

# Explanatory Meeting on the Acquis with Albania and North Macedonia

## Chapter 31 – Foreign, security and defence policy

**Date: 26 September 2019**

These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union.

### **1. CFSP/CSDP institutional actors:**

#### **1.1. The nature of CFSP and CSDP:**

- CFSP and CSDP are an integral part of EU *external action*, along with the other domains of external actions (e.g. trade, development cooperation, humanitarian aid).
- The CFSP is a *competence* of the EU (after Lisbon). The EU has no 'exclusivity' in the area of foreign and security policy. It is a *sui generis* parallel competence.
- Despite the term '*common*', the CFSP is *not* a mere intergovernmental process between Member States ('MS'). However, MS do not lose their sovereign power to implement their national foreign policies when the EU defines its CFSP. The actions of the MS are only being constrained by their duty of loyalty. MS continue to take foreign policy initiatives on their own. But, MS actions cannot contradict EU actions, they must be complementary.
- The CSDP forms an integral part of the CFSP, but has a number of distinct features. The CSDP covers two main areas:
  - the establishment by the EU of *crisis management operations or missions*, using civilian and military assets put at the disposal of the EU by the Member States (Article 42(1) TEU); The EU has mostly been active in the first domain and has developed a solid practice in conducting crisis management operations with a wide range of mandates.
  - the "*progressive framing*" of a *common Union defence policy* including a possible "common defence" (Article 42(2) TEU). A recent development in the second domain is the development of Permanent Structured Cooperation over the last few years.

#### **1.2. CFSP main institutional actors:**

##### ***European Council (Article 15 and 26 TEU)***

- EUCO becomes an institution. Its powers are set out in detail in Article 15 TEU. It has a permanent President, elected (by qualified majority) for a period of 2 ½ years (Article 15(5) TEU).

- It has an *express decision-making-power* (Articles 15(4) and 26(1) 1<sup>st</sup> subparagraph, last sentence TEU). Takes the '*strategic*' decisions in CFSP and other areas of external action of the Union. Also adopts *European Council conclusions*, in which it defines the general political directions. It may take decisions on the strategic interests and objectives which may relate to a specific country or region or may be thematic. For instance, in the case of sanctions against Russia following Crimea's annexation, where the EUCO instructed the HR to submit proposal for legal acts to the Council (March 2014).
- Decisions are taken by *consensus*<sup>1</sup>, unless otherwise provided in the treaties (Article 15(4) TEU).
- The President of the EUCO ensures the external representation of the Union "*in this capacity and at his level*" in this domain, however "*without prejudice to the powers of the High Representative*".

#### ***The Council of the European Union (Article 16 TEU)***

- The central decision-making body in the CFSP. In accordance with Article 26(2) TEU, it takes the necessary decisions to define and implement the CFSP. For instance, in the area of sanctions, decisions imposing visa and travel bans or freezing of assets.
- Together with the High Representative, also ensures the unity, coherence and efficiency of the Union's action in the CFSP (Article 26(2) TEU).
- HR chairs the Council in its formation of Ministers for Foreign Affairs (Article 18(3) TEU).
- The Council Working Parties dealing with CFSP matters are in majority chaired by representatives of the EEAS appointed by the HR and no longer by representatives of the rotating Presidency of the Council. In practice, this allows the EEAS to play a substantive role in ensuring follow-up to initiatives and proposals of the HR at the stage of deliberations in the Council.
- The main committee dealing with CFSP (regional and thematic) and CSDP issues is the Political and Security Committee (PSC), which has now a permanent chair (Article 38 TEU).

#### ***The High Representative (Article 18 TEU)***

Has three main functions:

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<sup>1</sup> Consensus is not a voting rule and has no legal definition. It is the way the European Council or the Council agree on conclusions or other texts of a political nature which are not in the form of an act having binding legal effects on third parties. Consensus means that a text is generally acceptable, with no delegation having any formal objection, although some delegations may have reservations on the substance or on certain aspects of the text without standing in the way of a consensus. Consensus is not the same with unanimity, which is a voting rule in the Council.

- **HR** - she exercises a number of specific responsibilities in the area of the CFSP and CSDP. This is her most important and complex function, as it breaks down in a series of specific responsibilities:
  - ***conducts the CFSP***, including the CSDP, i.e. to "*contribute to its development through proposals*", and implements the decisions of the Council (Articles 18(2), 27(1) TEU).
  - ***exercises a right of initiative vis-à-vis the Council***, including the submission of proposals for legal acts in the CFSP (Article 30(1) TEU); this right is shared with the Member States. The HR can also submit proposals with the support of the Commission (Article 31 (1). This was done for the first time in the proposal for the European Peace Facility currently discussed in Council. In specific cases the treaties foresee joint HR/Commission proposals (for instance sanctions).
  - In accordance with Article 27(2) TEU, ***exercises the external representation*** of the Union in the area of the CFSP; this includes the conduct of the '*political dialogue*' with third partners, as well as *expressing the Union's position* at international organisations and conferences. (see UNGA this week)
- The second main function is that of **chairing the Foreign Affairs Council** (Article 18(3) TEU).
- The third main function is **Vice-President** of the Commission, responsible for the external relations outside the CFSP and the coordination of other aspects of the Union's external action (Article 18(4) TEU). Given the wide scope of such responsibilities and despite the establishment of the Commissioner's Group on External Action in the current practice does not cover the specific actions in the external portfolios of trade, development cooperation and humanitarian affairs (although this does not follow from the Treaty).

***The EEAS (Article 27(3) TEU & Council Decision 427/2010)***

- The EEAS was created by a Council decision adopted on 26 July 2010 on the basis of Article 27(3) TEU and officially started functioning on 1 January 2011.
- A *functionally autonomous body* of the European Union, separate from the General Secretariat of the Council and from the Commission. It is not an institution (*except for the purposes of the Staff Regulations and the Financial Regulation*), but given its legal capacity and budgetary autonomy, functions like a quasi-institution.
- The main tasks of the EEAS are to *support the HR in fulfilling his/her mandate* in the framework of the CFSP, his/her capacity as President of the FAC, and his/her capacity as Vice-President of the Commission.

- The EEAS is placed under the authority of the HR and has a **central administration** at Headquarters, organised in thematic and geographical departments, departments for administration and budget, and horizontal issues such as interinstitutional relations and legal affairs.
- The **Union delegations** in third countries and at international organisations, another significant novelty introduced by the Treaty of Lisbon (Article 221 TFEU) replace former Commission delegations. They are in charge of representing the EU in third States and at international organisations, on all matters falling within EU competence, i.e. not only in CFSP matters. Now there are 141 delegations. They form an integral part of the EEAS, are under the direct authority of the HR.
- The EEAS also chairs a number of Council preparatory bodies.

### ***The Commission***

- Has *no* longer a *formal independent role* in CFSP; no right of initiative.
- The EEAS cooperates closely with the COM service responsible for the CFSP financing, e.g. implementation of the Instrument contributing to Peace and Stability. The Service for Foreign Policy Instruments is collocated with the EEAS. This allows a close cooperation and coordination of various initiatives and proposals on behalf of the HR. Its current responsibility for sanctions regulations will be soon transferred to DG FISMA.
- However, COM services are *fully associated* to the preparation of the HR initiatives and proposals in the CFSP.

### ***The European Parliament***

- From a *legal point of view*, the role of the EP in the CFSP is *not substantial*. The HR has the obligation to *regularly inform* the EP on the most important aspects of the CFSP, and to duly take into consideration the views expressed by the EP. EU Special Representatives may also be called on to provide information to the EP.
- However, *politically*, the EP plays a large role in exercising *democratic scrutiny* over the CFSP. The EP also approves the composition of the COM as a college, in which the HR, in her capacity of VP, is fully part.
- Moreover, as part of the Declaration on political accountability, newly appointed *heads of Delegation* have an exchange of views with the AFET Committee in the EP.

### ***Special representatives – EUSR (Article 33 TEU)***

- Appointed by the Council, there are currently 7 EUSR with a geographical mandate (Bosnia and Herzegovina, Kosovo, Horn of Africa, Sahel, South Caucasus and

Georgia, Central Asia, Middle East Peace Process) and one with a thematic mandate (Human Rights).

- They are the long arm of the HR. Are placed under the direct authority of the HR.

### **1.3. CSDP main institutional actors:**

All CFSP actors have also a role in CSDP, with the following specificities:

#### ***Council:***

- Special working groups: one for military operations (EU Military Committee, including preparatory formations), one for civilian missions (the Committee on the Civilian Aspects of Crisis Management); the working party dealing with cross-cutting issues - Political and Military Group (PMG); horizontal advisory body (PSC – Article 38). The working groups are also chaired permanently by persons appointed by the HR.

#### ***EEAS:***

- Following the most recent restructuring, a *Management Directorate* regroups various strands of work relating to the Integrated Approach for Security and Peace (conflict prevention and mediation, strategic planning for CSDP and stabilisation etc.) and Security and Defence Policy (partnerships and agreements, counterterrorism, disarmament and non-proliferation).
- There are some *dedicated implementing structures*, one for the military side (the EU military staff – EUMS, including the Military Planning and Conduct Capability (MPCC)) and one for civilian missions (the Civilian Planning and Conduct Capability – CPCC). These structures have been assigned command over certain missions, the former with regard to non-executive military missions and the latter for the civilian missions operated by the EU.

#### ***The CSDP agencies/European Defence Agency (Article 45 TEU):***

- The CSDP agencies: the European Defence Agency, the European Union Satellite Centre and the European Union Institute for Security Studies. Whilst not an agency, the European Security and Defence College is an important player in the delivery, together with Member States of a wide variety of courses and seminars. The agencies and the ESDC are financed by the MS and have a distinct institutional set-up.
- The European Defence Agency is the only Agency which has its basis in the Treaty of European Union. It contributes to identifying MS's military capability objectives and how those capability commitments are observed. It facilitates Member States willing to develop capabilities in cooperation. Three main missions:

- Supports the Member States and the Council in their effort to improve European Defence capabilities in the field of crisis management and to sustain the European Security and Defence Policy.
- Stimulates defence Research and Technology (R&T) to prepare the capabilities of tomorrow.
- Ensures that military interests are taken into account in the wider EU policies.
- The EU Institute of Strategic Studies (ISS) and the Satellite Centre (SATCEN) that were transferred to the EU from the WEU when that organisation became dormant in 2000. They have been established by – then – Joint Actions based on the 2000 Treaty on European Union.
- The European Security and Defence College was established by a Council Decision. It is a virtual network of defence and security policy education institutes, agreeing and delivering on education projects and seminars facilitated by Member States.

## **2. CFSP/CSDP instruments and procedures**

- The CFSP is governed by *specific rules and procedures* (Article 24 TEU), notably:
- The adoption of legislative acts is excluded. The legal acts taken in the field of CFSP are in the form of '*decisions*' (Article 25 TEU). The CFSP decisions define the *actions* and the *positions* to be taken by the EU.
- The general voting rule is *unanimity* – Article 31(1) TEU. However, the possibility of constructive abstention. QMV is possible (the second para of Article 31 sets out the cases where the adoption of legal acts by QMV is possible). For instance, the European Council may now take decision on the EU strategic interests. Such decisions may then be implemented by the Council by QMV. This possibility has not been used until now. The European Council may also decide on further cases where qualified majority could be applied. There have been no cases of voting by QMV so far. However, in the field of sanctions, the Council regularly adopts implementing decisions by QMV. But QMV not possible in the CSDP field – see Article 31(4).
- MS have the *right of initiative* (Article 30(1) TEU) – see PESCO. Normally, it is the HR, not MS. HR proposals submitted to Council are prepared by the EEAS.
- The Court of Justice of the EU has *no jurisdiction* to review the legality of decisions and legal acts adopted in the framework of CFSP, with the exception of decisions affecting the rights of individuals in the area of sanctions, and to review the delimitation between the CFSP and other domains of the EU's external action (Article 40 TEU).
- Articles Article 42(7), Protocol 22 and the Protocol on the concerns of the Irish people qualifies the CSDP aspects:

- The CSDP shall not prejudice the specific character of the security and defence policy of certain Member States;
- Commitments and cooperation in the area of mutual aid and assistance shall be consistent with commitments under the North Atlantic Treaty for Member States which are NATO members.
- Pursuant Article 5 of Protocol number 22, Denmark does not participate in the elaboration and implementation of decisions and actions of the Union which have defence implications.
- Article 3 of the Protocol on the Concerns of the Irish people, reiterates that the CSDP does not prejudice the security and defence policy or the obligations of any Member State; it *inter alia* recognises the traditional policy of military neutrality of Ireland.

#### ***CFSP Financing:***

- The arrangements for the financing of the CFSP are laid down in Article 41 TEU. The general rule is that all CFSP acts entailing expenditure (administrative and operating) are charged to the EU budget, with the exception of operating expenditure arising from operations having military or defence implications (i.e. EU military operations), and where the Council unanimously decides otherwise (Article 41(1) and 2 TEU). For EU military operations, their common costs are charged to the Member States through the so-called Athena mechanism, set up for this purpose by a Council decision.
- The COM has proposed a regulation to establish the European Defence Fund to support the research for the development of defence capabilities of the MS. Under the next Multi-annual Financial Framework (MFF), the Fund would replace the current European Defence Industrial Development Programme.

#### ***CSDP missions and initiatives:***

- The core part of the CSDP are the operational missions that the EU may decide to undertake with the objective of peace-keeping, conflict prevention and the strengthening of international peace and security, with military and civilian means. The specific tasks to be undertaken by the EU for this purpose are further specified in Article 43 TEU. The CSDP policy is implemented through the CSDP missions.
- Permanent Structure Cooperation ('PESCO') is an initiative under Article 46 TEU and Protocol 10 annexed to the Treaties. PESCO is a framework and process to deepen defence cooperation between those EU Member States who are capable and willing to do so.