

Anna Horn

European Defence Under the Treaties

Escalating geopolitical challenges and threats have led to an intensified defence collaboration within the EU, an area essentially controlled by the Member States. This analysis examines the constitutional framework for defence policy initiatives at EU level and concludes that there is a mismatch between the Treaties and the current political reality.

Table of contents

1.	Introduction	3
1.1	Aim and structure.....	4
2.	The Constitutional Framework for Defence Policy	4
2.1	A Separate Field of Competence	4
2.2	Decision-Making Procedure Controlled by Member States	6
2.3	Obligations of the Member States	7
2.4	Interim Conclusions: A Poorly Defined Legal Framework	8
3.	Choice of Legal Basis	8
3.1	The Importance of a Correct Legal Basis	8
3.2	Measures under the CFSP/CSDP	9
3.3	Tensions Arising from the Legal Basis	10
3.3.1	Demarcation Between the CSDP and Other Policy Areas	10
3.3.2	Disputes Over Correct Legal Basis.....	10
3.3.3	Principles for Establishing the Correct Legal Basis	11
3.3.4	New Initiatives – Fresh Challenges	12
3.3.5	Interim Conclusion: Defence Initiatives Adopted Under Non-CFSP Basis.....	13
4.	Conclusions.....	14
	Table of Cases	15
	Bibliography	15

Summary

This European Policy Analysis examines the constitutional foundations of the EU's Common Security and Defence Policy, focusing on the scope of the Union's competence, the decision-making procedures, the Member States' obligations, and the ongoing tension over the appropriate legal basis for action.

Unlike other areas of EU policy, defence and security remain largely under Member State control. As a result, defence decisions must be made unanimously by the Council or the European Council. Although this structure grants Member States significant influence, it also weakens the Union's ability to ensure consistent implementation.

In addition, no legislative acts can be directly adopted in this policy area. This creates legal uncertainty when the Commission introduces new defence initiatives. Overall, such initiatives focus on increasing the EU's defence capabilities through bolstering the defence industry and the internal market for defence products. This may give rise to new constitutional tensions, as there could be a debate on whether the initiatives are more appropriately placed under the Common Security and Defence Policy or within the domains of industrial and internal market policy.

If the EU seeks to deepen defence cooperation further, it will soon face the limits of its current constitutional framework. Reform will therefore be necessary to support future defence ambitions.

About the author

Anna Horn (LL.D.) is a Senior Researcher in Law at the Swedish Institute for European Policy Studies (SIEPS).

The opinions expressed in the publication are those of the author.

1. Introduction

It is almost a truism that the EU's defence policy is in a state of flux. The first half of 2025 has been marked by escalating threats from Russia, shifting positions of the United States, and a wave of new policy proposals within the European Union.

The desire for increased defence collaboration within the Union has been evident since Ursula von der Leyen's first mandate, when she introduced her Commission as a 'geopolitical one'.¹ The term 'geopolitical' may be understood as encompassing political and international dynamics that influence, or are influenced by, geographical issues.²

At the beginning of von der Leyen's second mandate, she appointed the EU's first Commissioner for Defence, Andrius Kubilius. There have also been a growing number of initiatives taken by the Commission on the Union's defence policy, driven by the war in Ukraine and the escalating geopolitical challenges faced by Europe. These initiatives include Sauli Niinistö's report on strengthening Europe's civilian and military preparedness and readiness, the Commission's *White Paper for European Defence – Readiness 2030*, the ReArm Europe Proposal and efforts to establish a collaborative procurement process for defence material through various EU Regulations.³

It is evident that the majority of EU leaders want Europe to intensify its defence collaboration. Full unanimity may nevertheless not always be obtained. Expanded cooperation on defence can happen in Europe both within and outside the EU framework. It is expected that the EU will proceed with its policy on defence at the same time as European countries collaborate outside the EU framework.

'... national security remains the sole responsibility of each Member State.'

The EU Common Security and Defence Policy (hereinafter the CSDP) differs from many other areas of EU decision making, in that key aspects of the cooperation remain under the control of the Member States.⁴ This is essentially the consequence of Art. 4(2) Treaty on the European Union (hereinafter TEU), which establishes that national security remains the sole responsibility of each Member State.

The unique decision-making procedure for the CSDP is laid down in Art. 24(1) TEU, according to which decisions are taken exclusively by the European Council or the Council acting unanimously. The Treaties do not give any legislative competence. Instead, CSDP policies are to be implemented as decisions and guidelines, according to Arts. 24(1) and 25 TEU.

¹ European Commission, 'Speech by President-elect von der Leyen in the European Parliament Plenary on the Occasion of the Presentation of her College of Commissioners and their Programme' (27 November 2019) <[Speech by President-elect von der Leyen in the EP](#)> accessed 30 June 2025.

² Luigi Lonardo, *EU Common Foreign and Security Policy – Between Law and Geopolitics* (Springer 2023) 5.

³ European Commission, *Niinistö Report: European Defence and Security – Delivering on Commitments* (2024) https://commission.europa.eu/document/download/5bb2881f-9e29-42f2-8b77-8739b19d047c_en?filename=2024_Niinisto-report_Book_VF.pdf; European Commission, *White Paper for European Defence – Readiness 2030* (2025). https://commission.europa.eu/document/download/e6d5db69-e0ab-4bec-9dc0-3867b4373019_en?filename=White%20paper%20for%20European%20defence%20%E2%80%93%20Readiness%202030.pdf; European Commission, *Letter by President von der Leyen on Defence* (2025) <https://ec.europa.eu/commission/presscorner/api/files/attachment/880628/Letter%20by%20President%20von%20der%20Leyen%20on%20defence.pdf>; Regulation 2023/2418 of the European Parliament and of the Council of 18 October 2023 on establishing an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA); Regulation 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP); proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industry Programme, and a framework of measures to ensure the timely availability and supply of defence products (EDIP), which have not yet been brought into force, COM/2024/150 final.

⁴ In this regard it should, however, be recognised that Art. 23 TEU provides that the CSDP is subject to the same principles and objectives as every other policy area within the EU.

Therefore, it could be argued that increased defence collaboration within the EU framework, particularly under the leadership of the Commission, may face constitutional challenges when assessed against the EU Treaties.

1.1 Aim and structure

The specifics of the competence in respect of the CSDP, coupled with the growing interest in defence cooperation within the EU, make research on constitutional issues particularly relevant. This European Policy Analysis aims to clarify the scope of the EU's competence in respect of the CSDP and how that competence may be exercised.

The analysis focuses exclusively on constitutional issues, specifically the conferral of competence in this policy area, the EU's decision-making procedure and the question of the choice of an appropriate legal basis for initiatives strengthening the defence of the Union. Ultimately it answers this question: what is the constitutional framework for defence policy within the EU, including the Union's competences and its decision-making procedures? Furthermore, how does this framework align with the recent defence initiatives undertaken by the EU?

The paper is delimited in several ways. Even though financial considerations are key for increased defence collaboration within the EU, the analysis does not address budgetary and financial questions.⁵ Further, it does not focus on the possibility of some Member States participating further in cooperation without including all 27 Member States. Instead, this paper discusses the constitutional issues arising from increased collaboration of the Union as a whole in the area of the CSDP.

The structure of the analysis is as follows: Section 1 introduces the topic and outlines the key issues at stake. Section 2 assesses the Union's competence and its decision-making procedures in the area of defence policy. Section 3 examines the multiple legal bases chosen for recent initiatives in the field of defence, and discusses their implications. Finally, Section 4 presents the overall conclusions of the analysis.

2. The Constitutional Framework for Defence Policy

2.1 A Separate Field of Competence

The importance of competence is based on the principle of conferral in Art. 5(2) TEU, which states that the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties. Naturally, competences not attributed to the Union remain within the power of the Member States.⁶

The competence in respect of the CSDP is different from the 'regular' competences defined in Arts. 3, 4 and 6 Treaty of the Functioning of the European Union (hereinafter TFEU). The CSDP is organised in the Treaties as a component of the Common Foreign and Security Policy (hereinafter the CFSP), which is specified in Art. 24(1) TEU.⁷ Furthermore, Art. 2(4) TFEU states:

The Union shall have competence, in accordance with the provisions of the TEU, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

'The importance of competence is based on the principle of conferral in Art. 5(2) TEU ...'

⁵ See Art. 41(2) TEU on budgetary issues in respect of the Common Foreign and Security Policy (CFSP).

⁶ See Art. 4 TEU. See also the principle of subsidiarity in Art. 5(3) TEU and the principle of proportionality in Art. 5(4) TEU.

⁷ For more on the CFSP see Panos Koutrakos, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (2017) SIEPS.

It is important to highlight that Art. 2(4) TFEU does not clarify whether the EU's competence in the area of the CFSP is exclusive, shared, or complementary. Nor does it define the precise boundaries of the competence conferred.

Furthermore, the policy field of the CSDP, including the overarching CFSP, is not mentioned in Art. 3 TFEU regulating the policy areas that lie within the field of exclusive competence, nor does it hold the characteristics of being exclusive to the EU. The areas of exclusive competence conferred on the Union are customs, commercial policy, competition rules, conservation of marine biological resources and monetary policy for the Member States whose currency is the euro. These are issues that lie far away from the CFSP but are prominent for the foundation of the Union as an organisation for internal and external trade. Further, the CFSP is not mentioned in Art. 6 TFEU, which provides competence to the Union to carry out actions to support, coordinate and supplement the actions of the Member States.

Art. 4(1) TFEU provides that the Union shares competence with the Member States in areas in which the Treaties confer competence on the Union that is neither exclusive nor supportive or complementary. This could suggest that the CFSP falls within the category of shared competence. The CFSP is not included in the non-exhaustive list set out in Art. 4(2)–(4) TFEU, which is not necessarily problematic in itself. Still, the CFSP cannot easily be classified as an area of shared competence, particularly when considering the principle of pre-emption under Art. 2(2) TFEU.⁸ According to this principle, Member States may exercise their competence in areas of shared competence only to the extent that the Union has not exercised its own. This implies that, once the EU acts, Member States' powers are pre-empted.

This must also be considered in the light of the *ERTA* doctrine, which implies that the explicit external powers of the Union laid down in the Treaties are complemented by implied external powers. This means that, to achieve the internal objects of the Treaties, the Union can also employ its competences externally. The doctrine was established by the Court of Justice of the European Union (CJEU) in its significant *ERTA* judgment in 1971.⁹ The Court held that the Union's external competence can be based on provisions in the Treaties regarding its internal competence. The *ERTA* doctrine has been refined in later cases, for example *Kramer*, where the Court held that, when the EU has not yet acted externally, the Member States retain a 'transitional power' to enter international agreements on their own.¹⁰

'One way to define the competence over the CFSP is to acknowledge that the area does not fit within any field of competence described in the TFEU.'

If the CFSP were to fall under shared competence, such pre-emption would encroach upon the Member States' control in the domain of foreign and defence policy – an outcome that is difficult to reconcile with the apparent effort by the drafters of the Treaties to ensure that the Member States retained power over the CFSP, especially since Art. 4(2) TEU explicitly states that national security remains the sole responsibility of the Member States. Arguably, Art. 4(2) TEU cannot be combined with the principle of pre-emption and the *ERTA* doctrine.

One way to define the competence over the CFSP is to acknowledge that the area does not fit within any field of competence described in the TFEU. This is supported by Art. 40 TEU, which states that initiatives taken under the competence of the CFSP do not interfere

⁸ Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases and Materials*, 8th ed. (Oxford University Press 2024), 119.

⁹ CJEU's judgment of 31 March 1971 in Case 22-70 *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1971:32.

¹⁰ CJEU's judgment of 14 July 1976 in Cases 3-, 4- and 6-76 *Cornelis Kramer and others*, ECLI:EU:C:1976:114.

with the competence given in Arts. 3–6 TFEU and, equally, that the competence in those provisions does not affect the competence within the CFSP. In this light, the professor and legal scholar Graham Butler proposes that the aim of Art. 40 TEU is to protect the unique decision-making procedure for CFSP matters.¹¹ Building on this, it is better to define the boundaries of CFSP competence by examining the limits of its distinct decision-making procedure, which is characterised by Member States' control and unanimity in the Council or European Council. This is developed in the next section.

2.2 Decision-Making Procedure Controlled by Member States

Adding to the uniqueness of the CFSP (including the CSDP) is its decision-making procedure. This is highlighted by the fact that policy must be defined and implemented by the European Council and the Council acting unanimously.¹² This rule contradicts the ordinary legislative procedure established in the Treaties, which is based on qualified majority voting in the Council.

The Union's legal instruments in the area of the CFSP are set out in Art. 25 TEU, which also highlights the distinct nature of this policy field. According to Art. 25 TEU, the Union is to conduct the CFSP by:

- defining general guidelines,
- adopting decisions that outline actions and positions to be taken by the Union, and
- establishing the arrangements for implementing those actions and positions.

In addition, Art. 25 TEU provides that the Union must promote systematic cooperation among the Member States in the conduct of the CFSP.¹³ Furthermore, CSDP missions are adopted under Art. 28 TEU, following a decision by the Council.

Importantly, the adoption of legislative acts is excluded across the entire field of the CFSP.¹⁴ This exclusion sets the CFSP apart from other areas of Union policy. I would argue that this highlights that the focus of the CFSP is on external rather than internal matters. The CFSP involves non-legislative instruments – such as general guidelines, actions, positions, and external missions – rather than binding legislative acts. As a result, this delineates the scope of what may be classified as 'defence policy' and the extent of the actions permissible under that umbrella.

'The High Representative may be seen as representing EU competence in a field that is otherwise controlled by the Member States.'

The CFSP is implemented by the High Representative of the Union for Foreign Affairs and Security Policy and by the Member States.¹⁵ The High Representative may be seen as representing EU competence in a field that is otherwise controlled by the Member States. The roles of both the European Parliament and the Commission are limited.¹⁶ The Commission

¹¹ Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy – Competence and Institutions in External Relations* (Hart 2019), 59.

¹² See Art. 31(1)–(3) TEU on exceptions to the unanimity rule.

¹³ See also Art. 21 TEU, which provides objectives for the EU's policies and actions on the international scene.

¹⁴ See Arts. 24(1) and 31 TEU.

¹⁵ See Arts. 24(1) and 31 TEU.

¹⁶ However, see Marianne Riddervold, Guri Rosén, 'Beyond Intergovernmental Cooperation: The Influence of the European Parliament and the Commission on EU Foreign and Security Policies' (2015) 20(3) *European Foreign Affairs Review* 399 and Marianne Riddervold, '(Not) In the Hands of the Member States: How the European Commission Influences EU Security and Defence Policies' (2015) 54(2) *Journal of Common Market Study* 353 on the Commission's and Parliament's increased influence on the CSDP.

can, according to Art. 30(1) TEU, co-initiate initiatives with the High Representative by referring questions relating to the CFSP to the Council, and may submit initiatives or proposals to the Council. Art. 36 TEU requires the High Representative to consult the European Parliament regularly on the main aspects of the CFSP and CSDP and ensure that the views of Parliament are duly taken into consideration. Further, Parliament may address questions or make recommendations to the Council or High Representative. Twice a year it must hold a debate on the progress of implementing the CFSP.

‘Generally, the CJEU has no jurisdiction on CFSP issues ...’

Generally, the CJEU has no jurisdiction on CFSP issues, except to monitor compliance with the provision in Art. 40 TEU on the distinction between the competence defined in Arts. 3 to 6 TEU and the implementation of the CFSP. In addition, it has jurisdiction to review the legality of decisions adopted by the Council providing for restrictive measures against natural or legal persons.¹⁷ Once again, this is a derogation from the regular order. Art. 19 TEU states that the CJEU shall ensure that, in the interpretation and application of the Treaties, the law is observed. In this regard, the CJEU has held that the exception in the field of the CFSP should be interpreted narrowly.¹⁸ I would argue that the ‘weak jurisdiction’ of the CJEU is an additional example of how the Member States control the EU’s CFSP.

2.3 Obligations of the Member States

The TEU imposes some obligations on the Member States in the area of the CSDP. Some are more extensive than others, but they have in common that a breach gives rise only to weak sanctions. The obligations are the following:

- Art. 24(3) TEU establishes a general loyalty obligation, requiring Member States to refrain from any action contrary to the interests of the Union.
- Art. 32 TEU requires Member States to show mutual solidarity and to consult one another within the European Council and the Council on matters of foreign and security policy.
- Art. 28(2) TEU provides that when the international situation necessitates operational action by the Union, the Council shall adopt the necessary decisions. These decisions commit Member States ‘in the positions they adopt and in the conduct of their activity’.
- Art. 42(7) TEU stands out by requiring that if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power.¹⁹
- Art. 4(3) TEU sets out the principle of sincere cooperation, which applies to the CSDP as an overarching principle.²⁰

Turning to the question of sanctions, since the CJEU has a narrowly defined jurisdiction in the area of CSDP, Arts. 258–260 TFEU on state liability for breach of EU law cannot, in

¹⁷ See Art. 24(1) second paragraph TEU and Art. 275 TFEU.

¹⁸ See CJEU’s judgment of 24 June 2014 in Case C-658/11, *Parliament v Council (Pirate Transfer Agreement with Mauritius)*, ECLI:EU:C:2014:2025, para 70; judgment of 12 November 2015 in Case C-439/13 P, *Elitaliana v Eulex Kosovo*, ECLI:EU:C:2015:753, para 42. See, further, Peter van Elsuwege, ‘Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice’ (2021) 58 *Common Market Law Review*, 1731.

¹⁹ On the issue of the scope of Art. 42(7) TEU. For Swedish readers see, for instance, Inger Österdahl, ‘Försvarsklausulen i EU-fördraget – i ljuset av Sveriges ansökan om Nato-medlemskap’ (2023) SIEPS.

²⁰ See, for instance, the CJEU’s judgment of 14 July 2005 in Case C-433/03 *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2005:462, para 64 and the case law cited.

general, apply in the event of a breach of the obligations in respect of the CSDP set out in the Treaties. Instead, the Council and the High Representative must ensure compliance with the above-mentioned obligations.²¹ As a result, there are no legally defined sanctions in the field.

‘... there are no legally defined sanctions in the field.’

To conclude, although the Treaties establish certain obligations in the field of the CSDP, the overall framework for CSDP competence remains weak. This weakness is compounded by the limited jurisdiction of the CJEU and the absence of effective enforcement mechanisms or sanctions. Moreover, the primary responsibility for monitoring compliance with CSDP obligations lies with the Council. Taken together, I would argue that these factors support the view that the Member States hold the dominant control over the CSDP.

2.4 Interim Conclusions: A Poorly Defined Legal Framework

To summarise, the competence conferred in respect of the CFSP stands out from the competence in all other policy fields and this area is therefore separate from other areas. Consequently, the EU has not been granted ‘regular’ competence in this field, representing a deviation from the general order of the Treaties. The decision-making procedure under the CFSP, along with its CSDP component, is essentially ‘Member State-controlled’, with limited powers for the Commission and Parliament. As a result, the boundaries of the EU’s CSDP cooperation are determined by the Council and the European Council, which must act unanimously. In addition, the CJEU lacks almost any jurisdiction in the field. Furthermore, the legal framework for the Union’s CSDP is poorly defined, and there are few material or substantive requirements for how the CSDP must be carried out.

On the one hand, there are generally no sanctions applicable to Member States which decide to act by themselves instead of cooperating further within the Union. On the other hand, it is not legally impossible for a common defence policy to evolve within the Union if all Member States agree.²²

In conclusion, this gives almost total sway to the Member States. In fact, it could be argued that the non-specific legal framework for competence in the field of the CSDP allows flexibility. As a result, the policy field is, on the one hand, wide open to the Member States’ wishes, but, on the other, is weak in that the Member States cannot be ‘forced’ to uphold their promises.

3. Choice of Legal Basis

3.1 The Importance of a Correct Legal Basis

Given Art. 40 TEU, which establishes a clear distinction between the competences defined in Arts. 3 to 6 TFEU and the framework governing the CFSP, the CFSP is often subject to disputes regarding its legal basis.²³ This issue becomes even more pronounced as a result of the CFSP’s distinct decision-making procedure, which largely excludes the European Parliament and the Commission. As a result, internal conflicts arise between different EU institutions.

Every action taken within the Union must have a legal basis in the Treaties. The legal basis represents the competence conferred upon the EU by the Member States. Furthermore, each legal basis also confers institutional competence, thereby regulating the decision-

²¹ See Art. 24(3) TEU.

²² See, for an argument along the same lines, Inger Österdahl, ‘After Lisbon: The New Legal Framework for the EU’s Common Foreign and Security Policy’ in Antonina Bakardjieva Engelbrekt et al. (Eds), *The European Union Facing the Challenge of Multiple Security Threats* (Edward Elgar 2018).

²³ Butler, *Constitutional Law of the EU’s Common Foreign and Security Policy – Competence and Institutions in External Relations*, 62.

‘Since the legal basis for the CSDP establishes a specific decision-making procedure, it cannot easily be combined with other legal bases.’

making procedure.²⁴ There must be coherence between the competence conferred upon the EU, the legal basis, and the appropriate decision-making procedure. For an initiative to be realised within the Union, it must fall within the EU’s competence while adhering to the principles of proportionality and subsidiarity.²⁵ Additionally, it must be founded on a legal basis provided by the Treaties and carried out in accordance with the correct decision-making procedure.²⁶

In a case relating to the CFSP, the CJEU has highlighted that the use of an incorrect legal basis for an act is liable to invalidate that act, and has stated that this is particularly so when the appropriate legal basis lays down a procedure for adopting acts that is different from that which has in fact been followed.²⁷ Since the legal basis for the CSDP establishes a specific decision-making procedure, it cannot easily be combined with other legal bases.

3.2 Measures under the CFSP/CSDP

In order to consider when to use the legal basis of the CFSP, one may first assess the kind of measures that can be taken in that policy area. One of the key measures is sanctions on either individuals or states, based on Art. 29 TEU and Art. 215 TFEU, through decisions taken by the Council unanimously. Other measures are military operations and civil missions. International agreements can also be concluded under the CFSP.²⁸

Art. 42(1) TEU states that the CSDP provides the Union with an operational capacity to draw on civilian and military assets. The Union may use these assets on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks has to be undertaken using capabilities provided by the Member States.

Linked to Art. 42(1) TEU, the tasks of the CSDP are defined in Art. 43 TEU. Hence, the missions and operations of the EU must be compliant with the objectives in Art. 43 TEU. The provision states that these missions may include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, and tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.²⁹

The measures outlined clearly delineate the scope of actions that can be taken under the legal basis of the CFSP/CSDP, in contrast to other areas of EU law. As previously discussed, legislative acts cannot be adopted under the CFSP/CSDP framework; instead, actions taken on this legal basis are solely measures of an external nature.

3.3 Tensions Arising from the Legal Basis

3.3.1 Demarcation Between the CSDP and Other Policy Areas

The key question is which initiatives should be adopted as decisions on a CSDP legal basis, as opposed to actions founded on another legal basis.³⁰ In addition, if a dispute over the correct legal basis is to arise then there must exist multiple possible legal bases for an initiative.

²⁴ See, however, the flexibility clause in Art. 352 TFEU.

²⁵ The principle of subsidiarity is in Art. 5(3) TEU and the principle of proportionality is in Art. 5(4) TEU.

²⁶ See, for instance, the reasoning by the CJEU in its judgment of 19 July 2012 in Case C-130/10 *European Parliament v Council of the European Union*, ECLI:EU:C:2012:472, para 80.

²⁷ CJEU’s judgment of 14 June 2016 in Case C-263/14 *European Parliament v Council of the European Union*, ECLI:EU:C:2016:435, para 42.

²⁸ See Art. 37 TEU and Art. 218(3) TFEU.

²⁹ Lonardo, *EU Common Foreign and Security Policy – Between Law and Geopolitics*, 95.

³⁰ See the reasoning of Lonardo, *EU Common Foreign and Security Policy – Between Law and Geopolitics*, 64.

There are three common demarcation issues in regard to the CFSP:

- CFSP vs. Area of Freedom, Security and Justice (AFSJ):
 - AFSJ falls under Title V of Part Three of the TFEU.
 - It is an area of shared competence according to Art. 4(2)(j) TFEU.
- CFSP vs. Development Cooperation:
 - Development cooperation is covered under Title III, Chapter One of Part Five of the TFEU.
 - It is in an area of shared competence according to Art. 4(4) TFEU.
- CFSP vs. Common Commercial Policy:
 - Common commercial policy is governed by Arts. 206–207 TFEU.
 - This area sometimes raises issues regarding the appropriate legal basis for international agreements.
 - Competence in this area is exclusive to the EU, as per Art. 3(1)(e) TFEU.

Additionally, in relation to the work for the rearmament of Europe, one may discuss the difference between the legal basis for the CSDP and that for industry, under which the Union has competence to support, coordinate or supplement the actions of Member States according to Art. 6(b) TFEU, together with that for the functioning of the internal market under which the EU has shared competence according to Art. 4 TFEU.

3.3.2 Disputes Over Correct Legal Basis

An example of a demarcation issue between the AFSJ and the CSDP is the issue of naval operations or border missions. CSDP operations do not include operations coordinated by Frontex. Instead, Frontex-coordinated operations fall under the AFSJ and are defined as border control missions.³¹

In this line, there are two important cases from the CJEU on the distinction between the CFSP and the AFSJ. In Case C-130/10 *Parliament v Council*, the question was whether restrictive measures directed against certain persons and entities associated with Usama bin Laden were taken on the correct legal basis. Parliament claimed that the contested regulation was wrongly based on the policy area of the CFSP (Art. 215 TFEU on restrictive measures) rather than the AFSJ and the topic of addressing terrorism, based on Art. 75 TFEU.³²

‘An example of a demarcation issue between the AFSJ and the CSDP is the issue of naval operations or border missions.’

The second is Case C-263/14 *Parliament v Council*, which concerned a dispute about the choice of the legal basis for an agreement between the EU and Tanzania on the conditions for the transfer of suspected pirates and associated seized property from an EU-led naval force to Tanzania. The agreement was considered to be exclusively in the area of the CFSP and to be based on the first clause of the second paragraph of Art. 218(6) TFEU, and was made without the involvement of Parliament. Parliament claimed that the agreement had a twofold purpose, covering both the CFSP and the fields of judicial cooperation in criminal matters and police cooperation (AFSJ). The contested decision ought therefore to have had as its legal basis Art. 37 TEU, within the area of the CFSP, and also Arts. 82 and 87 TFEU, both within the AFSJ, and, accordingly, should have been adopted under the procedure that requires the consent of Parliament, set out in point (a)(v) of the second subparagraph of Art. 218(6) TFEU.³³

³¹ See discussion in Lonardo, *EU Common Foreign and Security Policy – Between Law and Geopolitics*, 99.

³² See CJEU’s judgment of 19 July 2012 in Case C-130/10 *Parliament v Council*.

³³ CJEU’s judgment of 14 June 2016 in Case C-263/14 *Parliament v Council*.

The Court concluded in both these judgments that the contested measures were taken on the correct legal basis (that is, that of the CFSP).

Another dispute on the choice of legal basis in the field of the CFSP is the Kazakhstan case, Case C-244/17 *Commission v Council*. The Commission claimed that the Council had used the incorrect legal basis for the position of the Union within a Cooperation Council of Enhanced Partnership and Cooperation Agreement between the Union, its Member States and Kazakhstan. The position was based both on the CFSP and on common commercial policy in Art. 207 TFEU, transport policy in Art. 91 TFEU and Art. 100(2) TFEU and development cooperation in Art. 209 TFEU. In this case the Court agreed with the Commission that the Council had erred in including the CFSP as a legal basis.³⁴

3.3.3 Principles for Establishing the Correct Legal Basis

It is worth noting that the creative use of legal bases is a common feature of the Union's legislative procedure and is something that occurred when tackling the Covid-19 pandemic.³⁵ In addition, the legal basis for the functioning of the internal market, Art. 114 TFEU, is a common basis for any approximation of laws within the Union, and its wide scope has been contested several times.³⁶

The CJEU has established certain principles for establishing the choice of a correct legal basis. The choice must rest on objective factors amenable to judicial review, taking the aim and the content of the measure into account. Further, the principle of 'centre of gravity', as established by the CJEU, applies,³⁷ meaning that there must be an evaluation of whether the act has, as its main objective, the execution of the CFSP or instead relates to other policy domains.

It is possible to combine several legal bases, but the use of multiple legal bases is excluded when the decision-making procedures are incompatible with each other. In respect of the CFSP it should be emphasised that a Treaty provision providing for the use of an ordinary legislative procedure cannot be combined with a provision which requires unanimity in the Council or the European Council.³⁸ In conclusion, one cannot easily combine the CFSP with another legal basis.

'... the use of multiple legal bases is excluded when the decision-making procedures are incompatible with each other.'

3.3.4 New Initiatives – Fresh Challenges

The emergence of new initiatives aimed at enhancing EU defence capabilities by bolstering the EU's defence industry may give rise to fresh demarcation challenges. Generally, the new initiatives are driven by the Commission and often involve legislative proposals which, as we have seen, is not possible under the CFSP/CSDP.

³⁴ See CJEU's judgment of 4 September 2018 in Case C-244/17 *European Commission v Council of the European Union*, ECLI:EU:C:2018:662; see discussion in Butler, *Constitutional Law of the EU's Common Foreign and Security Policy – Competence and Institutions in External Relations*, 61–62.

³⁵ See here Kai P. Purnhagen, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak' (2020) 11(2) *European Journal of Risk Regulation*, 297.

³⁶ CJEU's judgment of 12 December 2006 in Case 380/03 *Tobacco Advertising II*, ECLI:EU:C:2006:772 and judgment of 3 September 2015 in Case C-398/13 P *Inuit II*, ECLI:EU:C:2015:535.

³⁷ See CJEU's judgment of 26 March 1987 in Case 45/86 *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1987:163, para 11; judgment of 11 June 1991 in Case C300/89, *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1991:244, para 10; Opinion 2/00 (*Cartagena Protocol on Biosafety*) of 6 December 2001, ECLI:EU:C:2001:664, para 22.

³⁸ Case C-130/10, *Parliament v Council*, paras 45–48.

The reasons for this are manifold. Since initiatives under the CSDP must, according to Arts. 24 and 25 TEU, be implemented through decisions or guidelines, and given that the same provisions explicitly exclude legislative competence in this field, there is no legal basis for adopting legislative measures under the CSDP. This raises the question of whether the exclusion of legislative acts is intended to prevent legislation on defence policy within the Union altogether, or whether the CSDP should be understood as a policy field which naturally exists exclusively within the realm of the EU's external actions. The answer, perhaps, lies in the conclusion that the Treaties were not formulated with the current geopolitical challenges in mind.

'... the Treaties were not formulated with the current geopolitical challenges in mind.'

A further reason why initiatives are taken on other bases is that the EU's defence may be strengthened by actions in other policy areas. In the following paragraphs I assess some of the new initiatives and their legal bases (or presumed legal bases).

One example is Regulation 2023/2418 of the European Parliament and of the Council of 18 October 2023 on establishing an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA). The Regulation's legal basis is Art. 173 TFEU on the conditions necessary for the competitiveness of the Union's industry, which lies within the competence category provided in Art. 6 TFEU for actions to support, coordinate or supplement the actions of the Member States. In addition, Regulation 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP), which aims to increase ammunition production across the EU, relies on Art. 114 TFEU regarding the functioning of the internal market; this exists within the shared competence of Art. 4 TFEU, as well as Art. 173 TFEU on the competitiveness of the EU's industry.

Both Regulations should now be seen in the light of the proposal for a Regulation of the European Parliament and of the Council to establish a European Defence Industry Programme, and a framework of measures to ensure the timely availability and supply of defence products (EDIP), which have not yet been brought into force.³⁹ EDIP was proposed by the Commission in March 2024 and relies on Art. 173 TFEU (industry), Art. 114 TFEU (internal market), Art. 212 TFEU (economic, financial and technical cooperation with third countries) and Art. 322 TFEU (in relation to its financial provisions).

The Regulations mentioned are, overall, based on the EU's policies for industry and the functioning of the internal market. As such, they do not fall under the CFSP/CSDP framework and can instead be viewed as measures aimed at strengthening the Union from within. Nevertheless, considering the principle of centre of gravity, one might question whether the true substance of these initiatives really lies in bolstering the EU's industrial base and internal market, or whether, instead, it is about enhancing its defence capabilities.

This raises a broader issue: if the Treaty provisions have prevented the legislator from taking actions it would otherwise have wanted to do, does the creative use of other legal bases for these Regulations reflect a growing misalignment between the current Treaties and the EU's response to an evolving geopolitical reality?

³⁹ In the White Paper, the co-legislators are invited to adopt the European Defence Industry Programme (EDIP) before Summer 2025: European Commission, *White Paper for European Defence – Readiness 2030* (2025) https://commission.europa.eu/document/download/e6d5db69-e0ab-4bec-9dc0-3867b4373019_en?filename=White%20paper%20for%20European%20defence%20%E2%80%93%20Readiness%202030.pdf, 20.

In addition, it needs to be highlighted that the ordinary legislative procedure, which requires a qualified majority in the Council, is to be used under Arts. 114 and 173 TFEU. The legal bases therefore allow a deviation from the Member State-controlled decision procedure for the CFSP. Hence, by relying on provisions related to industrial policy and the functioning of the internal market, the EU is effectively shifting from the Member State-controlled framework of the CFSP to the legislative mechanisms of the internal market domain.

‘... the EU is effectively shifting from the Member State-controlled framework of the CFSP to the legislative mechanisms of the internal market domain.’

In March 2025 the Commission presented the *White Paper for European Defence – Readiness 2030*. The paper presents initiatives to build European defence through, for example, closing critical capability gaps, enhancing military mobility, securing border protection, strategic stockpiling, and fostering cooperation with Ukraine. For instance, it suggests a review of all existing EU legislation that has an impact on military mobility.⁴⁰ These initiatives are in addition to the earlier proposal to ‘ReArm Europe’, which is included in the White Paper. ReArm Europe is structured around five pillars, each comprising distinct financial initiatives aimed at generating a significant increase in defence spending.⁴¹

An assessment of the initiatives presented in the White Paper reveals that the proposed actions do not fall within the scope of the CFSP/CSDP. Instead, they are primarily rooted in industrial policy, measures to support the functioning of the internal market, or the AFSJ. In this way, the Commission has effectively identified alternative legal bases to strengthen the EU’s defence capabilities beyond the confines of the CFSP framework and within the ordinary legislative procedure.

3.3.5 Interim Conclusion: Defence Initiatives Adopted Under Non-CFSP Basis

To determine the appropriate legal basis for a given measure, the principle of the centre of gravity must be applied. This requires the legislator to identify the primary objective of the measure. In the field of defence, however, this task becomes particularly complex. At what point does an issue fall within the realm of defence policy? While it is clear that the European Commission’s recent proposals are motivated by a desire to enhance the EU’s defence capabilities, they have not been adopted under the CFSP/CSDP framework.

This raises a broader constitutional question: is the current legal architecture of the CFSP/CSDP, as established by the Treaties, sufficient to accommodate the evolving defence initiatives? Ultimately, this becomes a matter of whether the Treaties should be revised to allow deeper integration in defence cooperation by, for example, allowing legislative acts in the field or increasing the CJEU’s jurisdictional control, or whether it is legitimate to pursue such initiatives through other policy areas focused on the Union’s internal affairs.

4. Conclusions

The aim of this European Policy Analysis has been to examine the borders of the constitutional framework for defence policy within the EU, including the Union’s competences and its decision-making procedures and, further, to explore how this framework aligns with the recent defence initiatives undertaken by the EU.

Given that Art. 4(2) TEU states that national security remains the sole responsibility of each Member State, it is unsurprising that the constitutional framework of the Treaties establishes defence as a Member State-controlled policy area. This is reflected in the high

⁴⁰ European Commission, *White Paper for European Defence – Readiness 2030* (2025), 9.

⁴¹ See, further, European Commission, *Letter by President von der Leyen on Defence* (2025) <https://ec.europa.eu/commission/presscorner/api/files/attachment/880628/Letter%20by%20President%20von%20der%20Leyen%20on%20defence.pdf>.

degree of flexibility within the CFSP/CSDP, which remains legally undefined in many respects and is predominantly governed by unanimity in the Council and the European Council. This has created a policy field which is broadly open to the preferences of the Member States, but which remains weak because the Member States cannot be 'forced' to uphold their promises.

The area of the CFSP/CSDP is also constrained by the fact that no legislative acts can be presented in this policy field. The CFSP/CSDP must therefore be seen as existing solely in respect of EU's external relations. This creates confusion when the Commission promotes increased defence collaboration within the Union on the basis of strengthening the EU's industry and the functioning of the internal market. However, the proposed initiatives cannot be taken under the CFSP/CSDP as CFSP/CSDP measures must instead be in form of guidelines and decisions focused primarily on external relations.

Through assessing the new initiatives introduced by the Commission, it is evident that their main purpose is to increase defence capabilities through bolstering the defence industry and the internal market for defence products. This may give rise to new constitutional tensions, as it is open to debate whether the initiatives fit best under the CSDP or the industrial and internal market policy areas. By relying on the legal basis under the areas of industrial policy and the functioning of the internal market, the Commission is employing legal bases beyond the framework of the CSDP and within the ordinary legislative procedure, which grants it more power.

'... there is a mismatch between the policy area of defence as defined in the Treaties and the current political reality.'

A legal dead-end seems to be emerging: on the one hand, these initiatives cannot be based on the CFSP/CSDP, as those policy areas do not permit the adoption of legislative acts; on the other hand, the centre of gravity of the initiatives arguably concerns defence, rather than industrial policy or the internal market. Therefore, there is a mismatch between the policy area of defence as defined in the Treaties and the current political reality. This raises the question of whether the current Treaties meet the political will of the Union, or whether the geopolitical reality has outpaced the current constitutional framework for the CSDP. Even if this has not already happened, the Union will soon reach the limits of its current constitutional framework. To ensure there is solid legal ground on which to effectively promote EU defence, the constitutional framework for the CSDP is bound to change.

References

Table of Cases

- CJEU's judgment of 31 March 1971 in Case 22-70 *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1971:32
- CJEU's judgment of 14 July 1976 in Cases 3-, 4- and 6-76 *Cornelis Kramer and others*, ECLI:EU:C:1976:114
- CJEU's judgment of 26 March 1987 in Case 45/86 *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1987:163
- CJEU's judgment of 11 June 1991 in Case C300/89, *Commission v Council* ECLI:EU:C:1991:244
- CJEU's Opinion 2/00 (*Cartagena Protocol on Biosafety*) of 6 December 2001, ECLI:EU:C:2001:664
- CJEU's judgment of 14 July 2005 in Case C-433/03 *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:2005:462
- CJEU's judgment of 12 December 2006 in Case 380/03 *Tobacco Advertising II*, ECLI:EU:C:2006:772
- CJEU's judgment of 19 July 2012 in Case C-130/10 *European Parliament v Council of the European Union*, ECLI:EU:C:2012
- CJEU's judgment of 24 June 2014 in Case C-658/11 *Parliament v Council (Pirate Transfer Agreement with Mauritius)*, ECLI:EU:C:2014:2025
- CJEU's judgment of 3 September 2015 in Case C-398/13 P *Inuit II*, ECLI:EU:C:2015:535
- CJEU's judgment of 12 November 2015 in Case C-439/13 P, *Elitaliana v Eulex Kosovo*, ECLI:EU:C:2015:753
- CJEU's judgment of 14 June 2016 in Case C-263/14 *European Parliament v Council of the European Union*, ECLI:EU:C:2016:435
- CJEU's judgment of 4 September 2018 in Case C-244/17 *European Commission v Council of the European Union*, ECLI:EU:C:2018:662

Bibliography

- Butler, Graham, *Constitutional Law of the EU's Common Foreign and Security Policy – Competence and Institutions in External Relations* (Hart 2019)
- Craig, Paul and Gráinne de Búrca, *EU Law – Text, Cases and Materials*, 8th ed. (Oxford University Press 2024)
- van Elsuwege, Peter, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice' (2021) 58 *Common Market Law Review*, 1731-1760
- European Commission, *Letter by President von der Leyen on Defence* (2025) <https://ec.europa.eu/commission/presscorner/api/files/attachment/880628/Letter%20by%20President%20von%20der%20Leyen%20on%20defence.pdf>

- European Commission, *Niinistö Report: European Defence and Security – Delivering on Commitments* (2024) https://commission.europa.eu/document/download/5bb2881f-9e29-42f2-8b77-8739b19d047c_en?filename=2024_Niinisto-report_Book_VF.pdf
- European Commission, ‘Speech by President-elect von der Leyen in the European Parliament Plenary on the Occasion of the Presentation of her College of Commissioners and their Programme’ (27 November 2019) <[Speech by President-elect von der Leyen in the EP](#)> accessed 30 June 2025
- European Commission, *White Paper for European Defence – Readiness 2030* (2025) https://commission.europa.eu/document/download/e6d5db69-e0ab-4bec-9dc0-3867b4373019_en?filename=White%20paper%20for%20European%20defence%20%E2%80%93%20Readiness%202030.pdf
- Koutrakos, Panos, ‘The European Union’s Common Foreign and Security Policy after the Treaty of Lisbon’ (2017), The Swedish Institute for European Policy Studies (SIEPS)
- Lonardo, Luigi, *EU Common Foreign and Security Policy – Between Law and Geopolitics* (Springer 2023)
- Österdahl, Inger, ‘After Lisbon: The New Legal Framework for the EU’s Common Foreign and Security Policy’ in Antonina Bakardjieva Engelbrekt et al. (Eds), *The European Union Facing the Challenge of Multiple Security Threats* (Edward Elgar 2018)
- Österdahl, Inger, ‘Försvarsklausulen i EU-fördraget – i ljuset av Sveriges ansökan om Natomedlemskap’ (2023), The Swedish Institute for European Policy Studies (SIEPS)
- Purnhagen, Kai P., ‘More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak’ (2020) 11(2) *European Journal of Risk Regulation*, 297-306
- Riddervold, Marianne and Guri Rosén, ‘Beyond Intergovernmental Cooperation: The Influence of the European Parliament and the Commission on EU Foreign and Security Policies’ (2015) 20(3) *European Foreign Affairs Review*, 399-418
- Riddervold, Marianne, ‘(Not) In the Hands of the Member States: How the European Commission Influences EU Security and Defence Policies’ (2015) 54(2) *Journal of Common Market Study*, 353-369