever a Common Position deviates from a UNSC resolution, or when it is intended to turn a recommendation of the UNSC into measures are obviously needed.

While the establishment, suspension, termination or extension of economic sanctions usually forms the key element of these Common Positions, occasionally other provisions are also included. “The Common Position on Nigeria, for instance, introduces some sanctions and a suspension of development cooperation, but at the same time in the operative part condemns the execution of a human rights activist, condemns other human rights abuses, recalls the concern of the Union on the installation of a new military dictatorship and reaffirms some previously adopted measures.”<sup>31</sup>

An analysis of the provisions of the Common Positions on sanctions leads to the statement that the norms establishing, suspending, terminating or expanding sanctions vis-à-vis third states van best be viewed as being of an imperative nature because they are to be seen as orders from the Council to the Member States. But in these Common Positions non-imperative norms may be included, which are nonetheless of a binding character because of the simple fact that they are included in a Common Position, the legal nature of which was already defined by the Treaty. “It is claimed that, for that

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<sup>29</sup> Romes A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Klewer Law International 1999) p. 176.

<sup>30</sup> Romes A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Klewer Law International 1999) p. 177.

<sup>31</sup> Romes A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Klewer Law International 1999) p. 177.

reason and despite their non-imperative nature, these norms may limit the freedom of the member states in the determination of their national policies.”<sup>32</sup> In practice, one may discover expressive legal acts as well as assertive ones that in their quality as legal facts may impose restrictions on the actors operating within the CFSP legal order.

#### *4.2. Sanctions or restrictive measures*

Within the framework of the Common Foreign and Security Policy, the European Union applies restrictive measures in pursuit of the specific CFSP objectives set out in the Treaty on European Union.

Sanctions or restrictive measures - the two terms are used interchangeably - have been frequently imposed by the Union in recent years, either on an autonomous EU basis or implementing binding Resolutions of the Security Council of the United Nations. Sanctions are an instrument of an economic or diplomatic nature which seek to bring about a change in activities or policies such as violations of policies or international law or human rights that do not respect democratic principles or the rule of law.

Restrictive measures imposed by the European Union may target governments of third countries, or non-state entities and individuals, such as terrorist groups and terrorists. They may comprise arms embargoes, other general or specific trade restrictions for example import and export bans, restrictions on admission (visa or travel bans), financial restrictions or other measures, as appropriate. There is a website on the Internet which offers a consolidated list containing the names and identification details of all persons, groups and entities targeted by financial restrictions as well.

In view of the economic significance of the European Union, the application of economic and financial sanctions can be a powerful tool because such sanctions could consist of export-import ban, trade sanctions which may apply to specific products such as timber, diamonds or oil, bans on the provision of specific services - brokering, financial services, technical assistance -, flight bans, prohibitions on

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<sup>32</sup> Romes A. Wessel: *The European Union's Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 178.

investment, payments and capital movements, or the withdrawal of tariff preferences. However, broad financial or economic restrictions may result in unduly high economic and humanitarian costs.

Financial or economic restrictive measures, including targeted financial sanctions, have to be applied by all persons and entities doing business in the European Union, including nationals of non-EU countries, and by EU nationals and entities incorporated or constituted under the law of a Member States of the European Union when doing business outside the EU as well.

Third state nationals could be subjected to a ban on admission into the European Union; Member States are called upon to take all the necessary measures to prevent the entry into, or transit through, their territories of the listed persons. The legal instrument imposing such restrictions will allow for exemptions from the visa or travel ban on humanitarian and other grounds or in order to comply with obligations of a Member State under international law as a general rule. It is important that restrictions on admission do not oblige a Member State to refuse its own nationals entry into its territory.<sup>33</sup>

#### *4.3. The Policy of the European Union vis-à-vis third countries*

Common Positions are used less frequently to define the European Union's policy vis-à-vis a particular third country. Common Positions contain a large number of expressive legal acts in some cases; these are used by the European Union to express its attitude concerning certain events in the third country in question. The European Union for instance "condemns the human rights abuses" or "is concerned at the absence of progress towards democratisation. "More importantly, however, Common Positions concerning the policy of the Union vis-à-vis a third state in general contain the objectives of the Union, together with the measures to achieve these objectives."<sup>34</sup> The objectives of Common Positions in general have a wide scope and are rather ambitious; objectives are not exceptional. The objectives become more than just hollow phrases, by including these in official CFSP decisions. They obtain a function in the CFSP legal order as part of the agreement on the future course of action set out by the Member States as purposive legal norms.

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<sup>33</sup> [http://eeas.europa.eu/cfsp/sanctions/docs/index\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf)

<sup>34</sup> Romes A. Wessel: *The European Union's Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 178.

It is important that these provisions aim at excluding action by the Member States apparently in conflict or contrary to the purposes they agreed on. When the Common Position also includes the means to attain the objectives positive action is called for. These measures are occasionally quite concrete. “It is however important to stress that, regardless of the content of the various provisions, member states are bound by them on the basis of Article 15, second sentence, in the sense that they shall ensure that their national policies conform with the adopted positions.”<sup>35</sup>

The most important question is what is expected of the individual Member States after the policy vis-à-vis a third country is laid down in a Common Position. Concrete actions by Member States are sometimes required looking at the text of the decisions. This is for example the case with the suspension of development cooperation or visa restrictions. Common Positions generally set out the European Union’s policy; the Council binds the Union to pursue the adopted objectives and to take the measures it has announced. Common Positions establish a policy of the European Union and that the Union in most cases will have to take the initiative to implement the measures Member States will have to ensure that their national policies conform to the Common Positions. This means, that national policies may not be in conflict with Common Positions and that these decisions are upheld by Member States in international organisations and at international conferences. The policies as set forward in the Common Positions constrain the Commission in its relations with third countries as well (because of the fact that they are presented as European Union policies).

#### *4.4. The Policy of the Union regarding Specific Issues*

To deal with specific international issues a limited number of Common Positions are used by the Council. A substantive number of these decisions are aimed at the establishment of a common policy by the Member States in view of planned or ongoing negotiations on an international treaty. “The language in these decisions is of an imperative nature; it leaves no doubt as to the fact that member states are prohibited from following their own course in the negotiations on the respective treaties.”<sup>36</sup>

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<sup>35</sup> Romes A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 180.

<sup>36</sup> Romes A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 181.

These Common Positions may be viewed as an instrument to harmonise the actions of Member States in that sense, at the same time however the decisions may give instructions to the European Union.

Another category of decisions deals with specific issues in a particular geographical setting. Examples include Common Positions concerning conflict prevention and resolution in Africa or, more general, democratic principles, the rule of law, good governance and human rights in Africa; these decisions contain clear policy initiatives, mostly laid down in unambiguous instructions to the European Union. “However, by deciding that these principles should underpin the Union’s policy towards Africa, they become legal facts that can no longer be denied by the actors in CFSP.”<sup>37</sup>

## **V. Effectiveness of the Common Foreign and Security Policy**

The CFSP must be consistent with other policies and have an efficient decision-making procedure. Consistency in the CFSP sphere is ensured under two headings:

- a) The Treaty on European Union has provided a framework, resources, methods and patterns of work for implementing the CFSP, whilst keeping it within the single institutional framework; this framework already existed in the field of the Community’s action. It is strengthened by the fact that the European Commission is fully associated in discussions on the CFSP matters.
- b) The European Council is setting out guidelines for the development of the European Union, to ensure the consistency of the CFSP with Community policies such as external economic relations or development cooperation policy, which are conducted under the responsibility of the European Commission.

Decision of the CFSP is generally taken unanimously, this means that only one Member State can block the adoption of a text. However the Treaty includes a number of measures intended to overcome this barrier so there are two options for making decisions easier:

- a) Constructive abstention: when a decision is adopted, a Member State may couple its abstention with a formal declaration, in such case it is not required to apply the decision but acknowledges that the decision is binding on the European Union.

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<sup>37</sup> Romes A. Wessel: *The European Union’s Foreign and Security Policy (A Legal Institutional Perspective)*, (Kluwer Law International 1999) p. 182.

- b) The use of qualified majority voting: this “has been extended to cases where the Council implements common strategies decided on by the European Council and to decisions on the implementation of joint actions and common positions.”<sup>38</sup> When a decision is adopted by qualified majority voting, a Member State may nevertheless invoke important reasons of national policy in order to oppose the adopting of the text, a vote will not then be taken. Acting by a qualified majority voting the Council may refer the matter to the European Council for an unanimous decision. “It is important to note that qualified majority voting in the CFSP field is, in a way, “reinforced qualified majority voting”: for adoption, acts require 62 votes in favour cast by at least 10 members.”<sup>39</sup>
- c) The Treaty of Nice introduced the concept of enhanced cooperation between several Member States: “Where the objectives of the Union and the Community cannot be achieved by the Member States as a whole, those Member States in a position to do so (at least eight Member States) may establish between them “enhanced” cooperation”<sup>40</sup> In the CFSP sphere this cooperation may relate solely to the implementation of a common position or a joint action, to arms initiatives or to security and defence initiatives contributing to the acquisition of crisis management capabilities.

## VI. Conclusion

Europe is prosperous, secure and free; but the violence of the first half of the 20th Century has given way to a period of peace and stability unprecedented in the European history. The creation of the European Union has been central to this development; it has transformed the relations between the states, and the lives of the citizens. European states are committed to dealing peacefully with disputes and to co-operating through common institutions. Over this period, the progressive spread of the rule of law and democracy has seen authoritarian regimes change into stable, secure and dynamic democracies. It has to emphasise that the United States has played a critical role in European integration and European security, in particular through NATO. It is important that, however, no single

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<sup>38</sup> Council of the European Union General Secretariat: The Common foreign and security policy (Luxembourg , Office for Official Publicatory of the European Communities, 2002) p. 19.

<sup>39</sup> Council of the European Union General Secretariat: The Common foreign and security policy (Luxembourg , Office for Official Publicatory of the European Communities, 2002) p. 20.

<sup>40</sup> Council of the European Union General Secretariat: The Common foreign and security policy (Luxembourg , Office for Official Publicatory of the European Communities, 2002) p. 20.

state is able to tackle today's complex problems on its own; the European Union still faces security threats and challenges. The enlargements make foreign policy activism more difficult, quite apart from the complexity of building consensus among all Member States. "European opinion expects the CFSP to defend European interests robustly but non-violently, and without behaving in a way which would raise the spectre of the old power politics and colonialist attitudes which are associated with so many disasters of the past."<sup>41</sup> As a union of 27 states with over 460 million people producing a quarter of the world's Gross National Product, and with a wide range of instruments at its disposal, the EU is inevitably a global player. The most important thing is that Europe should be ready to share in the responsibility for global security and in building a better world.<sup>42</sup>

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<sup>41</sup> Christopher Hill: The Evolution of the Common Foreign and Security Policy of the European Union (Diplomatic Academy Vienna Favorita Papers 02/2003) p. 22.

<sup>42</sup> <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>



## List of literature

- **Council of the European Union General Secretariat:** Common foreign and security policy, Office for Official Publicatory of the European Communities, Luxembourg, 2002.
- **Pál Dunay:** Hungarian Foreign Policy after EU accession: Substance and Process, Diplomatic Academy Vienna Favorita Papers 02/2003.
- **Romses A. Wessel:** The European Union's Foreign and Security Policy (A Legal Institutional Perspective), Kluwer Law International 1999.
- **Christopher Hill:** The Evolution of the Common Foreign and Security Policy of the European Union, Diplomatic Academy Vienna Favorita Papers 02/2003.
- **Simon Nuttal:** European Foreign Policy, Oxford University Press, 2000

## Treaties:

- The Treaty on European Union
- The Treaty of Amsterdam
- The Treaty of Nice
- The Treaty of Lisbon

## Websites:

- [www.consilium.europa.eu](http://www.consilium.europa.eu)
- <http://eeas.europa.eu>
- <http://eur-lex.europa.eu>
- [http://europa.eu/lisbon\\_treaty](http://europa.eu/lisbon_treaty)