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## Mapping the involvement of the European Parliament in EU external relations – a legal and empirical analysis

Bjorn Kleizen



**CLEER**



CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**MAPPING THE INVOLVEMENT OF THE EUROPEAN  
PARLIAMENT IN EU EXTERNAL RELATIONS – A LEGAL  
AND EMPIRICAL ANALYSIS**

**BJORN KLEIZEN, LL.M, MSc\***

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## 1. INTRODUCTION

Over the decades the European Union (EU) has developed into an important player on the international scene, capable of utilising diplomatic, economic and – through the resources of its member states – even military measures to exert influence in the world. A few recent examples illustrative of the salience of EU external action are the ongoing negotiations on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States (US), the EU's role in the Ukraine conflict – including the recent provisional application of the final section of the geopolitically important and sensitive EU-Ukraine Association Agreement<sup>1</sup> – and the continuing deployment of civilian and military missions under the flag of the EU across the globe.<sup>2</sup> In addition to these particularly salient examples, dozens of international agreements are concluded by the EU each year, while 139 EU Delegations and Offices permanently represent the EU's interests worldwide. This expansive set of competences, tasks and activities raises the question to what extent the EP, being the only body directly representing EU citizens,<sup>3</sup> is capable of scrutinising EU external action. This paper will therefore focus on the EP's role in EU external action, and will aim to comprehensively map the various formal, informal and indirect tools available to the EP to scrutinise or influence the EU's various external policies.

The paper is intended to address three gaps in the literature. First, while the involvement in the European Parliament (EP) in the internal dimension of the EU decision-making processes is a popular subject for EU scholars,<sup>4</sup> the EP's powers to scrutinise the EU's external policies have as of yet been less well-explored. The analyses that do exist have mostly focused on the EP's role in

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<sup>1</sup> The final section concerns Title IV of the Association Agreement, which establishes a deep and comprehensive free trade zone. Its entry into force was postponed to prevent further tension in the ongoing Ukraine conflict. See, in particular, Article 1 of Council Decision 2014/691/EU amending Decision 2014/668/EU on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols, *OJ* [2014] L 289/1, 3.10.2014.

<sup>2</sup> At the time of writing of this article, the EU has 17 ongoing operations, of which 6 are military in nature. The list of ongoing operations can be consulted on the following site: <<http://www.eeas.europa.eu/csdp/missions-and-operations/>>.

<sup>3</sup> Although the European Council and the Council are also democratic bodies in the sense that they are indirectly accountable to national parliaments and – through parliaments – national electorates, they do not directly represent the EU electorate.

<sup>4</sup> In particular in the context of the democratic deficit debate. Prominent contributions include: S. Hix, *What's Wrong with the European Union and How to Fix It* (Cambridge: Polity Press 2008), 67-86; A. Follsedahl and S. Hix, 'Why There is a Democratic Deficit in the EU: A response to Majone and Moravcsik', 44 *Journal of Common Market Studies* 2006, 533-562. An institutional approach more similar to this article is provided by A.P. Maurer, 'The Legislative Powers and Impact of the European Parliament', 41 *Journal of Common Market Studies* 2003, 227-247 and D. Kietz and A.P. Maurer, 'The European Parliament in Treaty Reform: Predefining IGC's Through Interinstitutional Agreements', 13 *European Law Journal* 2007, 20-46.

the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP).<sup>5</sup> The amount of comprehensive analyses also incorporating the EP's role in non-CFSP/CSDP external competences remains relatively limited, even though the EP's powers in the external dimensions of the internal market and the Area of Freedom Security and Justice (AFSJ) are substantially stronger than its powers under the CFSP.<sup>6</sup> A focus on CFSP decision-making alone could therefore underestimate the toolbox available to the EP to scrutinise external affairs. A second little explored facet of the EP's involvement in EU foreign affairs is how, and to what extent, the EP's formal competences in external affairs translate into involvement in practice. It is for instance unknown to what extent the EP's strengthened *de jure* rights under the Lisbon Treaty have increased the amount of opportunities in which the EP can exert its veto power to scrutinise international agreements in practice. Thirdly, the EP possesses an array of informal and indirect methods to scrutinise policy-making or bargain for a better institutional position, such as the adoption of resolutions, scrutiny through the budget and inter-institutional agreements. While the usage of budgetary prerogatives of the EP has previously been explored in a CFSP context,<sup>7</sup> a more comprehensive analysis of these indirect methods is still lacking.

In order to research these subjects, an approach combining both legal and empirical analysis will be utilised. In addition to the changes introduced by the Lisbon Treaty to decision-making procedures, the legal analysis will include other instruments that the EP has at its disposal to influence foreign policy, including budgetary scrutiny, inter-institutional agreements, information rights and EP resolutions. The paper moreover takes an integral approach to the study of the EU's external competences and will consider both the EU's civil, social and market based external action as well as its security policy arm under the CFSP/CSDP.

Section 2 will first consider the formal involvement of the EP through the rights accorded to it under the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The section will also elaborate on the establishment of a European External Action Service (EEAS)

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<sup>5</sup> See for instance the interesting contributions of D. Thym, 'Beyond Parliament's Reach? The Role of the European Parliament in the CFSP', 11 *European Foreign Affairs Review* 2006, 109-127; U. Diedrichs, 'The European Parliament in CFSP: More than a Marginal Player?', 39 *The International Spectator* 2004, 31-46; B. Crum, 'Parliamentarisation of the CFSP through Information Institution-Making? The Fifth European Parliament and the EU High Representative', 13 *Journal of European Public Policy* 2006, 386-401; K. Raube, 'The European External Action Service and the European Parliament', 7 *The Hague Journal of Diplomacy* 2012, 65-80.

<sup>6</sup> Recently, the trend seems to be changing and more contributions on non-CFSP external areas are also appearing. See for instance C. Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures', 12 *International Journal of Constitutional Law* 2014, 904-929 and D. Jančić, 'World Diplomacy of the European Parliament', 11 *The Hague Journal of Diplomacy* 2016, 121-143. General volumes on EU external affairs also mention the EP's powers passingly, but are focused more on the EU's external competences. Examples include: P. Eeckhout, *EU External Relations Law*, (Oxford: Oxford University Press 2011), p. 199; B. Van Vooren and R. Wessel, *EU External Relations Law: Text Cases and Materials*, (Cambridge: Cambridge University Press 2014), 27-28.

<sup>7</sup> For instance U. Diedrichs, *supra* note 5.

to support the High Representative (HR) of the EU, and what rights the EP possesses *vis-à-vis* this new service. Section 3 will move beyond the formal powers of the EP by analyzing informal and indirect methods of influencing decision-making. The section will focus on the EP's inter-institutional agreements with the Commission and the Council, the Declaration by the HR on political accountability, issued in 2010, at the establishment of the EEAS. Section 4 will continue by exploring the EP's involvement through EU budgetary processes and will include a review of the annual budgetary procedure of 2011. Of particular interest in both sections 3 and 4 is how inter-institutional agreements and the budgetary process nuance the clear divide made in the Treaties between the more elaborate involvement of the EP in non-CFSP external competences and its relative exclusion in CFSP/CSDP affairs. Section 5 will discuss the involvement of the EP in practice by analyzing samples of agreements adopted under Article 218 TFEU, and its predecessor, Article 300 Treaty Establishing the European Community (TEC). This exercise will shed light on the frequency with which the EP has exercised the right to consent, the right to be consulted and the right to receive information in the EU external action fields. It will also serve to illustrate the change in the degrees of involvement of the EP between the Treaties of Nice and Lisbon. Section 5 will additionally present an analysis of the EP usage of resolutions in 2013, considering both which foreign policy subjects are scrutinised the most through this instrument and the EP's focus on foreign affairs compared to its focus on internal policy areas.

## 2. FORMAL INVOLVEMENT OF THE EP IN FOREIGN AFFAIRS AND EXTERNAL ACTION

### 2.1 Introduction

Before turning to specific policy areas and empirical analyses, it is helpful to set out the general procedures governing the adoption of international agreements as established in the Treaties. The Treaty of Lisbon introduced a variety of improvements to the rights of the EP, but in some policy fields – in particular the CFSP/CSDP – it also shows remarkable consistency with the Nice Treaty. Subsection 2.2 will turn to the innovations contained in Article 218 TFEU on the conclusion of international agreements, after which subsections 2.3 and 2.4 will consider respectively the post-Lisbon developments in the CFSP/CSDP and the relationship between the EP and the EEAS. Finally, subsection 5 will devote some attention to the only external action area in which the EP could be considered an institutional 'loser' after the 2009 Treaty revision: the EP's reduced rights in the procedure on the adoption restrictive sanctions pursuant to Article 215 TFEU.

## 2.2 General procedures on the conclusion of international agreements: Article 218 TFEU

Article 218 TFEU lays down the general procedure for the international agreements that are concluded by the European Union and is important for the roles played by the Council, Commission and the EP throughout the negotiation, conclusion and suspension process of any EU international agreement. The previous version of Article 218 TFEU, Article 300(2) TEC, already provided several notable rights for the Parliament, including firstly the right to be immediately and fully informed of decisions regarding the provisional application or suspension of agreements and of a position reached in a body set up by an agreement under Article 310 TEC. Also notable is that the EP already possessed the power to consent to agreements that have important budgetary implications, agreements establishing a specific institutional framework by organising cooperation procedures and agreements covering fields for which the co-decision procedure applies.<sup>8</sup>

Building on the rights already established under the Nice Treaty, the new Article 218 TFEU contains several innovations which have substantially improved the position of the Parliament. Among the textual changes to the provision it is first of all notable that Article 218(6)(a) TFEU extends the EP's right to consent to association agreements, the accession agreement to the ECHR<sup>9</sup> and agreements covering fields to which the special legislative procedure requiring the EP's consent applies. Moreover, subparagraph b) provides that in other cases Parliament has the right to be consulted. Furthermore, although not a direct change in Article 218 TFEU itself, an important innovation of the Lisbon Treaty is that it has significantly extended the usage of the ordinary legislative procedure for internal measures. This has simultaneously resulted in the extension of the scope of Article 218(6)(a)(v) TFEU, as this provision provides the EP with the right to consent to international agreements concerning matters for which the ordinary legislative procedure applies internally.<sup>10</sup> This change has implications, for instance, for the conclusion of international agreements within the framework of the EU Common Commercial Policy (CCP), a notably prolific EU external policy area whose implementation requires the ordinary legislative procedure since the entry into force of the Treaty of Lisbon.<sup>11</sup> Similarly, the integration of the former first and third pillars has resulted in an extension of Article 218(6)(a) and Article 218(6)(b) to cover all AFSJ legal bases that internally require the ordinary legislative procedure, or a special

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<sup>8</sup> Art. 300(3) TEC; the co-decision procedure has been renamed as the ordinary legislative procedure in the Treaty of Lisbon.

<sup>9</sup> Which has recently received a negative opinion in ECJ, Opinion 2/13, available at <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=39882>>.

<sup>10</sup> A. Herranz-Surrallés, 'PRIF-Report 104: The Contested "Parliamentarisation" of EU Foreign and Security Policy: The role of the European Parliament following the introduction of the Treaty of Lisbon', Peace Research Institute Frankfurt (2011), at 4-5, available at <[http://hsfk.de/Publikationen.9.0.html?&no\\_cache=1&detail=4296](http://hsfk.de/Publikationen.9.0.html?&no_cache=1&detail=4296)>

<sup>11</sup> Art. 207(2) TFEU.

legislative procedure requiring the EP's consent. The CFSP remains an exception under Article 218(6) TFEU, however, and the EP does not receive consultation or consent rights for agreements exclusively pertaining to the CFSP/ CSDP.

Beyond the procedural requirements for the conclusion of agreements laid down in Article 218(6) TFEU, the EP's information rights laid down in Article 218(10) are worth mentioning. This provision stipulates that the EP has to be informed immediately and fully at all stages of the procedure. The phrasing '*all stages of the procedure*' implies that the provision is of general application,<sup>12</sup> and that Parliament has to receive information on, for instance, the decision to enter negotiations, the decisions on who will be appointed negotiator, on the negotiation mandate, and the negotiation process itself.<sup>13</sup> This is especially relevant given the lack of a formal say for Parliament in the opening phase of international agreement negotiations, and as such the provision serves to (partially) mitigate the risk of Parliament being faced with a *fait accompli*. Nevertheless, the fact that the EP is limited to information rights may still result in the Parliament being in a difficult position in the negotiation and opening of negotiation stages, as the EP's veto powers only become available after the signing of the agreement.<sup>14</sup>

Over the years, the information requirements laid down Article 218(10) TFEU have received further elaboration. The Framework Agreement concluded in 2010 by the Commission and Parliament<sup>15</sup>, *inter alia*, contains provisions on the involvement of the EP in international conferences conducted by the Commission representing the Union, on which information should be transmitted when to the Parliament, with the aim of substantially reducing the information asymmetry between both institutions. Given its relevance, the Framework Agreement will be discussed extensively in section 3 on informal and indirect influence methods of the EP. Additionally, the European Court of Justice (ECJ) clarified for the first time in Case C-658/11 that the information requirement under Article 218(10) TFEU constitutes an essential procedural requirement and that it applies to any procedure for concluding an international agreement, including agreements relating exclusively to the CFSP.<sup>16</sup> In that context the ECJ noted that Article 218(10) forms an expression of the democratic principles on which the EU is founded, in particular the principle that the people should participate in the exercise of power through a representative assembly.<sup>17</sup> This leads to the conclusion that Article 218(10) TFEU must be interpreted as the EP having the right to be immediately and fully informed about the opening of negotiations, the proposal for negotiating directives, the negotiating directives, the proposal

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<sup>12</sup> In this context, see also: ECJ, Case C-658/11, *Parliament v. Council*, [2014] ECR, para. 75-76, available at <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-658/11>>.

<sup>13</sup> Which, since the Treaty of Lisbon, is at the discretion of the Council. See: P. Eeckhout, *supra* note 6, at p. 196.

<sup>14</sup> *Ibid.*, at p. 199.

<sup>15</sup> Framework Agreement on relations between the European Parliament and the European Commission, OJ [2010] L 304/47, 20.11.2010, point 25, 2<sup>nd</sup> indent.

<sup>16</sup> *Parliament v. Council*, *supra* note 12, para. 86.

<sup>17</sup> This principle is expressed in the Treaties through Art. 10(3) TEU.

for a Council decision authorising the signing of an agreement (including possible provisional application) and the proposal to suspend the application of an agreement. The violation of this obligation by any of the institutions involved in the negotiation process of CFSP or TFEU policies agreements will impact on the validity of the Council's acts concerned.<sup>18</sup> In this context, it is worth mentioning that during her hearing before the EP, the HR-/Vice-President of the Commission, Federica Mogherini, engaged to make sure that the outcomes of case C-658/11 will be fully respected and effectively applied by the EEAS.<sup>19</sup>

While the current Article 218 TFEU seems largely beneficial as opposed to its predecessor Article 300 TEC, one major point in which it still largely excludes the EP is the suspension of application of agreements. The regime for suspension is covered by paragraph 9 of Article 218. This provision provides that 'the Council, on a proposal from the Commission or the High Representative [...] shall adopt a decision suspending application of an agreement'. The EP is thus excluded from a formal say when adopting decisions suspending the application of an international agreement. This entails that the Parliament has no power to suspend the application of agreements which it no longer supports. Conversely, should the other institutions wish to suspend the application of an agreement, the EP has no formal options to prevent the adoption of a suspension decision. The potential adverse effects for the EP's position are demonstrated by the EU-US SWIFT Agreement on the transfer of financial messaging data in the context to the Terrorist Finance and Tracking Programme (TFTP).<sup>20</sup> Several years after the adoption of the agreement the American National Security Agency (NSA) scandal prompted criticism on the European side of the

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<sup>18</sup> In her opinion on Case C-263/14 *Parliament v. Council* (also known as *Tanzania* case), Advocate General Kokott suggested annulling Council Decision 2014/198/CFSP of 10 March 2014 on the signing and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates on the ground that Parliament did not receive any information during the ongoing procedure. The Council acted therefore in violation of Art. 218(10) TFEU.

<sup>19</sup> In her written answer to the EP, the HR stated: 'To achieve this, I will instruct the services – and Chief Negotiators in particular – to consistently and proactively offer to the European Parliament (by means of a letter to the AFET Committee as the competent Committee and focal point) to brief and inform the EP in the appropriate and agreed format. This will apply at the beginning of negotiations (including prior to the start of negotiations), during the conduct of negotiations (after each negotiating round or when significant developments occur) and upon the finalisation of negotiations (whenever negotiations are completed, an agreement is initiated, provisional application is proposed or there is the intention to suspend or modify an agreement). During the implementation phase of an agreement, I will instruct the EEAS competent services to accept the requests from the Parliament to discuss the implementation and the state-of-play of the agreement. The services will brief and regularly inform specific "ad hoc parliamentary monitoring groups" on important agreements, if so requested by the EP'. See <[https://ec.europa.eu/commission/sites/cwt/files/commissioner\\_ep\\_hearings/mogherini-reply\\_en.pdf](https://ec.europa.eu/commission/sites/cwt/files/commissioner_ep_hearings/mogherini-reply_en.pdf)>

<sup>20</sup> Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (the SWIFT agreement), OJ [2010] L 8/11, 13.1.2010.

Atlantic from several governments as well as the EP.<sup>21</sup> The EP was concerned, in particular, with the potential NSA usage of bulk data transmitted under the SWIFT agreement for other purposes than was envisaged at the time of adoption, and thus argued for the suspension of the application of the agreement.<sup>22</sup> Due to its lack of formal suspension powers, it threatened to withhold consent in future Article 218 adoption procedures with remarkably strong language: '[the Parliament] considers that, although Parliament has no formal powers under Article 218 TFEU to initiate the suspension or termination of an international agreement, the Commission will have to act if Parliament withdraws its support for a particular agreement; points out that, when considering whether or not to give its consent to future international agreements, Parliament will take account of the responses of the Commission and the Council in relation to this Agreement.'<sup>23</sup> The Council did not, however, suspend the agreement. The Commission instead opted for an inquiry of US officials, a response deemed insufficient by several MEPs.<sup>24</sup> This case does illustrate how the lack of independent suspension powers for the EP can translate into substantially lower negotiation positions for the EP when it comes to the suspension of sensitive agreements in light of changing circumstances. Thus, although Article 218 TFEU – coupled in particular with the extension of the ordinary legislative procedure internally – has substantially improved the EP's position with regard to the conclusion of international agreements, there remain caveats in which the EP is notably less powerful than the Commission or the Council.

### 2.3 Tentative increases in the EP's rights in CFSP/CSDP affairs

While the powers of the EP have been gradually growing in most policy areas, its involvement in CFSP affairs since the policy's introduction with the Treaty of Maastricht has remained remarkably constant.<sup>25</sup> Article 24(1) TEU already emphasises the different nature of the CFSP by providing that '*the specific role of the European Parliament and of the Commission in this area is defined by*

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<sup>21</sup> Especially notable was a long diplomatic row between Berlin and Washington. See for example P. Oltermann and S. Ackerman, 'Germany asks top US intelligence official to leave country over spy row', *The Guardian* (Berlin and New York, 10 July 2014) available at <<http://www.theguardian.com/world/2014/jul/10/germany-asks-top-us-intelligence-official-spy-row?>>.

<sup>22</sup> See European Parliament Press Release of 23 October 2013, 'MEPs call for suspension of EU-US bank data deal in response to NSA snooping', available at <<http://www.europarl.europa.eu/news/en/news-room/content/20131021IPR22725/html/MEPs-call-for-suspension-of-EU-US-bank-data-deal-in-response-to-NSA-snooping?>>.

<sup>23</sup> EP resolution on the suspension of the SWIFT Agreement (2013/2831(RSP)), paragraph 11. See also D. Jančić, 'The Role of the European Parliament and the US Congress in Shaping Transatlantic Relations: TTIP, NSA Surveillance, and CIA Renditions', 54 *Journal of Common Market Studies* 2016, 896-912, for an elaborate discussion of the EP's response to NSA surveillance.

<sup>24</sup> N. Nielsen, 'EU commissioner under fire over response to US spy allegations', *EU Observer* (Brussels, 27 November 2013), available at <<http://euobserver.com/justice/122266?>>.

<sup>25</sup> A. Herranz-Surrallés, *supra* note 10, 2-5.

*the Treaties*.<sup>26</sup> This specific role of the EP is further elaborated upon in Article 36 of the TEU, which includes the right for the EP to be consulted biannually on CFSP affairs. This provision requires that the HR shall regularly consult the EP on the main aspects and basic choices of the CFSP and CSDP. Among the other rights accorded to the EP in CFSP/CSDP affairs are that the HR has to ensure that the EP views 'are duly taken into consideration' and that the HR shall inform the Parliament of the evolution of the CFSP/CSDP. Finally, the EP possesses the right to address questions or to make recommendations to the Council and HR on its own initiative. However, the substantive legal bases of the CFSP continue to preclude any noteworthy formal role for the EP on specific measures.

A novelty of the Lisbon Treaty is its alteration of the dynamics between the HR, Council and the Parliament. Considering that the HR is in charge of CFSP implementation<sup>27</sup> and assists the Council and the Commission in ensuring the consistency of the CFSP with other EU external policies,<sup>28</sup> the merger of the positions of Commissioner for External Relations and the HR is an important development introduced by the Treaty of Lisbon. This provides an indirect increase in the EP's powers due to the fact that, under Article 17(7) TEU, the Parliament possesses the right to approve the Commission members proposed by the Council each term. Although this right is limited to a vote on the Commission as a whole, it does not prevent Parliament to refuse its consent in case it has reservations against certain candidate Commissioners.<sup>29</sup> Thus, Article 17(7) TEU may encourage the Council to take the EP's preferences on HR candidates into consideration, and can function as an *ultimum remedium* power for the EP when it considers a candidate unacceptable for the position of HR/VP.

Another noteworthy modification of the Lisbon Treaty, with potentially far-reaching consequences for questions pertaining to the choice between legal bases, and therefore the choice of the legislative or decision-making procedure related to these legal bases, is the rewording of Article 40 TEU. Under the Treaty of Nice, the well-known ECOWAS doctrine was put forward by the ECJ to determine the relationship between the Community pillar and the CFSP/JHA pillars.<sup>30</sup> The previous version of Article 40 TEU (Article 47 TEU (Nice)) provided that nothing in the EU Treaty was to affect the Treaties establishing the European Communities. Through this provision the Treaty drafters sought to exclude a potential competence creep of the CFSP to areas covered by Community law. This provision became central in the ECOWAS case, in which the ECJ had to determine whether the Development Cooperation Policy (DCP), the CFSP or both provided the correct legal bases to adopt small fire-arms reduction measures in the context of the Cotonou agreement. The ECJ noted

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<sup>26</sup> In addition, Art. 24(1) emphasises the general rule of unanimous decision-making within the Council and the exclusion of legislative acts and the ECJ.

<sup>27</sup> Art. 27(1-2) TEU.

<sup>28</sup> Art. 21(3) TEU.

<sup>29</sup> Or at least block a choice completely unsupported by Parliament. See also: A. Herranz-Surrallés, *supra* note 10, at 3.

<sup>30</sup> ECJ, Case C-91-05, *Commission v. Council (ECOWAS)*, [2008], ECR I-03651.

that when a measure has several objectives or components, without one being incidental to the other, the measure could exceptionally be based on several legal bases.<sup>31</sup> However, such a solution was not possible within the context of the ECOWAS case due to the explicit preclusion in Article 47 of the EU Treaty affecting Community competences.<sup>32</sup> The Court considered that the Agreement's international security aims and the concern to eliminate obstacles to the development of countries, respectively identified as CFSP and development policy goals, were indeed non-incidental to one another.<sup>33</sup> Thus, by basing the measure on an EU Treaty provision while a Community legal base was also viable, the Council had infringed Article 47 TEU.<sup>34</sup>

However, Article 40 TEU, as revised by the Lisbon Treaty, seems to cast doubt on the continued validity of this judgment. A second phrase now provides that the non-CFSP competences shall likewise not affect CFSP procedures and powers. It therefore no longer seems tenable to allow a legal base outside of the CFSP to per definition prevail over CFSP legal bases when both the CFSP and the other component are non-incidental to one another.<sup>35</sup> This also means that recourse to CFSP legal bases will be somewhat easier for the Council and HR after the entry into force of the Treaty of Lisbon. In turn, the regained maneuvering space in CFSP affairs may be used to keep a decision-making process beyond the powers and scrutiny of the Commission and the EP. Thus, the rewritten version of Article 40 can be interpreted as a conscious attempt of the Member States to retain the intergovernmental nature of the CFSP. From the perspective of democratic involvement this implies a responsibility for national parliaments to provide the decision-making legitimation that the EP cannot. One potential concern of this development is that it creates the possibility for the Council to actively circumvent parliamentary influence. The formal exclusion of the EP and the difficulty that national parliaments appear to have with the scrutiny of decision-making on the EU level thus threatens the democratic legitimation of EU foreign policy.<sup>36</sup>

Although the EP is thus largely excluded from decision-making in the CFSP/ CSDP, there remains some room for the EP to challenge measures adopted on CFSP legal bases before the ECJ. However, these options too have been limited by the Treaty drafters. Outside the CFSP, the EP is normally entitled to challenge a measure before the ECJ pursuant to Article 263 TFEU. Furthermore, the right to request an opinion on the compatibility of international agreements with EU law is accorded to the EP, the Council, the Commission and the Member States in Article 218(11). A negative opinion pursuant to Article 218(11)

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<sup>31</sup> See ECJ, Case C-211/03 *Commission v. Council*, [2005] ECR I-05141 para. 40, and ECJ, Case C-94/03 *Commission v. Council*, [2006] ECR, para. 36, available at <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-94/03>>.

<sup>32</sup> See *Commission v. Council*, *supra* note 30, paras. 73-77.

<sup>33</sup> *Ibid.*, in particular paras 88-99 and 108.

<sup>34</sup> *Ibid.*, para. 109.

<sup>35</sup> P. Eeckhout, *supra* note 6, at p. 182.

<sup>36</sup> Problems emerge due to for example information asymmetry between the governments acting within the Council and individual national parliaments or the lack of expertise on part of national MP's to oversee European affairs. See for example: U. Diedrichs, *supra* note 5.

precludes the entry into force of the agreement, making the provision an important tool for the review of the conformity of international agreements to EU law. However, as with the reluctance to grant the EP increased rights to scrutinise CFSP decision-making, so has the ECJ's jurisdiction largely been limited in CFSP affairs. Article 24(1) TEU and Article 275 TFEU state that the ECJ shall not have jurisdiction with respect to the provisions on the CFSP, although the second paragraph of Article 275 TFEU includes two exceptions, allowing the ECJ to monitor compliance with the earlier discussed Article 40 TEU and to review restrictive sanctions against natural or legal persons.

Despite the significant boundaries the Treaty drafters have established to the ECJ's jurisdiction, the latter has gradually expanded its influence in the CFSP. This is apparent, first, in the exception for the monitoring of compliance with Article 40 TEU included in Article 275, as this is a reflection of earlier case-law of the ECJ in which it confirmed its jurisdiction over cases including both elements from the CFSP and other Treaty areas.<sup>37</sup> More recently, the ECJ exercised its jurisdiction over Article 218 TFEU as a route to rule on a request lodged by the EP for the annulment of a CFSP Decision on the signing and conclusion of an Agreement adopted in the context of the EU NAVFOR Atalanta mission.<sup>38</sup> The judgment is notable, as the only substantive legal base for the Agreement is Article 37 TEU, which falls within the TEU's chapter on specific provisions relating to the CFSP. In its reasoning, the ECJ first established that the limitations laid down by Article 24 TEU and Article 275 TFEU must be interpreted narrowly. It then determined – as was already noted in paragraph 2.2 – that Article 218 TFEU is of general application to the adoption procedure of international agreements, and thus also governs the adoption of CFSP agreements. This led the Court to the conclusion that Article 24 TEU and Article 275 TFEU cannot preclude its jurisdiction over CFSP measures where the non-CFSP procedure provided by Article 218 TFEU applies.<sup>39</sup> As Article 218 TFEU is always relevant in the context of a CFSP agreement – even if substantively the measure falls purely within the scope of the CFSP – this ruling potentially opens the door to greater future ECJ involvement in the policy area.<sup>40</sup> Through the slowly increasing amount of confirmed possibilities to bring a CFSP measure or agreement before the Court, the EP's possibilities to exert influence over CFSP measures also increase. The fact that the EP has initi-

<sup>37</sup> *Commission v. Council*, *supra* note 30, paras. 29-34.

<sup>38</sup> *Parliament v. Council*, *supra* note 12, paras. 69-73.

<sup>39</sup> *Ibid.*, paras.72-73.

<sup>40</sup> Future clarification on the boundaries of the ECJ's jurisdiction over the CFSP may come from Case C-455/14 P, currently pending before the ECJ. The case concerns a former magistrate of the European Union Police Mission (EUPM) to Bosnia-Herzegovina. The magistrate was seconded to the EUPM by the Italian government and was subsequently redeployed by EUPM leadership – a decision the magistrate sought to annul. The appeal before the ECJ revolves, first, around the status of administrative decisions taken in the context of the CFSP, and whether such decisions fall under a different classification than CFSP acts for which Art. 24(1) TEU precludes ECJ jurisdiction. Second, the appellant argued that the contested decision constituted a restrictive sanction under Art. 275 TFEU. Advocate General Wahl considered both arguments unfounded, a line which in my view the ECJ is likely to continue. Nevertheless, the case provides another opportunity for the ECJ to clarify its position in CFSP affairs.

ated several cases which have tested limits of the ECJ's jurisdiction over a CFSP measure illustrates that the EP is certainly willing to use the arena provided by the ECJ to gain greater leverage over the CFSP.<sup>41</sup>

## 2.4 The EP's influence on and through the EEAS Decision

One of the most striking innovations of the Treaty of Lisbon is that Article 27(3) of the TEU provides the legal base for the establishment of a new the European External Action Service (EEAS), which is comprised of individuals from the relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from the Member States, and which provides support to the HR and the diplomatic relations of the EU worldwide.<sup>42</sup> Although placed among the provisions concerning the CFSP, the legal base itself already hinted that the EEAS would also receive tasks outside the context of defence and security. Article 27(3) provides that 'the High Representative shall be assisted by a European External Action Service'. This explicit reference to the intrinsic relationship of the EEAS and the HR is relevant due to the task of the HR under Article 21(3) TEU to ensure, *inter alia*, the consistency between the different areas of external action, which can be expected to flow down to influence the activities of the EEAS. The EEAS was therefore designed to support the HR/VP both on CFSP action and on initiatives in other external action areas, as well as to aid in guarding the coherence between the EU's various external policies.<sup>43</sup>

The EEAS Decision governs the tasks and organisation of the service,<sup>44</sup> and provide for several noteworthy powers for the Parliament. First, Paragraph 6 of its Preamble reads that the EP 'will fully play its role in the external action of the Union, including its functions of political control as provided for in Article 14(1) TEU, as well as in legislative and budgetary matters as laid down in the Treaties'. Moreover, it mentions that the HR will regularly consult the EP on CFSP matters, that the latter's views will duly be taken into consideration, and that right of access to documents for MEP's should be regulated. Preamble 6 is thus a surprisingly powerful statement in favor of procedural rights of Parliament in the external sphere, especially considering that the legal basis for the Council Decision on the EEAS falls within the scope of the CFSP. Article 3(4) furthermore notes that 'the EEAS shall extend appropriate support and cooperation [...] in particular to the European Parliament'. Thus, while no direct accountability link is established in Article 3(4) between the EP and the EEAS, it nonetheless provides a notable avenue for the EP to increase its involvement in – and information position on – CFSP/CSDP matters.

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<sup>41</sup> In addition to *Parliament v. Council*, *supra* note 12, see for instance also ECJ, Case C-130/10 *Parliament v. Council of the European Union*, [2012] ECR, para. 10 available at <<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-130/10&td=ALL>>.

<sup>42</sup> Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service, OJ [2010] L 201, 3.8.2010 p. 30, Art. 27(3).

<sup>43</sup> *Ibid.*, Art. 3(1).

<sup>44</sup> *Ibid.*

Several other provisions of the Council Decision are worth noting when considering EP involvement in CFSP/CSDP affairs. The first is Article 5 of the Decision, concerning the Union's delegations to third countries or international organisations. Paragraph 7 of the same Article provides that the delegations shall have the capacity to respond to the needs of other institutions, in particular the EP. This provides the EP with an explicit legal basis to request information it deems necessary to scrutinise EU affairs in third countries. Interesting in particular is that the provision bypasses the HR and central EEAS staff by requiring a direct response to Parliament from the delegations themselves. Moreover, it is noteworthy that the EP is entitled to an annual report by the High Representative on the occupation of posts in the EEAS pursuant to Article 6(9) of the Council Decision. While a relatively marginal right in terms of the tools available to scrutinise the EEAS, it does offer some additional insight into the day to day functioning of the service.

In addition to the provisions detailing the procedural involvement of the EP in EEAS affairs, it is worth devoting some attention to the financial accountability of the EEAS. With regard to the section of EEAS costs charged to the general budget, Article 8 states that operational expenditure will remain within the Commission section of the budget, that the EEAS shall consult with the European Commission, that there is an obligation for the EEAS to transmit to the budgetary authority (i.e., the Council and the EP) a working document relating to expenditure of all EU external action and that the EEAS is subject to an examination by the EP under the discharge procedure of Article 319 TFEU. Also notable with regard to the discharge procedure is the fact that the EEAS is subject to Article 167 of the Financial Regulation of 2012,<sup>45</sup> which contains the obligation to act on the observations submitted by the EP pursuant to Article 319 TFEU. Thus, the EEAS is required to take into account the observations of the EP, while the Commission is required to report on the steps taken to address the EP's observations upon the latter's request.<sup>46</sup> This provision is a clear expression of the EP's prerogatives as part of the budgetary authority of the EU, and provides an indirect tool for the EP to influence activities in the CFSP/CSDP. The role of the EP as budgetary authority and its relevance for external affairs will be examined more thoroughly in section 4 of this paper.

The importance of the above-mentioned procedural rights for Parliament *vis-à-vis* the HR and the EEAS should not be seen independent of their context. While they may seem relatively insignificant, it should be recalled that the CFSP remains a bastion of intergovernmentalism, and that any formal procedural rights for Parliament in this area are substantial enhancements of its position. Thus, while the rights granted to Parliament may not amount to decision-mak-

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<sup>45</sup> Regulation No 966/2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, *OJ* [2012] L 298, 26.10.2012 (hereinafter the Financial Regulation), p. 1. Regulation 966/2012 was amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union. *OJ* [2015] L 286, 30.10.2015, p. 1–29.

<sup>46</sup> Regulation 16-5/2002 Article 147, replaced in 2012 by Article 166 of the new Financial Regulation; Regulation 966/2012.

ing or vetoing powers, the steps taken under the Council Decision on the EEAS are an important development. Furthermore, the negotiation process leading to the final text of the Council Decision confirms that the EP is committed to exercising its (budgetary) rights in the sphere of the CFSP/CSDP, and that it is willing to develop into a full-fledged policy actor in this field, even if the Treaty of Lisbon did not accord it such a role.

## 2.5 From consultation to information in the adoption of restrictive sanctions

While the general tendency of the revisions introduced by the Lisbon Treaty favors the EP's position, there is one aspect of external action in which the Treaty revision was detrimental to the EP's powers. Under the Nice Treaty, the EU's restrictive sanctions against individuals were adopted under an improvised set of legal bases: Articles 60, 301 and 308 TEC. Up until that point the Treaty drafters had not explicitly laid down a legal base for restrictive sanctions against individuals, only including an option for sanctions against states. However, the 9/11 attacks and the subsequent wave of counter-terrorism measures raised a perceived need for a European-wide sanction instrument that was capable of targeting individuals, legal persons or particular sections of the economy; the so-called smart sanctions. These sanctions have the benefit of affecting key elements of the targeted organisation, instead of an entire nation's economy.<sup>47</sup> As the three legal bases that were chosen for these new sanctions also include Article 308 – the Nice version of the flexibility clause<sup>48</sup> – the EP had the right to be consulted. With the subsequent entry into force of the Treaty of Lisbon the lack of a specific legal base was addressed. The Treaty of Lisbon seems to lay down two potential legal bases for the adoption of sanctions against individuals.<sup>49</sup> The first is Article 75 TFEU, which includes full involvement of the Parliament through the ordinary legislative procedure and allows for the adoption of 'a framework of administrative measures with regard to capital movements and payments'. The second is Article 215(2) TFEU, which – as mentioned earlier – includes the power to adopt necessary measures on the basis of a CFSP decision to impose restrictive sanctions, but only requires the EP to be informed.<sup>50</sup> Post-Lisbon sanction measures were adopted by the Council on the basis of Article 215(2), leading the EP to be excluded from the procedure safe for its right to information.<sup>51</sup>

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<sup>47</sup> C. Portela, 'The EU's use of 'Targeted' Sanctions: Evaluating Effectiveness', Centre for European Policy Studies (CEPS) Working Document No. 391 (March 2014), at 4-5, available at: <<https://www.ceps.eu/system/files/WD391%20Portela%20EU%20Targeted%20Sanctions.pdf>>.

<sup>48</sup> Currently laid down in Art. 352 TFEU.

<sup>49</sup> C.C. Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Oxford and Portland, Oregon: Hart Publishing 2012), 128-130.

<sup>50</sup> ECJ, Case C-130/10 *Parliament v. Council of the European Union*, [2012] ECR p.10 available at <<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-130/10&td=ALL>>.

<sup>51</sup> See for instance Regulation 753/2011 concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan, *OJ* [2011] L 199/1, 2.8.2011.

Reluctant to accept its newfound exclusion, the EP attempted to force the other institutions to use Article 75 instead of Article 215(2) through an infringement procedure before the ECJ. However, after considering both the old Nice legal base and the new Treaty of Lisbon provisions, the ECJ ruled that Article 215(2) TFEU should be considered as the main replacement for Articles 60 and 301 EC and that the restrictive sanctions were rightly based on Article 215(2) TFEU.<sup>52</sup> Thus, the EP's rights in the adoption of smart sanctions have gone down from consultation to information rights. One reason for which this development can be seen as remarkable is that the ECJ itself briefly noted in the earlier *Kadi I* case,<sup>53</sup> also on the implementation of UN sanctions in the EU legal order, that the inclusion of the Nice flexibility clause served to improve the democratic legitimation of smart sanctions through its consultation procedure.<sup>54</sup> This was deemed particularly relevant given the impact of such sanctions on the rights of individuals.<sup>55</sup> By contrast, the Lisbon Treaty clause allows the Council to adopt regulations on smart sanctions without parliamentary scrutiny by the EP, even though the sanctions have potentially far-reaching effects for targeted EU citizens as well as targeted foreign individuals. This raises the question to what extent the Council alone – given it being a body that is only indirectly accountable to the electorate – is capable of appropriately legitimising restrictive sanctions. The ECJ however stated that democratic involvement alone was not a sufficient argument to overturn the choices made by the drafters of the Treaties.<sup>56</sup> While the reasoning of the ECJ seems sound in light of the current Treaties, the lacking democratic scrutiny of sanctions that infringe the rights of EU citizens is a point to be addressed in subsequent Treaty revisions.

In sum, the legal analysis of the Treaties seems to indicate that the extension of the ordinary legislative procedure made by the Lisbon Treaty and the more inclusive wording of Article 218 TFEU have considerably increased the rights of the EP. However, the CFSP/CSDP and restrictive sanctions remain policies in which the EP's rights are limited, potentially to the detriment of democratic legitimation. While the EP has secured several important rights with regard to the scrutiny of the EEAS, these do not seem powerful enough to offset the general exclusion of the EP in CFSP affairs. The next two sections will explore how the EP may go beyond the formal procedures contained in the

<sup>52</sup> *Parliament v. Council*, *supra* note 41, paras. 51-54, 84-85.

<sup>53</sup> ECJ, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* (hereafter *Kadi I*), [2008] ECR I-06351.

<sup>54</sup> *Ibid.*, in particular p.235. The *Kadi I* case related primarily to the relationship between EU law and public international law in the form of UN Security Council sanction decisions. However, in addition to the relationship between EU law and public international law, the ECJ also examined the position of the Court of First Instance on utilising Art. 308 TEC as a third legal base, leading to the comment on the benefits of Art. 308 TEC for the involvement of the EP in paragraph 235 of the *Kadi I* judgment. Paragraph 235 of the *Kadi* case was also referred to in the post-Lisbon Case C-130/10 *European Parliament v. Council of the European Union*, [2012] ECR p.79 available at <<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-130/10&td=ALL>>.

<sup>55</sup> *Kadi I*, *supra* note 53, para. 235.

<sup>56</sup> *Parliament v. Council of the European Union*, *supra* note 41, paras. 80-84.

Treaties and exert influence through inter-institutional arrangements and the budgetary process.

### 3. INDIRECT AND INFORMAL INVOLVEMENT THROUGH INTER-INSTITUTIONAL AGREEMENTS, THE DECLARATION ON POLITICAL ACCOUNTABILITY AND THE BUDGETARY PROCESS

#### 3.1 Introduction

Several agreements exist between the different EU institutions which add additional procedural arrangements, thereby fleshing out the requirements of the Treaties and shaping the involvement of the EP in external affairs. Inter-institutional agreements concluded before the Treaty of Lisbon were gentleman's agreements, seen as expressions of the horizontal principle of loyal cooperation, a principle currently enshrined in Article 4(3) TEU.<sup>57</sup> The Lisbon Treaty marks the introduction of Article 295 TFEU, however, which now forms an explicit legal base for the adoption inter-institutional agreements. Notable in particular is the second sentence of that provision, which states that inter-institutional agreements 'may be of a binding nature'.<sup>58</sup> Thus, although not a part of the classic set of instruments available to the Union as enshrined in Article 288 TFEU,<sup>59</sup> these agreements cannot always be considered soft law documents either. Even in cases where an inter-institutional agreement is not specified as binding in nature, the wording of Article 295 TFEU seems to encourage institutions to regard inter-institutional agreements as politically important commitments to one another. These agreements may therefore have substantial effects on the involvement of the EP in external relations, especially in those areas in which the EP is heavily reliant on the information input from other institutions and those areas in which the Parliament's involvement on the basis of the Treaties is relatively low.<sup>60</sup> This section will discuss those agreements which have a significant effect on EP involvement in the external policy areas of the Union: the Framework Agreement between the EP and the Commission and two inter-institutional agreements between the EP and the Council on sensitive information.

In addition, HR Catherine Ashton's Declaration on political accountability will be discussed. Although this last document is not an inter-institutional agreement in the sense of Article 295 TFEU, it similarly contains a set of commitments and procedural rules on interaction between the HR/VP and the EP. Moreover, it contains several important points with regard to the EP's position in CFSP/

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<sup>57</sup> A. Maurer, D. Kietz and C. Völkel, 'Inter-institutional Agreements in CFSP: Parliamentarisation through the back door?', 5 *EIF Working Paper Series* (2004), available at <[http://www.swp-berlin.org/fileadmin/contents/products/fachpublikationen/eif\\_mrr\\_ktz\\_Nov04\\_ks.pdf](http://www.swp-berlin.org/fileadmin/contents/products/fachpublikationen/eif_mrr_ktz_Nov04_ks.pdf)>.

<sup>58</sup> M. Cini, 'EU Decision-Making on Inter-Institutional Agreements: Defining (Common) Rules of Conduct for European Lobbyists and Public Servants', 36 *West European Politics* 2013, pp. 1143–1158.

<sup>59</sup> Regulations, directives, decisions, recommendations and opinions.

<sup>60</sup> See also D. Kietz and A. Maurer, *supra* note 4.

CSDP affairs that merit further discussion. The choice to publish these commitments in the form of a Declaration instead of an inter-institutional agreement makes it a formally non-binding, however, which could potentially impede the consistent application of the commitments made by HR/VP.

### 3.2 Framework Agreement between the European Parliament and the Commission

Important to the involvement of the EP in the foreign policy competences and external relations of the Union is first of all the Framework Agreement between the EP and the Commission (hereinafter Framework Agreement between the EP and the Commission), concluded originally in 2000<sup>61</sup> and revised in 2005<sup>62</sup> and 2010.<sup>63</sup> To reflect a 'new special partnership' between the EP and the Commission, the 2010 version agreement contains provisions on meetings with the Commission, the exchange of (confidential) information between both institutions, provisions on an annual Commission legislative work programme, and even provisions on the negotiation and conclusion of international agreements.<sup>64</sup> Chapter III title i, on the constructive dialogue between the EP and the Commission specifies that the Commission, within its competences, 'shall take measures' to better involve the EP in the CFSP field in a way that its views are taken into account.<sup>65</sup> While a relatively cautious and open formulation, this provision is nonetheless significant in that it shows the commitment of the Commission – an institution itself not formally competent in CFSP decision-making – not only to inform but also to include the Parliament in CFSP decision-making process. While the lack of Commission competences in CFSP matters does limit the impact of the provision, the Commission's task in ensuring the coherence between different areas of external relations could provide it with information that would aid the scrutiny of CFSP affairs by the EP. Furthermore, the integration of the positions of HR and Vice President of the Commission into one double-hatted post can be expected to improve the information position of the European Commission on CFSP matters, information which in turn may be relayed to the EP through application of the Framework Agreement.

Title ii of Chapter 3 concerns the arrangements between the EP and the Commission on international agreements and enlargement. While some of the provisions mainly reiterate and specify the information requirements laid down in Article 218(10) TFEU, they nevertheless form important safeguards for the

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<sup>61</sup> Framework Agreement on relations between the European Parliament and the Commission, 5 July 2000, (C5-0349/2000).

<sup>62</sup> European Parliament decision of 20 October 2010 on the revision of the Framework Agreement on relations between the European Parliament and the European Commission (2010/2118(ACI)).

<sup>63</sup> Framework Agreement on relations between the European Parliament and the Commission, OJ [2010] L304/47, 20.11.2010, p. 47; European Parliament decision of 20 October 2010 on the revision of the Framework Agreement on relations between the European Parliament and the European Commission (2010/2118(ACI)).

<sup>64</sup> Framework Agreement between the EP and the Commission, Art. 1.

<sup>65</sup> Art. 10 Framework Agreement between the EP and the Commission.

EP's information position. Points 23 and 24 together with Annex III to the Agreement provide several detailed provisions on the transmission to the EP of (classified) information concerning the negotiation and conclusion of international agreements.<sup>66</sup> Particularly important are Articles 1 and 2 of this Annex, which provide that the Commission will inform the EP on its intention to start negotiations on international agreements at the same time it informs the Council and on its draft negotiating directive to the Council. These Articles can be understood as an admission from the Commission that the phrasing 'all stages of the procedure' in Article 218(10) TFEU must be interpreted broadly, also applying to the intent to start negotiations instead of being a requirement only applicable after an official start of the negotiation process.<sup>67</sup> Perhaps equally important is Article 3 of Annex 3 to the agreement, which specifies that the Commission will take due account of the Parliament's comments throughout the negotiations. The Annex thus institutionalises, on top of the consultation/consent envisaged by Article 218(6) TFEU for Decisions implementing agreements, a consultation-like procedure even during and before the negotiation process. The importance of such additional safeguards is illustrated by C. Eckes, who noted that, despite the entry into force of the Treaty of Lisbon and thus Article 218(10) TFEU, the EP was not informed timely and correctly in the context of the SWIFT/TFTP and ACTA agreements.<sup>68</sup> Regulating how the information flow from the Commission to the EP should be construed may aid in avoiding similar situations in the future.

While points 23 and 24 are thus specifications of obligations referred to in the Treaty, other provisions of Title ii go far beyond what is required by Article 218 TFEU. With a reference to the 'immediately and fully informed' wording of Article 218(10) TFEU, Point 25 of the revised Framework Agreement states that the Parliament may request to have MEPs included as observers in Union delegations to international conventions where the Commission represents the Union, so that it may be immediately and fully informed about the conference proceedings. The Commission undertakes, where applicable, to systematically inform the Parliament delegation about the outcome of negotiations. Although a refusal to include MEPs as observers is possible, the Commission will notify the Parliament of the reasons for such a refusal. Point 26 of the Framework Agreement also specifies that the Commission will facilitate the involvement of the EP in bodies set up by treaties to which the EU is a contracting party, 'whenever such bodies are called upon to take decisions which require the consent of Parliament or the implementation of which may require the adoption of legal acts in accordance with the ordinary legislative procedure'. The formulation 'legal acts' and the limitation of the provision to decisions which require consent or application of the ordinary legislative procedure does ensure that Article 26 only applies in non-CFSP matters – as both are elements that are excluded from CFSP decision-making.

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<sup>66</sup> See C. Eckes, *supra* note 6.

<sup>67</sup> This was also confirmed in the later case *Parliament v. Council*, *supra* note 12.

<sup>68</sup> *Ibid.*

The rules included in Chapter 3 and Annex 3 to the Framework Agreement thus constitute important elaborations of the information requirements laid down in Article 218(10) TFEU, in particular with regard to the time the EP has to respond, the forwarding of confidential information, and a timely supply of information. As the EP requires a sufficient and timely flow of information to be able to avert any opportunistic behavior on part of the Commission and to effectively be able to take decisions on treaties or implementing legislation, fleshing out the general information requirements of Article 218 (10) TFEU will go a long way towards preventing situations where the EP is left devoid of the appropriate information to scrutinise external action. Despite the commitment on part of the Commission to inform the EP on CFSP affairs, both the fact that the Framework Agreement is only binding on the EP and the Commission and the fact that such an agreement cannot alter the institutional balance as laid down in the Treaties mean the effects of this particular commitment will most likely remain limited.

### 3.3 Inter-institutional agreements between the European Parliament and the Council concerning access to sensitive information

Two complementary inter-institutional agreements currently govern the EP's access to information held by the Council in external action – one relevant for the CFSP<sup>69</sup> and one relevant for non-CFSP action.<sup>70</sup> The CFSP agreement provides that the President of the EP or the Chairman of the Committee on Foreign Affairs (AFET), Human Rights (DROI), Common Security and Defence Policy (SEDE) may request the Presidency of the Council or the Secretary-General/High Representative to provide information on developments in European security and defence policy, including those of sensitive nature. A procedure with several safeguards applies in the event of such a request: A special committee chaired by the Chairman of the AFET Committee and its subcommittees DROI and SEDE and with four members selected from the Conference of Presidents<sup>71</sup> shall be informed on the content of sensitive information by the Council. The President of the EP may then decide on the extent to which other members of AFET have access to sensitive information and whether information with sensitive points expunged may be transmitted. In particular, with regard to information designated as secret, the President of the EP may not act alone, however, and access of information by AFET MEPs must first be discussed with and approved by the Council,<sup>72</sup> while in case of TOP SECRET information, none of the options listed in Article 3.3 applies. At first,

<sup>69</sup> Hereinafter Inter-institutional agreement on sensitive information in the CFSP, *OJ* [2012] C 298/1, 30.11.2002 p. 1.

<sup>70</sup> Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, *OJ* [2014] C 95/1, 1.4.2014. This agreement also covers internal affairs.

<sup>71</sup> A body of the EP containing the presidents of EP political groups.

<sup>72</sup> Art. 3.3 Inter-institutional agreement on sensitive information in the CFSP.

the committee was only authorised to access sensitive CFSP information on the premises of the Council, but more recently the EP has made secure reading rooms available on its own premises, reducing the practical difficulties for the committee when accessing sensitive information.<sup>73</sup>

The 2014 inter-institutional agreement covering EP access to Council information in non-CFSP matters provides for a similar, albeit somewhat less restrictive, procedure for matters outside the CFSP. Under this agreement five bodies within the EP are competent to request and receive sensitive information: the President, the Conference of Presidents, the Bureau, the chairs of relevant committees and relevant parliamentary rapporteurs.<sup>74</sup> Other MEPs may request information through these bodies, although access for MEPs is subject to a security clearance and, for confidential information, a solemn declaration of non-disclosure.<sup>75</sup> Moreover, the Council, together with the requesting EP body, will determine on a need-to-know basis which MEPs may have access to the transmitted information.<sup>76</sup> While the 2014 agreement is certainly stringent in its security measures, it is notable that TOP SECRET information is handled less restrictively than under the agreement's CFSP counterpart. Where the 2002 CFSP agreement specifies that top-secret information may not be made available beyond the President of the EP, Article 4(b) of the 2014 non-CFSP agreement does allow appropriately cleared MEPs access.

Both agreements are noteworthy contributions to the information position of the Parliament *vis-à-vis* the Council in the area of the CFSP, and constitute welcome reflections of the duty of horizontal sincere cooperation between the EP and the Council in CFSP affairs.<sup>77</sup> Nevertheless, it is notable that current procedures for access to CFSP-related documents remains relatively stringent compared to EP access to non-CFSP documents, once again reaffirming the current tendency to exclude EP involvement in CFSP/CSDP affairs. In this regard, it is interesting to note that the current CFSP agreement is under reconsideration, which may lead to a rebalancing on this issue in the near future.

### 3.4 Declaration by the High Representative on political accountability

Another recent development for the involvement of the EP in the CFSP is the 2010 Declaration by the HR on political accountability,<sup>78</sup> which signals a move

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<sup>73</sup> D. Curtin, 'Official secrets and the negotiation of international agreements: is the EU executive unbound?' 50 *Common Market Law Review* 2013, pp.423-458; Art. 6(1)(c) of the Rules of Procedure of the European Parliament, 8<sup>th</sup> Parliamentary term – September 2015.

<sup>74</sup> Art. 5(4)(a) Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy.

<sup>75</sup> *Ibid.*, Arts. 4(2) and 5(3).

<sup>76</sup> *Ibid.*, Art. 4(4)(a).

<sup>77</sup> Inter-institutional agreement on sensitive information in the CFSP, Art. 2.1.

<sup>78</sup> OJ [2010] C 210, 03.08.2010, p. 1 where the Declaration has been published as a "draft".

away from the previously distant relationship between the HR and the EP.<sup>79</sup> Although not a legally binding document, the HR commits to improve or establish several mechanisms to enhance the democratic accountability of CFSP action. It is not by accident that this Declaration was published in 2010. Its publication coincided with the creation of the EEAS, and as such the Declaration partially frames the relationship between the new EU diplomatic service and the EP. While a short document, the Declaration nonetheless lists several important commitments on part of the HR. The Declaration on political accountability is in large part a response to the EP's discontent with the original HR proposal for the Council Decision on the EEAS.<sup>80</sup> Thus, many of the commitments made in the Declaration were in response to the demands of the EP included in the counter-proposal submitted by MEPs E. Brok and G. Verhofstadt. Although the concessions are not included in a legally binding document, they nevertheless constitute strong political commitments to the EP.<sup>81</sup>

To be able to fully appreciate the weight of the Declaration, it is helpful to first recall the role of the HR for Foreign Affairs of the Union as envisaged by the Treaties. According to Articles 18(2) to (4) of the TEU, his/her primary task is to conduct the Union's CFSP, submit proposals for this policy area on mandates of the Council, to preside over the Foreign Affairs Council and to 'ensure' the consistency of EU external action.<sup>82</sup> The Treaty drafters have coupled the provision establishing that the HR will also be Vice President of the Commission with his/her task of ensuring consistency,<sup>83</sup> thereby emphasising that the HR/VP is expressly encouraged to transcend the borders between the various external policies of the EU. Considering this set of tasks, it is arguable that the HR/VP, and through him/her the EEAS (which is designed to assist the HR pursuant to Article 27(3) TEU), fulfills the role of the executive for large portions of EU foreign affairs, in particular for the CFSP/CSDP. The Treaties then establish that the Council can be viewed as the main part of CFSP 'legislative power'.<sup>84</sup> Article 36 TEU establishes that the EP should be considered the second part of the democratic accountability link to the HR, but as mentioned before this provision merely provides for scrutiny on 'main aspects and basic

<sup>79</sup> In 2006 it was argued that the relationship between the HR and the EP was characterised as one where the EP was kept happy and informed, but also excluded from any real involvement. See B. Crum, *supra* note 5, 393-397.

<sup>80</sup> While an elaborate review of the establishment of the EEAS was left beyond the scope of this article, other contributions have carefully examined the dynamics between the EP, the Commission, the Council and the HR in drafting the Council Decision on the EEAS. See for instance: Z. Murdoch, 'Negotiating the European External Action Service (EEAS): Analyzing the external effects of internal (dis)agreement', 50 *Journal of Common Market Studies* 2012, pp.1011-1027 and K. Raube, *supra* note 5.

<sup>81</sup> K. Raube, *supra* note 5, p. 74.

<sup>82</sup> A task reaffirmed in Art. 21(3) TEU.

<sup>83</sup> Art. 18(4) TEU.

<sup>84</sup> Since the Council appoints the HR/VP (Art. 18(1) TEU), mandates HR policy implementation and development (Art. 18(2) TEU), is part of the CFSP budgetary authority (Art. 16(1) TEU, see also Art. 41(3) TEU) and adopts CFSP Decisions (Art. 28(1) TEU), this last task possibly on proposal from the HR (Art. 27(1) TEU). Although it must be noted that this term should technically be considered incorrect due to the explicit notion in the Treaties that CFSP acts may not be legislative in nature. See Art. 31(1) TEU.

choices of CFSP', thus confining its role to limited *ex post* scrutiny. Therefore, considering the restrictive role accorded to the EP in the Treaties, the significance of the Declaration on political accountability is that it constitutes affirmation on part of the HR that the EP should also be considered as a substantial part of the accountability channel for the HR, instead of being the ancillary actor a literal reading of the Title V (on external action and CFSP) of the TEU might suggest.

The first significant commitment of the Declaration is included in point 1, which *inter alia* states that the Joint Consultation Meetings between the Bureaux of the Committee on Foreign Affairs (AFET) and the Committee on Budgets (COBU) of the EP will be enhanced. The EEAS presence (at all the meetings) will include in addition to the permanent Chair of the Political and Security Committee, senior officials responsible for the policy. These briefings are in particular meant to inform the aforementioned parliamentary committees on CFSP missions financed out of the general budget of the European Union. The HR allows for extra meetings to be held, if necessary, on top of the regular ones. This practice would allow the AFET and COBU committees some flexibility should an unforeseen matter come up. In addition to point 1, several other points of the Declaration address the 'interpillar' budgetary processes. Point 3 for example addresses the communication of strategic planning phases of financial instruments which are used by the CFSP, but which are based on the general budget (with the exception of the European fund for Development). Point 9 provides for consultation in the area of Election Observation Missions based on the European Instrument for Democracy and Human Rights (EIDHR), which is also financed from the EU general budget. Point 10 includes commitments on part of the HR to update the 2006 budgetary discipline and sound financial management and to increase the transparency of the CFSP budget. These points provide welcome clarifications on what the EP may expect from the HR when controlling or discharging the EU budget, and ensure that the former is accorded the information it needs to effectively analyze whether expenditure was rightful, efficient and effective in relation to the aims pursued by a measure. Both points thus heavily relate to the budgetary prerogatives of the Parliament, which will be discussed in greater detail in section 4 of this paper.

Furthermore, the Declaration states that the HR will facilitate the appearance of Heads of Delegations, EU Special Representatives to third countries, Heads of CSDP missions and senior EEAS officials in relevant parliamentary committees and sub-committees in order to provide 'regular' briefings.<sup>85</sup> While a welcome addition from the viewpoint of democratic involvement, this point of the Declaration does not say much about the frequency, circumstances and officials which will appear before the Parliament. Furthermore, it does not mention the possibility of a request by Parliament for the appearance of a specific official. While this may of course be informally arranged between the HR, the EP and the official in question, it remains to be seen how this point of the Declaration will function in practice.

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<sup>85</sup> Point 7 of the Declaration by the High Representative on political accountability.

Overall, the inter-institutional agreements and the Declaration on political accountability substantially strengthen the information position of the EP. The Framework Agreement between the Commission and the EP provides additional safeguards to the adequate inclusion of the EP as observer in negotiation processes for international agreements, while the inter-institutional agreements between the Council and the EP on access to sensitive information ensure that methods are in place that allow the EP to view (most) classified materials under certain restrictions. Perhaps even more significant is the Declaration on Political Accountability of the HR/VP, which provides several political commitments to allow the EP to apply its budgetary prerogatives appropriately. It is noteworthy, however, that the Framework Agreement between the Commission and the EP seems more developed than the inter-institutional agreements with the Council and the Declaration of political accountability. Also remarkable is that under the current inter-institutional agreements, procedures for access to sensitive CFSP information differ somewhat from those granting access to sensitive non-CFSP information. A welcome future addition would therefore be an inter-institutional agreement between the EP, the Council and the Commission on how the Parliament is to be involved and consulted in CFSP/CSDP matters, which is binding on all the institutions involved under Article 295 TFEU. While the HR/VP is not an actor explicitly capable of engaging in an inter-institutional agreement pursuant to Article 295 TFEU, his/her role could be (partially) defined through her status as a Vice President of the Commission. This would provide a more stable and reliable basis for the EP to apply its budgetary authority. Point 40 of the new Inter-institutional Agreement on Better Lawmaking already commits the EP, the Council and the Commission to 'negotiate improved practical arrangements for cooperation and information-sharing within the framework of the Treaties' with regard to the negotiation and conclusion of international agreements. Furthermore, the calls to update the inter-institutional agreement between the EP and the Council on access to sensitive information in CFSP matters provide a chance to integrate various arrangements on EP involvement in EU external action.<sup>86</sup> Thus, it seems that 2016 provides the EU with a policy window to draft such an agreement, although it remains to be seen to what extent the CFSP and external action beyond the negotiation and conclusion of international agreements will be included in these new arrangements.

#### 4. USING BUDGETARY PROCEDURES TO SCRUTINISE EXTERNAL AFFAIRS

##### 4.1 Introduction

Another source of influence for the EP lies in its power to reject and amend the EU budget. Since all policies are limited by the budget allocated to them, and

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<sup>86</sup> G. Rosén, 'Secrecy versus Accountability: Parliamentary Scrutiny of EU Security and Defence Policy', ARENA Working Paper (February 2014), at 19-20, available at: <<http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2014/wp1-14.html>>

since the Union will be hard-pressed to function appropriately without the consent of Parliament to adopt a budget,<sup>87</sup> the threat of budgetary rejection is both a powerful and controversial tool. In policy areas where the Parliament is largely excluded from decision-making procedures, the budget may provide an alternate method to steer policy-making in the direction favoured by the EP. This section will therefore primarily focus on the influence that the Parliament gains in CFSP matters (a policy field which, as was noted in section 2, largely excludes the Parliament from formal decision-making) through the budget. The budgetary process of the Union is characterised by three main procedures: the adoption of a multi-annual financial framework, the adoption of the annual budget, and the annual budgetary discharge procedure. After a discussion of the input of the Parliament under these procedures, the role of the budget in the CFSP will be considered more specifically. The section will be concluded by a short discussion of the budgetary amendments in external relations for the 2011 financial year, which is one of the more recent of the fully implemented annual budgetary cycles. On the 17<sup>th</sup> of April 2013 the discharge procedure for the annual budget of 2011 was completed, marking the closure of accounts for that year.<sup>88</sup> The 2011 procedure was selected for two reasons. First, the negotiations on the establishment of the EEAS and the CFSP budget headings of that year provide an interesting insight into the way the EP can utilise its budgetary prerogatives to indirectly influence CFSP/CSDP affairs. Second, the 2011 has the practical benefit of being one of the procedures after the introduction of the Treaty of Lisbon that has already been completed, allowing for a discussion of all phases of the annual cycle.

## 4.2 The budgetary procedure

Chapter 2 of Title II of Part Six of the TFEU on the multi-annual financial framework includes, *inter alia*, the legal bases for the budgetary process of the EU. Important first is the consent power for the EP with regard to the multi-annual financial framework (MFF), which is adopted in accordance with the special legislative procedure of Article 312(2) TFEU.<sup>89</sup> MFF commitments serve as the annual ceilings for individual policy area expenditures for an upcoming period of at least five years.<sup>90</sup> Nevertheless, Parliamentary influence on the CFSP or

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<sup>87</sup> If no budget is adopted in time for the next financial year, one twelfth of the total budget allocated to a budget chapter may be spent to keep the Union functioning in accordance with Art. 315 TFEU. Such a situation may severely hamper the execution of new and adjusted policies, however.

<sup>88</sup> In accordance with Art. 164 of the Financial Regulation (Regulation 966/2012), the maximum deadline of a discharge procedure is May the 15<sup>th</sup> of the year n+2. The fact that this period was used almost entirely shows the lengthy nature of a discharge procedure. See for the decision to discharge: European Parliament decision of 17 April 2013 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2011, Section III – Commission and executive agencies (COM(2012)0436 – C7-0224/2012 – 2012/2167(DEC)).

<sup>89</sup> In the form of a regulation and with a unanimity requirement in the Council.

<sup>90</sup> Arts. 312(1) and 312(3) TFEU. In practice all MFF's except for the first (1988-1992) have been adopted for a period of 7 years. The adoption of MFF's by way of a regulation is an innovation of the Lisbon Treaty; the previous MFF's were adopted by inter-institutional agreements,

other specific external policy areas seems limited, since the MFF only distinguishes between broad budgetary headings. The current MFF laid down in Regulation 1311/2013 for example commits between 7,8 (2014) and 8,6 (2020) billion Euros annually<sup>91</sup> to the Global Europe heading (with the other budgetary years (2015-2019) falling in between these two amounts), yet does not indicate any subdivisions under this heading. Nevertheless the MFF procedure provides the Parliament with the power to reject the framework should it feel that the amount committed to the Global Europe heading is a misappropriation.

The MFF is further implemented by the Union's annual budget adopted in accordance with the special legislative procedure laid down in Article 314 TFEU. Each year before the 1<sup>st</sup> of September the Commission will submit to the Parliament and the Council a proposal for a draft budget.<sup>92</sup> The Council then adopts a position on the draft of which it informs the Parliament.<sup>93</sup> The latter is then competent to approve or amend the draft annual budget.<sup>94</sup> Should the Parliament amend the budget, a Conciliation Committee with representatives from the Council and the Parliament and supported by the Commission will convene to settle the differences between the Council position and the EP's amendments.<sup>95</sup> Both the Council and the EP are subsequently competent to approve the amended text drafted by the Conciliation Committee. Interestingly enough, the EP enjoys a more powerful position in this phase than the Council does. In the event that the EP rejects the new joint text, a new draft budget will be submitted by the Commission, regardless of whether the Council approved or rejected the Committee text.<sup>96</sup> Should the Council reject the text while the EP approves it, however, the EP may, on the basis of Article 314(7)(d), confirm all or some of its amendments by a majority of its component members and three-fifths of the votes cast. If the EP confirms its amendments in accordance with 314(7)(d), that text will be adopted as the final budget. The competence to approve and amend the annual budget, coupled with its final say over the inclusion of its amendments, provides the EP with a powerful tool to influence policy-making. Furthermore, the threat of a budgetary veto potentially provides leverage in areas where EP involvement is limited, and indeed MEP's have threatened to veto the 2011 budget if the HR/VP did not draft a decision on the setting up of the EEAS which was more in line with the desires of the EP.<sup>97</sup>

Finally, the EU Treaties also includes a possibility for *ex post* budgetary control: the annual budgetary discharge procedure. In accordance with Article 318 TFEU, each year the Commission submits the financial accounts and a

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which only committed the different participating institutions. Regulations, by contrast, apply directly in the EU and Member States. See also M. Sapala, 'The European Union Multiannual Financial Framework 2014-2020: How to do more for less?', 5 *Institute for European Studies Policy Brief* 2013, available at <[http://www.ies.be/files/2013-05\\_MS.pdf](http://www.ies.be/files/2013-05_MS.pdf)>.

<sup>91</sup> Based on 2011 price levels, see preamble 7 of Regulation 1311/2013.

<sup>92</sup> Art. 314(2) TFEU.

<sup>93</sup> Art. 314(3) TFEU.

<sup>94</sup> Art. 314(4) TFEU.

<sup>95</sup> Art. 314(5) TFEU.

<sup>96</sup> Art. 314(6) and Art. 314(7)(a) to (d) TFEU.

<sup>97</sup> H. Mahoney, 'MEPs threaten budget veto over diplomatic service', *EU Observer* (Brussels, 9 March 2010), available at <<http://euobserver.com/institutional/29627?>>.

report on the implementation of the EU budget to the EP. Likewise, the European Court of Auditors (ECA) will submit an evaluation report pursuant to Article 319(1) TFEU. During the discharge process the EP may hear the Commission and the EEAS for additional information or evidence, and the latter are obliged to submit the necessary and requested information.<sup>98</sup> After the process, and on the basis of a recommendation from the Council, the EP takes the decision to give discharge to the Commission with regard to the implementation of the EU budget on the basis of Article 319(1) TFEU. It may attach observations (in the form of a resolution) to its discharge decision for which the Commission has the obligation to take all the appropriate steps to act in line with. The Parliament may also request the Commission to report on the actions that the latter will take to combat the shortcomings noted in the discharge procedure.<sup>99</sup> As Article 167 of the Financial Regulation specifies that the EEAS is also subject to the requirements of Article 319 TFEU, these observations may also relate to EEAS matters falling under the EU budget. However, the revised 2015 version of the Financial Regulation has clarified that it is the Commission that is obliged to implement any follow-up measures in accordance with the procedure outlined above, including those pertaining to EEAS affairs.<sup>100</sup> Note, furthermore, that neither the Council nor the HR/VP acting in her CFSP capacity are obliged to take the recommendations of Parliament into account, somewhat weakening the leverage Parliament has over the CFSP with its discharge competences. While the focus of a discharge procedure is on the financial accountability of the Union, this function inevitably overlaps with other forms of accountability.<sup>101</sup> Indeed, when tied to the results of a programme, budgetary expenditures can give insightful information on the effectiveness and efficiency of a given policy measure. In this sense the discharge procedure may provide an additional tool for political scrutiny, both overlapping and complementing other tools available to the Parliament.

In this regard, it is worth recalling that the CFSP/CSDP is an exceptional area with regard to financing and is governed by the CFSP-specific provisions included in Article 41 TEU. This provision requires all administrative expenditures to be charged on the general budget of the EU, while operational expenditure having military or defence implications is partially charged on the Union budget and partially on national budgets. With regard to operational expenditure, the distinction between high salience politics and low salience politics in the CSDP and their relevance to national sovereignty becomes apparent, as operational expenditure relating to military or defence activities is charged on the national budgets. All other expenditure, including for example CSDP civilian

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<sup>98</sup> Art. 319(2) TFEU.

<sup>99</sup> Art. 319(3) TFEU.

<sup>100</sup> Financial Regulation, OJ [2012] L 298/1, 26.10.2012, Arts. 166 and 167, amended by Regulation (EU, Euratom) 2015/1929. The new version of Art. 166 is more specific on the bodies falling under the scope of that provision, but otherwise the content of both Articles remains the same.

<sup>101</sup> B. Laffan, 'Auditing and accountability in the Union', 10 *Journal of European Public Policy* 2003, 762-777.

missions, should be charged on the EU general budget.<sup>102</sup> Furthermore notable with regard to the CFSP portion of the budget are the explicit commitments made by the HR in the earlier analysed Declaration on political accountability to consistently inform the EP on budgetary matters. These include the strengthening of Joint Consultation Meetings between the AFET and COBU committees, the PSC and the EEAS on CFSP missions based on the general budget and commitments to inform and consult the EP when instruments based on the general budget are utilised.

### 4.3 Illustrating the dynamics: the budgetary process in 2011

This subsection will discuss the EU's annual budgetary cycle of 2011 and the EP's stance and actions in the various phases of the cycle. The subsection will first discuss the negotiation stage starting with the draft budgets submitted by the Commission, after which the amendments to the draft budget and the Conciliation Committee stage will be described. Finally, some attention will be devoted to the budgetary discharge process.

With regard to the budgetary negotiation process it is first of all notable that the Commission had to submit two draft budgets, due to the text of the Conciliation Committee being rejected by the EP and the Council.<sup>103</sup> In the first draft budget, it is evident that the EP did not exclude the CFSP from its considerations due to its formally limited mandating and scrutinising roles in that area. Indeed, it was this budget that the EP threatened to veto if its EEAS demands were not met. The EP amended the Council position on the Commission draft budget so that the total CFSP budget would be restored to its 2010 amount, despite the intention of the Council to exercise budget cuts in this area.<sup>104</sup> Moreover, to improve CSDP transparency in light of the establishment of the EEAS in that period, the EP split up the EUMM Georgia, EULEX Kosovo and EUPOL Afghanistan missions into separate budget entries.<sup>105</sup> In other external policy areas the pattern is similar, with the EP deciding on a considerable amount of amendments.<sup>106</sup> It for example decided to put appropriations for environment and sustainable management in reserve,<sup>107</sup> addressed the effectiveness of assistance granted to the peace process in Palestine but also noted its commitment to not reduce appropriations arbitrarily,<sup>108</sup> and noted that the EU-US

<sup>102</sup> Art. 43(2) TEU. The opinion of the Parliament is that all external actions of the Union should as a rule be financed from Community appropriations, and only exceptionally – in the event of an emergency – on the basis of contributions outside the Union budget (European Parliament resolution of 7 May 2009 on the financial aspects of the Lisbon Treaty (2008/2054(INI)), paragraph 56).

<sup>103</sup> K. Raube, *supra* note 5, at 78.

<sup>104</sup> European Parliament resolution of 20 October 2010 on Council's position on draft general budget of the European Union for the financial year 2011 – all sections (12699/2010 – C7-0202/2010 – 2010/2001(BUD)), p.44.

<sup>105</sup> *Ibid.*, p.49.

<sup>106</sup> Global Europe (heading 4) is in fact one of the more extensively discussed headings in the resolution of the EP.

<sup>107</sup> EP resolution on Council's position on draft budget 2011, *supra* note 104, p. 45.

<sup>108</sup> *Ibid.*, p. 47.

partnership should be clearly identifiable in the budget.<sup>109</sup> All in all the EP seemed to approach all external policies, including CFSP/CSDP, in a similar manner. Notable is that the EP goes beyond purely procedural amendments and also considers the appropriations necessary for an effective implementation of policies, which shifts the influence it exerts from a purely financial to partially political nature.

The Council of the EU, however, decided not to approve the amendments of the EP, leading to the Conciliation Committee stage. As noted before, the text proposed by this Committee was also rejected by the EP and the Council on the 15<sup>th</sup> of November 2010. The second draft budget was submitted by the Commission within a mere 11 days of the rejection of the first draft, and contained a call to the institutions to closely cooperate, in order to reach an approved budget by the end of 2010. This was important, in particular, to ensure that the unstable European economies were not affected by a political deadlock that year.<sup>110</sup> Under heading 4 (Global Europe) the Commission did increase total spending in line with the desire of the EP and specifically included the desire of the EP to keep spending with regard to Palestine assistance on level, even reserving another 100 million for this budget line.<sup>111</sup> In other areas the Commission tried to incorporate points agreed upon by the Conciliation Committee of the previous draft budget. Due to the delay caused by the rejection of the first budget, the EP subsequently considered that it was its duty to ensure the continued functioning of the Union in 2011 and chose to accept the new draft without significant further amendments.<sup>112</sup> Nevertheless, the 2011 budgetary process shows the options available to the EP to mandate spending in external relations and that it is prepared to use the tools it possesses. Being prepared to adopt significant amendments and rejecting the Conciliation Committee text amending the first draft budget shows that the EP is a full-fledged policy-actor when it comes to financial mandating, and the threat of using the procedure to leverage concessions in EEAS decision-making show that in some cases it is willing to leverage this power to areas in which the Treaties determine that the EP is formally only to be consulted.

The portion of the 2011 budgetary discharge dedicated to external relations was characterised by a focus on transparency and lawfulness. Point 232 of the 2011 EP discharge decision introduced the external relations section of the resolution by 'stressing that the Union's resources must be managed in line with the principles of transparency and good governance'.<sup>113</sup> The decision

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<sup>109</sup> Ibid., p. 51.

<sup>110</sup> European Commission, 'Draft general budget 2011 – statement of revenue and expenditure by section', (November 2011), p. 7, available at <[http://ec.europa.eu/budget/library/biblio/documents/2011/new\\_DB2011\\_november/NewDB2011\\_introduction\\_en.pdf](http://ec.europa.eu/budget/library/biblio/documents/2011/new_DB2011_november/NewDB2011_introduction_en.pdf)>.

<sup>111</sup> Ibid., p. 10.

<sup>112</sup> European Parliament resolution of 15 December 2010 on the draft general budget of the European Union for the financial year 2011, all sections, as modified by the Council (17635/2010 – C7-0411/2010 – 2010/2290(BUD)), p. 1.

<sup>113</sup> European Parliament decision of 17 April 2013 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2011, Section III – Commission and executive agencies (COM(2012)0436 – C7-0224/2012 – 2012/2167(DEC)), p. 232.

continues by noting the importance of transparency in the management of funds in election observation missions under the CFSP, warning against fraud and irregularities, considering the error rate of the budget, encoding errors and their consequences for the accuracy of the budget, etc.<sup>114</sup> With regard to the effective and efficient usage of the EU budget, the Parliament notes the need for election observation missions to re-use their materials, the effectiveness of programmes implemented by civil society organisations (while warning against over-encumbering these organisations with procedures that are too elaborate), and a desire for the Commission and the EEAS to utilise impact and results-based assessments of spending programmes for the MFF period 2014-2020.<sup>115</sup> However, these effectiveness based analyses remain limited in comparison to the attention the lawfulness of appropriations receives. Thus, the discharge procedure seems to be an area where the EP would be able to improve its position with regard to its involvement in external matters. By focusing more on effectiveness, efficiency and policy coherency of expenditure, the EP could gain an important tool to scrutinise CFSP and other external policies from an *ex post* perspective and improve the financial accountability of the Council and HR/VP in CFSP matters.

## 5. THE EP'S INVOLVEMENT IN THE ADOPTION OF INTERNATIONAL AGREEMENTS AND SCRUTINY THROUGH RESOLUTIONS

### 5.1 Introduction

The legal analyses presented in sections 2-4 shows a relatively favorable development with regard to the EP's involvement in external affairs. In the former first and third pillars the EP's rights have increased considerably. Moreover, while in the CFSP/CSDP formal rights have mostly remained consistent, other documents such as the Declaration by the High Representative on political accountability have also slightly increased the EP's standing in this policy area. Finally, it was observed that the budgetary rights of the EP provide it with an additional tool to scrutinise those policies which are funded from the general budget of the EU. This section will go one step further and discuss on the basis of quantitative data how the EP's formal rights result in factual inclusion in international agreement adoption-processes. Subsequently, the EP's 'unilateral' activities *vis-à-vis* the other institutions in the form of resolutions will be examined as well, as these activities can potentially provide another tool for the EP to scrutinise areas in which it formally has no competences. Before turning to the empirical analyses themselves, however, it is necessary to shortly elaborate on the employed sampling methods in the next subsection.

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<sup>114</sup> Ibid., p. 232 – p. 253.

<sup>115</sup> Ibid. p. 236, 239 and 248.

## 5.2 Sampling of international agreements and resolutions

Two datasets have been accumulated on the basis of the EUR-LEX database and the EP's Legislative Observatory. The dataset based on EUR-LEX data includes international agreements and conventions from the periods 2006 to 2008 and 2010 to 2013, thereby covering both the external legislative process under the Nice Treaty and under the Lisbon Treaty. The documents considered for the sampling procedure were gathered by using several queries on the EUR-LEX database.<sup>116</sup> Protocols and exchanges of letters were left unconsidered, while both agreements and conventions have been included. Moreover, only the final amended version of any given measure was considered. This was done in order to prevent counting amended agreements more than once. Furthermore, EUR-LEX does not only contain agreements concluded by the EU. European Atomic Energy Community (EAEC) agreements are also a part of the same database. Due to the EAEC's existence beyond the scope of the main EU Treaties, these agreements were also excluded. Finally, 'internal' international agreements will be excluded from the scope of the sample. These international agreements are signed between a Member State of the Union and the Union itself, for instance regarding the treatment and application of Union law to overseas territories of the Member States which are not a part of the European Union itself.<sup>117</sup> Therefore, these agreements do not truly constitute interactions between the EU and a third country. Included agreements were subsequently coded on the basis of their adoption dates, legal base(s) and the parliamentary procedure followed. The validity of EUR-LEX information on the remaining agreements was verified by using either the implementing Council Decisions or the Legislative Observatory<sup>118</sup> documentation of the EP. This resulted in several additions and corrections to the legal bases used and provided additional certainty on the procedures followed by Parliament.

The EP's legislative observatory has been used to compile the second dataset of the resolutions adopted by the EP. This dataset serves two purposes for the study of EP involvement in external affairs. First, analysis of the amount of attention devoted to external affairs by the EP relative to the total set of resolutions provides an indication of the extent to which the EP's activities concern external affairs. Second, within the subset of resolutions adopted on external affairs-related policy fields it is possible to compare the attention devoted by the EP to specific topics. This is, *inter alia*, relevant with regard to the

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<sup>116</sup> Which, at the time this paper was written, can be found here: <<http://eur-lex.europa.eu/advanced-search-form.html?qid=1397159627284&action=update>>. The advanced search form was limited to the domain international agreements, after which four additional types of acts could be selected. Protocols and exchanges of letters were left unconsidered, while agreements and conventions have both been included.

<sup>117</sup> See for example recently: Council Decision 2013/671/EU on the signing, on behalf of the European Union, of the Agreement between the European Union and the French Republic concerning the application to the collectivity of Saint-Barthélemy of Union legislation on the taxation of savings and administrative cooperation in the field of taxation, OJ [2013] L 313/1, 22.11.2013.

<sup>118</sup> Which, at the time this paper was written, can be found here: <<http://www.europarl.europa.eu/oeil/home/home.do>>.

amount of attention devoted by the EP to CFSP/CSDP affairs through resolutions, as the EP's formal rights in this area remain relatively limited. Thus, the dataset allows for an analysis that examines whether the EP focuses mostly on areas in which it also has substantial formal rights, or whether it goes beyond the formal scope of the Treaties in an attempt to intensely scrutinise CFSP/CSDP decision-making. To compile a manageable dataset, the review was restricted to the year 2013, a relatively recent full year in the EP's legislative observatory.<sup>119</sup>

### 5.3 International agreements adopted under the Treaty of Lisbon: procedures and legal bases

Perhaps the most interesting finding from an investigation of the EUR-LEX sample is the extent to which the EP is capable of exercising its veto rights after the introduction of the Treaty of Lisbon. It will be recalled from the previous chapters that the EP has gained a boost in rights in several areas of the Treaty, and this has indeed resulted in a substantial increase in the frequency with which the EP can veto agreements through the consent procedure. This is illustrated in table 1, which lists the frequencies with which a given decision-making procedure was followed in the 2010-2013 period:

*Table 1:* procedural rights for the EP under the Treaty of Lisbon in the conclusion of international agreements (period 2010-2013)

	Consent	Consultation	Information	No rights	Total
<b>N agreements</b>	65	1	17	1	84
<b>% agreements</b>	77,4%	1,2%	20,2%	1,2%	100%

Table 1 lists the various procedures followed for the 84 agreements included in the sample of this research. As can be seen, usage of the consent procedure is especially prevalent in the conclusion of international agreements, with the right to information being a distant second. As was already implied by the legal analysis in the second section, a distinction between the CFSP and the other Treaty areas can easily be observed, with the 17 information procedures corresponding to 17 out of 18 CFSP agreements concluded between 2009 and 2013. The Convention on the International Recovery of Child Support was the only international agreement adopted on the basis of a consultation procedure.<sup>120</sup> The reason for this is that Article 81(3) – in contrast to many other AFSJ legal bases – provides for a special legislative procedure when adopting mea-

<sup>119</sup> Admittedly, this choice is somewhat arbitrary, as 2014 and 2015 would also have been good candidates for such a review. However, as an indexation of 2013 EP resolutions in the legislative observatory was already available to the author, this year was chosen for analysis.

<sup>120</sup> Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, OJ [2011] L 192, 22.7.2011, 39–70.

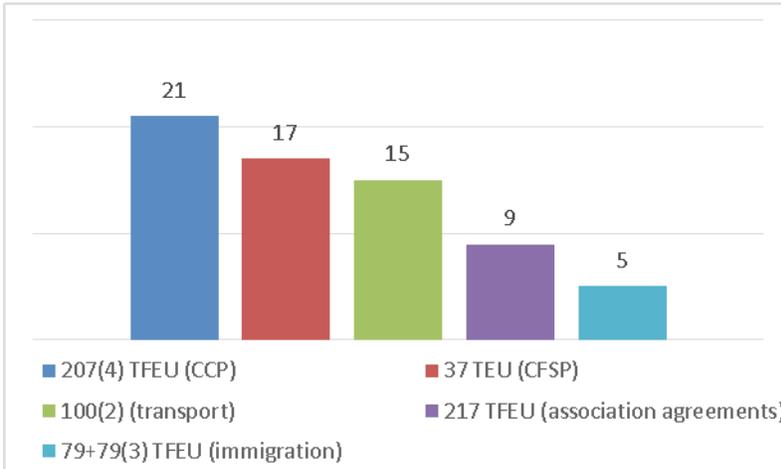


Figure 1: amount of times a legal base has been used by an agreement in the sample

asures internally. The effect is that for international agreements, Article 218(6)b instead of Article 218(6)(a)v should be applied, the former only providing for consultation rights. Furthermore, the single agreement adoption procedure in which Parliament had no rights whatsoever was not based on Article 218, and therefore the EP did not receive information rights through paragraph 10 of that Article.<sup>121</sup>

Another way to look at the rights available to the EP per procedure is to consider the frequency with which various legal bases were used. Among the most frequently invoked legal bases, the large majority require consent by the Parliament. Figure 1 illustrates this by showing the 5 most often used legal bases within the sample. The most notable feature of the graph is that four of the five legal bases, that is Articles 207(4) TFEU (CCP), 100(2) TFEU (transport), 79 TFEU (immigration) and 217 TFEU (association agreements) accord the right to consent to Parliament in the external sphere. All legal bases not included in the graph were used three times or less in the sampled post-Lisbon agreements.

The prevalence of these legal bases in the external sphere goes a long way towards explaining why the EP has grown substantially regarding vetoing power in foreign policy after the adoption of the Lisbon Treaty. In the second section it was mentioned that Article 218(6)a TFEU provides for the power to consent in the case a legal base provides for the ordinary legislative procedure in internal situations. The extension of the ordinary legislative procedure *inter alia* affected internal CCP measures, meaning that for external trade agreements the procedure laid down in Article 218(6)a TFEU applies. Being the most

<sup>121</sup> Agreement between the Government of the Russian Federation and the European Union on the protection of classified information, OJ [2010] L 155, 22.06.2010. The lack of information rights granted to the EP would, under more recent jurisprudence, probably be considered an infringement of Article 218(10) TFEU. See *Parliament v. Council*, *supra* note 12.

often used legal base for agreements according to the sample, the data thus affirms that this reform of the CCP has boosted EP formal consent powers extensively. Moreover, the AFSJ has been integrated into the former first pillar after the Treaty of Lisbon,<sup>122</sup> which has, *inter alia*, extended the ordinary legislative procedure to Article 79(2) TFEU on immigration policy.<sup>123</sup> Again, this means that when the Union acts externally through the conclusion of agreements under 79(3) TFEU, the EP has the right to consent to that agreement. This, in combination with the consent rights already existing for Parliament in the area of the transport policy and association agreements, means that the EP has the right to consent to all agreements adopted under all but one of the 5 legal bases that were utilised most in this sample. The only exception remains the strictly intergovernmental CFSP procedure under Article 37 TEU.

At this stage it is also interesting to consider to what extent the inclusion of the EP differs in practice between the Treaty of Nice and the Treaty of Lisbon. Table 2 shows the substantial differences between EP rights in the conclusion of agreements under Lisbon and Nice respectively:

*Table 2:* procedural rights for the EP under the Treaty of Lisbon and the Treaty of Nice in the conclusion of international agreements (respectively period 2010-2013 and 2006-2008)

		Consent	Consultation	Information	No rights	Total
<b>Lisbon</b>	N agreements	65	1	17	1	84
	% agreements	77,4%	1,2%	20,2%	1,2%	100%
<b>Nice</b>	N agreements	1	23	0	38	62
	% agreements	1,6%	37,1%	0%	61,3%	100%

Noticeable is that the data for Nice and Lisbon are nearly completely inversed: while the Lisbon data shows high amounts of procedures in which consent and information rights applied, Nice shows high amounts of consultation and no rights for the EP. This is due to the aforementioned introduction of consent for all agreements based on internal policy area governed by co-decision or a special legislative procedure with consent (save for the CFSP) and the introduction of information rights for all agreements, including those agreements concluded in the context of the CFSP.

What is perhaps equally interesting is the extent to which the Treaty of Lisbon had an effect in formally including the EP in decision-making through either the right to consent or the right to be consulted. When considering that informa-

<sup>122</sup> A. Klip, *European Criminal Law* (Cambridge, Antwerp and Portland: Intersentia 2012), at 19.

<sup>123</sup> General Secretariat of the Council of the EU, 'The Lisbon Treaty's impact on the Justice and Home Affairs (JHA) Council: More co-decision and new working structures', (December 2009) available at <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/111615.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111615.pdf)>.

tion rights provide for no further formal inclusion of the Parliament in the decision-making procedure, while both consultation and consent rights require the Council, HR/VP and/or Commission to take the Parliament’s views into account, it is possible to regroup the four categories of involvement into two new categories. The first encompasses all consent and consultation procedures, while the second encompasses all procedures in which the Parliament has no formal rights in the decision-making procedure – information procedures and no rights. Since Nice mainly implemented inclusion of the Parliament with regard to the adoption of agreements through consultation procedures, while Lisbon does so mainly through the usage of the consent procedure, pooling the categories provides a meaningful insight into the relative amount of times the EP is included as opposed to the amount of times it is excluded (the EP having no rights or only the right to be informed) under both Treaties. This allows for a comparison of the ratio of involvement between the Nice and Lisbon Treaties, and whether the Parliament can be said to be involved relatively more often after the introduction of the Treaty of Lisbon. The statistical chi-squared procedure was used to calculate whether inclusion/exclusion of the Parliament was dependent or independent of Treaty change. Subsequently, a Cramer’s V procedure was applied to calculate the strength of the relationship between both variables.<sup>124</sup> The cross-tabulation is included in table 3:

Table 3: cross-tabulations between variables Treaty and procedural inclusion/procedural exclusion

	Treaty of Nice	Treaty of Lisbon	Total
<b>No rights or information rights (no formal involvement)</b>	38	18	56
<b>Inclusion through consultation or consent</b>	24	66	90
<b>Total</b>	62	84	146

Calculating Cramer’s V for the sample data provides a value of 0.405.<sup>125</sup> Values between 0.3 and 0.4 are often considered to denote a moderate relationship between the variables, while values between 0.4 and 0.5 express a moderate to strong level of association.<sup>126</sup> The value of 0.405 therefore implies that the

<sup>124</sup> The calculation of a chi-squared statistic can be performed in several ways. This research utilised the Pearson’s  $\chi^2$  procedure, which is one of the most common methods. Once calculated, Pearson’s  $\chi^2$  can be used in the Cramer’s V procedure to calculate the strength of the relationship between the variables in the sample. The Cramer’s V procedure approximates the extent to which the independent and dependent variables are associated, and is calculated by considering the mean differences between the categories of the dependent variable under the different states of the independent variable. See also: A.C. Acock and G.R. Stavig, ‘A Measure of Association for Nonparametric Statistics’, 57 *Social Forces* 1979, 1381-1386.

<sup>125</sup> Degrees of freedom  $df=1$ ; significant at the  $p<0,01$  level.

<sup>126</sup> University of Toronto, ‘Crosstabulation with Nominal Variables’, available at <[http://groups.chass.utoronto.ca/pol242/Labs/LM-3A/LM-3A\\_content.htm](http://groups.chass.utoronto.ca/pol242/Labs/LM-3A/LM-3A_content.htm)>.

transition from the Treaty of Nice to the Treaty of Lisbon is moderately associated with the transition of EP from no rights or information rights to formal inclusion through the consultation or consent procedures. This supports the argument that the Treaty of Lisbon was not only relevant in substituting no rights for information rights and consultation rights for consent rights, but that it also increased the ratio between the amount of times the EP is consulted/asked to give consent and the amount of times it is not included in either manner in the decision-making procedure in practice. As such the data interestingly complements the legal analysis of chapter 2, in which the extension of the ordinary legislative procedure, the integration of the former first and third pillars and the effects of the new Article 218 TFEU have been discussed.

#### 5.4 Resolutions of the EP

The EP has issued numerous resolutions both with regard to areas in which it entertains elaborate foreign rights and in areas in which its rights are more limited. These resolutions provide the Parliament with an additional tool to provide its views on a particular topic, including policy fields in which its role is traditionally restricted, particularly in the CFSP/CSDP fields. Moreover, the EP can utilise its resolutions to make its views known on international agreements in the early negotiation stages. This potentially pressures the other institutions to take into account the views of the EP before the latter has to provide consent in the adoption stage, thereby avoiding conflict between the institutions in this phase.<sup>127</sup> Rule 133 of the Rules of Procedure of the EP provides that resolutions may be proposed by MEP's on any activity falling within the sphere of the Union's activities, while Rule 123(2) provides for the possibility to adopt a resolution after a debate on a statement made by the European Council, the Council of Ministers or the Commission before the Parliament. Furthermore, Rule 52(1) states that a committee may draw up a report and submit to the Parliament a motion for a resolution on a matter falling within its competences on which neither a consultation nor an opinion has been requested, provided that the Conference of Presidents authorises the committee to do so. Studying these resolutions thus offers additional insight into the extent to which the EP attempts to scrutinise external policy areas and the extent to which it attempts to ameliorate its limited formal role under the CFSP/CSDP.

The legislative observatory maintained by the EP is capable of providing considerable insight into the activities of the EP with regard to resolutions on specific topics and policy areas. This database indexes the activities of the EP in legislative, unilateral and inter-institutional matters, and as such has also indexed every resolution adopted by the EP in recent years. With regard to the year 2013 the legislative observatory lists a total of 298 resolutions.<sup>128</sup> Out of

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<sup>127</sup> See also the discussion by C. Eckes, *supra* note 6, at 913-914 of the Commission's inclusion of the EP's views in the fourth Passenger Name Record (PNR) agreement between the EU and the US.

<sup>128</sup> The six recommendations adopted by the EP were excluded from this count, due to their specific nature under Art. 288 TFEU.

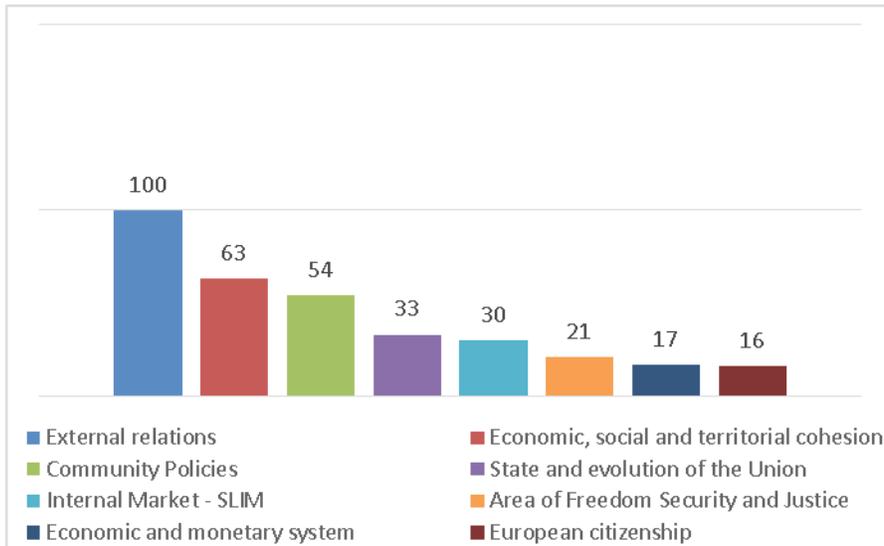


Figure 2: n-times 2013 resolutions address a policy area as indexed by the EP legislative observatory

these, 122 documents were related to the external relations of the Union. Community Policies was a distant second category at 77 resolutions.<sup>129</sup> Although it must be kept in mind that a resolution may address several policy areas at once, this nonetheless illustrates how active the Parliament has been in attempting to influence external relations through own initiative procedures in 2013.<sup>130</sup> Figure 2 shows the different amounts of resolutions adopted per subject.

It is interesting, furthermore, to consider the amount of attention the EP devotes with its resolutions to separate subjects within the external relations category. Figure 3 shows that the resolutions that include the area of the CFSP easily make up the largest part of the subjects addressed by resolutions in foreign affairs. Nevertheless, the EP has also adopted a sizable 104 of resolutions on relations with third countries and 71 resolutions on CCP matters.

The high amount of EP resolutions in the CFSP can potentially be explained by the lack of hard powers that the EP entertains in this policy field. As mentioned earlier, the EP is largely reliant on informal methods of involvement and

<sup>129</sup> Note that one resolution may be adopted on issues spanning several policy areas. If a resolution concerns for example both the AFSJ and external relations, it is counted once for the total number of resolutions, but is shown twice when distinction is made between the separate policy fields AFSJ and external relations. For this reason the numbers of individual categories have a different sum than the total amount of resolutions adopted. This comment also applies to figures 2 and 3. Community policies includes agriculture, fisheries, transport, information and communications, industrial policy, enterprise policy, R&D, energy and environmental policy.

<sup>130</sup> Although a quick look at the database for the entire 2009-2014 period seems to confirm the pattern seen in 2013, additional filtering of resolutions on topical subjects for the CFSP and other areas would be needed to definitively establish this.

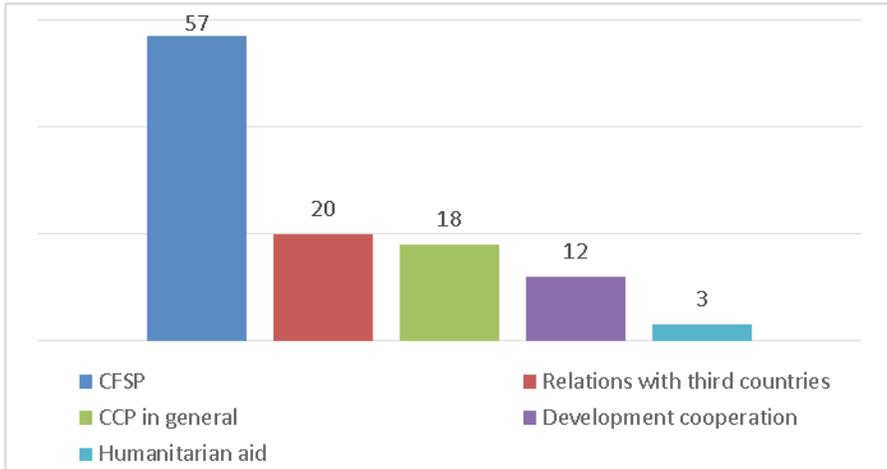


Figure 3: n-times a subject area is addressed by 2013 resolutions within the external relations category in 2013

information/consultation rights in the CFSP, and the large amount of resolutions seems to be an expression of this dependence. The interesting implication of this argument is that the EP does not seem to readily accept the institutional position accorded to it by the Treaty drafters in the CFSP.<sup>131</sup>

For the purposes of this paper it is furthermore interesting to consider that while the EP's formal role in CFSP is largely limited to the basic choices and aspects of that policy area<sup>132</sup> and budgetary control, its resolutions touch upon very specific subjects. While at first glance CFSP activity is often associated with diplomacy or security, the EP specifically seemed to focus on human rights issues in its resolutions in the studied 2013 period. Examples of such initiatives include a resolution containing a call to the EU Institutions and the international community to address state-sanctioned organ harvesting from non-consenting Chinese prisoners of conscience,<sup>133</sup> a resolution on the human rights and rule of law violations addressed to the government of Bahrain (including a call for EU sanctions and political pressure from both the Union and its Member States against Bahrain),<sup>134</sup> a resolution condemning the use of chemical weapons by the Syrian government,<sup>135</sup> etc. Although several resolutions have been adopted with security and defence elements, initiatives on this subject seem to be less prevalent. The most specific example of such a resolution concerns the support of the EP for the NATO anti-ballistic missile shield and

<sup>131</sup> An ambition also observed by B. Crum, *supra* note 5, at 399.

<sup>132</sup> Art. 36 TEU.

<sup>133</sup> European Parliament resolution of 12 December 2013 on organ harvesting in China (2013/2981(RSP)).

<sup>134</sup> European Parliament resolution of 12 September 2013 on the human rights situation in Bahrain (2013/2830(RSP)), p. 13-14.

<sup>135</sup> European Parliament resolution of 12 September 2013 on the situation in Syria (2013/2819(RSP)).

urges Member States and HR to achieve full Member State coverage of the system.<sup>136</sup> Other than that, the lack of activity regarding defence resolutions may imply that the EP is cautious not to infringe upon Member State prerogatives too extensively in this particular subarea of the CFSP. However, additional analysis of other years would be needed to confirm this observation.

Even when excluding the CFSP, it is notable that the EP still issues a respectable portion of its resolutions on other foreign affairs policy areas. The EP is particularly prolific in CCP affairs, which is addressed by 20 parliamentary resolutions. This implies that, even though the CCP has become an area governed by the ordinary legislative procedure for internal implementing measures and the consent procedure for international agreements, it is still an area of high salience for the EP warranting substantial attention through own-initiative procedures. Resolutions in the CCP can roughly be divided in three types: resolutions on internal EU matters which also have an external CCP aspect, general external trade resolutions and resolutions on specific CCP agreements.

Another matter addressed by resolutions and deserving of some attention is the coherence of EU external action, a principle incorporated into the EU Treaties in particular through Article 21 TEU. Within the context of development cooperation the EP has sought to further the extent to which the EU's other policies – both internal and external – are synchronised with the policy goals of development cooperation (a process named Policy Coherence for Development (PCD)).<sup>137</sup> Furthermore, a relatively lengthy resolution has been adopted on the topic of vertical and horizontal policy coherence within the context of Articles 21 and 24(3) TEU. The resolution illustrates the EP's commitment to a comprehensive approach and the coordination of EU external action to 'frame an efficient response to multidimensional crises.'<sup>138</sup> Simultaneously it also criticizes a perceived lack of progress in the area of external consistency and criticises the Commission for its 'restrictive approach, protecting its own competences and minimising coordination functions with the EEAS.'<sup>139</sup> The resolution furthermore acknowledges the link between conflict prevention and conflict resolution and supports the structural foreign policy method of addressing root causes and creating well-functioning institutions in third countries.<sup>140</sup> Finally, the resolution reaffirms the observation made earlier that the EP is strongly interested in human rights protection in the external sphere.<sup>141</sup> All in all the resolution is a strongly worded commitment to a comprehensive and structural foreign policy, and makes clear that the EP is attempting to push this in-

<sup>136</sup> European Parliament resolution of 12 March 2014 on an anti-missile shield for Europe and its political and strategic implications (2013/2170(INI)).

<sup>137</sup> European Parliament resolution of 13 March 2014 on the EU 2013 Report on Policy Coherence for Development (2013/2058(INI)).

<sup>138</sup> European Parliament resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action (2013/2146(INI)), p. 4-5; see also on the EU's comprehensive approach and structural foreign policy S. Keukeleire and T. Delreux, *The Foreign Policy of the European Union* (Hampshire: Palgrave Macmillan, 2nd edition 2014), at 27-34.

<sup>139</sup> European Parliament resolution (2013/2146(INI)), p. 8-9.

<sup>140</sup> *Ibid.*, p. 8-9, p. 25-27.

<sup>141</sup> *Ibid.*, p. 8-9, p. 24.

novation of the Lisbon Treaty forward. A by-product of further integration of external action may also be an improved information position for the Parliament, a matter also addressed indirectly in the Resolution in paragraph 28.

## 6. CONCLUSION

The development of the EP's role in the scrutiny of EU external action appears to follow two lines: a general trend of increasing powers – both *de jure* and in practice – can be observed with regard to the former first and third pillars, while the CFSP/CSDP to a large degree still excludes the EP and remains intergovernmental in nature. Within the context of non-CFSP policies, the EP has gained a significant amount of influence through the extended scope of Article 218 TFEU, the extension of the ordinary legislative procedure in internal situations (in which case the EP's consent is required for concluding international agreements), and the right to be informed at all stages of the procedure pursuant to Article 218(10) TFEU. Indeed, the internal extension of co-decision right to the CCP ensured that the EP would have consent rights to the large majority of EU trade agreements adopted in the post-Lisbon period. Moreover, the sampled Lisbon and Nice agreements provided strong evidence in support of the argument that the EP enjoys a substantial level of involvement after the entry into force of the Treaty of Lisbon. The conclusion of 80% of EU sampled agreements on the basis of the consent procedure indicates that Article 218(6) TFEU provides the EP with a considerably powerful vetoing tool. The extension of the ordinary legislative procedure to notable areas such as the CCP, in combination with the increased rights for the EP under Article 218 TFEU, seems to be a powerful explaining factor for this observation. Another notable factor in the increased usage of the consent procedure was the incorporation of the first and third pillars in a single legal framework after Lisbon, extending the consent procedure of Article 218 TFEU to cover agreements concluded under the relatively often used Article 79(3) TFEU.

The rights included in Article 218 TFEU have been supplemented with an elaborate Framework Agreement between the Commission and the EP, further improving the involvement of the EP beyond what is strictly required by the Treaties. Initiatives included in the Framework Agreement such as the potential inclusion of Parliamentary representatives in international delegations and the commitment of the Commission to take the EP's position into consideration during negotiations seem powerful instruments to improve the information position of the EP in all stages of the procedure, thus giving expression to the information requirements of Article 218(10) TFEU. They uplift the formal consent rights from an *ex post* control to Treaty negotiations to a potentially powerful threat if the Parliament is not included appropriately in the negotiation procedure. Additionally, the Framework Agreement notes that the European Commission will assist the Parliament as best as it can with regard to the provision of information on CFSP activities. This means that through the former Community side of EU external policies, the EP will be able to gather some information on CFSP matters, aiding in the scrutiny of EU foreign policy as a holistic

affair, thereby potentially increasing the effects of the EP on the consistency of EU external action.

The revolution of formal EP rights in the non-CFSP policies has not been repeated in the area of the CFSP/CSDP, however. Here, the European Council and the HR remain firmly in charge of the decision-making process, with the EP being marginally included through biannual debates, information rights and budgetary powers. Indeed, the exclusion of formal consultation or consent rights for Parliament in the area of the CFSP seems nearly complete, with all agreements after Lisbon utilising either the information procedure or according the Parliament no rights at all. As such, the goal of the Treaty drafters to keep the CFSP a primarily intergovernmental policy area and to largely exclude supranational influences remains apparent in the post-Lisbon era. Informally the EP is very active in attempting to influence CFSP-related matters, however. It was shown that the highest amount of resolutions adopted deal with CFSP matters. Moreover, informal commitments, such as the HR Declaration on political accountability as well as the EP's right to scrutinise portions of the CFSP budget and EEAS activities, mean that beyond the Treaty the EP has gained some additional influence in recent years. Finally, from the various cases the EP has lodged before the ECJ on its involvement in CFSP decision-making it is clear that the former is willing to contest its exclusion in CFSP affairs.<sup>142</sup>

The paper highlights that overall EP involvement in EU external affairs is not necessarily bad, but that specific problems still exist per policy area. Nevertheless, the reluctance of Member States to include too many supranational elements in particularly sensitive areas such as the CFSP/CSDP limits the amount of feasible solutions available to improve democratic accountability across the board. A powerful illustration of this reluctance is the reduction in EP rights in the adoption of smart sanctions, with these rights being downgraded from consultation under Nice to information under Lisbon.

Given the sensitiveness of external action and the sovereignty concerns of the Member States, improvements of EP involvement should be performed in incremental ways. An overarching inter-institutional agreement, covering all foreign affairs policies and of binding nature on the basis of Article 295 TFEU, could perhaps be one of the more feasible tools available to achieve these improvements. Such an agreement would allow for normalisation and more predictability in the information flow to the EP, as well as make arrangements for the role of EP budgetary scrutiny of CFSP/CSDP affairs. As point 40 of the

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<sup>142</sup> For instance *Parliament v. Council*, *supra* note 12, *Parliament v. Council of the European Union*, *supra* note 41. The observation that the EP is willing to go beyond the limitations of its role under the Treaties is in line with recent research by Gianniti and Lupo and Dutoit. Gianniti & Lupo observe that the European Parliament's President has relatively strong external powers, often being able to represent the EP at significant foreign policy-related events, while Dutoit has noted that the EP's various Intergroups tackle a variety of controversial issues – sometimes at the fringe of the EU's competences. See: L. Gianniti and N. Lupo, 'The role of the European Parliament President in Parliamentary Diplomacy', 11 *The Hague Journal of Diplomacy* 2016, pp. 144-160 and L. Dutoit, 'The International Role of the European Parliament's Intergroups', 11 *The Hague Journal of Diplomacy* 2016, pp. 182-195.

Inter-institutional agreement on Better Lawmaking already specifies that improved arrangements on the negotiation and conclusion of international agreements should be drafted in the near-future, such an agreement seems closer than ever. Ideally, such an agreement would integrate and build upon the current Framework Agreement between the EP and the Commission, the Declaration on political accountability by the HR/VP and both inter-institutional agreements between the EP and the Council on sensitive information. As the HR is Vice President to the Commission and the Council is also represented, it may be possible to include commitments relating to the CFSP in the primary agreement itself, or through a second complementary agreement. Making such an inter-institutional agreement (or set of agreements) binding on the basis of Article 295 TFEU would add to the certainty of the EP's position, granting the democratic scrutiny of external affairs a stronger basis than soft law documents. Moreover, such an agreement could provide an opportunity to further improve the coherence of EU external affairs, as is, *inter alia*, required by Article 21 TEU.

Another option to consider is greater involvement of national parliaments in areas where national autonomy is highly valued by the Member States. This in particular concerns CFSP/CSDP affairs, but can also concern mixed agreements such as trade agreements. While this solution would raise information and scrutiny problems in itself, increased coordination and collaboration between the national parliaments and the EP through networks and inter-parliamentary conferences may offer a partial, if imperfect solution.<sup>143</sup> Achieving a stable and effective set of rules for inter-parliamentary scrutiny may be relatively difficult in itself however, as shown by Herranz-Surrallés, who noted the substantial disagreement between national parliaments and the EP over the respective roles both parties should play in inter-parliamentary cooperation on CFSP/CSDP.<sup>144</sup> Moreover, as noted by Jančić, these activities would have to culminate in a systematic instead of an *ad hoc* scrutiny of external affairs by the EP and other parliaments, which would require a sizeable commitment of all bodies involved.<sup>145</sup> The challenge for the future thus seem to be mending specific accountability gaps where EP involvement is desirable, while considering what role national institutions or network formations can play when EP involvement is politically less feasible.

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<sup>143</sup> This solution is explored in more detail by J. Wouters and K. Raube, 'Seeking CSDP accountability through interparliamentary scrutiny', 47 *The International Spectator* 2012, pp.149-163.

<sup>144</sup> A. Herranz-Surrallés, 'The EU's Multilevel Parliamentary (Battle)Field: Inter-parliamentary Cooperation and Conflict in the Area of Foreign and Security Policy', 37 *West European Politics* 2014, 957-975.

<sup>145</sup> D. Jančić, *supra* note 6.