



# Study Guide EU Council



Topic: The EU Sanctions Regime in the Common Foreign and Security Policy (CFSP)

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## Words of Welcome

Honourable Heads of State and Government

It is our great pleasure to welcome you to the European Council at the 2022 St. Gallen Model United Nations Conference. During four days in December, you will have the opportunity to debate on a topic of high relevance: the sanctions policy of the European Union (EU). Given that the EU's main asset is its economic power, sanctions are one of the most powerful tools of its foreign policy. This has been exemplified by the response of the EU to Russia's invasion of Ukraine: the restrictive measures such as asset freezes for Russian officials, the export bans on European industrial goods, and, perhaps most notably the embargoes on Russian gold, oil and, potentially, gas have taken the centre stage of public debate in Europe. At the same time, these issues have led to ruptures among the EU Member States. It is therefore up to you to identify common ground for common growth in the EU's foreign policy.

Let us also seize this opportunity to introduce ourselves, the Presidents (picture a three-headed Charles Michel), to you. Niklas Graefen is currently pursuing a Bachelor's degree in Law at the University of St. Gallen after already having completed a degree in International Affairs. Having written his bachelor thesis on the EU rule of law regime, he is particularly interested in European Law. Besides his studies, Niklas enjoys cooking, good wine and suffering through games of FC Barcelona. Sebastian Linke is a Master's student in International Affairs at the University of St. Gallen. Enrolled in the Dual Degree Programme with Sciences Po in Paris, he is concurrently pursuing a degree in European Affairs. As a native of St. Gallen, he enjoys little more than drinking a beer and eating a Bratwurst (without mustard) at a game of FC St. Gallen. Cédric P.M.J. Schad is a Master's student in Law at the University of St. Gallen. He is currently writing his master thesis on the consideration of sanctions in international arbitration proceedings. Born in Geneva, raised in Northern Germany and holding three passports, he considers himself a true European.

The three of us are all excited to welcome you to St. Gallen and to see you work together towards excellence. We encourage you to brave the storms of the EU's foreign policy together and shape tomorrow in unity.

All the best

Niklas, Sebastian & Cédric

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## List of Abbreviations

AG	Advocate General of the CJEU
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of the European Union
CSDP	Common Security and Defence Policy
ECJ	European Court of Justice
EU	European Union
High Representative	High Representative for Foreign and Security Policy
QMV	Qualified Majority Voting
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

# 1. Introduction to the Committee

In the early stages of the European Union (EU), Heads of State and Government used to meet around twice a year in so-called European Summits. Then, former French President Valéry Giscard-d'Estaing declared the Paris summit of December 1974 as a convention of the European Council, thereby introducing a body without legal basis in the Treaties.<sup>1</sup> The basic idea, expressed in the summit of 1974, was to establish a platform which strengthens the solidarity between the Member States and that was capable of addressing issues which go beyond the scope of the Treaties.<sup>2</sup> It was only in 1986 that Heads of State and government reformed the Treaty with the Single European Act and the Lisbon Treaty in 2009, finishing the formal establishment of the new Institution.<sup>3</sup>

The European Council consists of either the Head of State or Head of Government of the 27 Member States, the President of the European Council and the President of the Commission. The High Representative of Foreign Affairs may participate.<sup>4</sup> Upon invitation of the President of the European Council, members meet twice every six months, with the possibility of additional extraordinary meetings.<sup>5</sup> During SGMUN 2022, the European Council will consist of delegates as Heads of State or Government while the chairs will take the role of the President of the European Council.

Pursuant to Art. 15(1) of the Treaty on European Union (TEU), the European Council is responsible for the political leadership of the EU, setting the basis for the agenda of the institutions involved in the legislative process.<sup>6</sup> It is further responsible for setting the Common Foreign and Security Policy (henceforth CFSP), treaty changes<sup>7</sup> as well as important nominations for positions within the Union's institutions, such as the President of the European Parliament and the President of the Commission.

Pursuant to Art. 15(4) TEU, the European Council takes decisions by consensus unless the Treaties provide otherwise.<sup>8</sup> It is important to note, however, that consensus is not a voting rule and has no legal definition in the treaties.<sup>9</sup> This is related to the way the European Council works under consensus: Formal voting does not take place, rather the Member States deliberate until they reach a general agreement on a proposal.<sup>10</sup> This might seem strange at first glance but one should remember that the European Council was only formally established with the Treaty of Lisbon; before, the meetings of the

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<sup>1</sup> European Council, 2022c.

<sup>2</sup> CVCE, 2012; Oesch, 2019, 97.

<sup>3</sup> Art. 15 TEU; Art. 235 f. TFEU. Puetter, 2014, 82 et seqq.

<sup>4</sup> Art. 15 (2) TEU; Herdegen, 2019, 115.

<sup>5</sup> Art. 15 (3) TEU.

<sup>6</sup> European Council, 2020; Herdegen, 2019, 114; Oesch, 2019, 97.

<sup>7</sup> A special summit is convened to change the treaties following the procedure of Art. 48 (3) TEU.

<sup>8</sup> Art. 15 (4) TEU. Note that the President of the EC as well as the President of the Commission do not have a voting right.

<sup>9</sup> European Parliament, 2004.

<sup>10</sup> EU Monitor, n.d.

European Council were ‘fireside chats’, an informal platform of discussion for the leaders of the Member States.

However, the CFSP, is one of these policy areas where the Treaties provide for a different decision-making procedure than consensus: Art. 31(1) TEU stipulates that, as a general rule, decisions in the CFSP are taken by the European Council and the Council of the European Union (CoE) acting unanimously. There is a limited number of exceptions to this which will be described in detail in section 3.1.2 below. Unlike consensus, voting by unanimity is defined in Art. 238(3) of the Treaty on the Functioning of the European Union (TFEU): A decision by unanimity is reached if no Member State votes against a decision; if one or several Member States abstain from voting, a decision requiring unanimity can still be adopted.

## 2. Introduction to the Topic

EU sanctions play an integral role within the EU's CFSP. They represent both measures of general application to achieve policy goals in foreign relations and individualised decisions interfering with the fundamental rights of individuals.<sup>11</sup> They are deployed very frequently, and despite being called sanctions, they are not punitive in nature. They are intended to bring about a change in policy and behaviour by targeting non-EU countries as a whole or specific entities and individuals responsible.<sup>12</sup> As of today, the EU has over forty different sanctions regimes in place, covering a wide array of different issues. Situations such as human rights violations in Lebanon, Russia's military operations in Ukraine, or combatting terrorism in Europe ask for quick and decisive action.<sup>13</sup> Some of these sanctions are mandated by the United Nations Security Council (henceforth UNSC) and some are deployed by the EU itself. Among the CFSP policies, sanctions are unique as they usually consist of a CFSP Decision under Title V of the TEU, and a regulation adopted pursuant to the TFEU.

This study guide will serve you as an introduction to the topic so as to provide you with a sound basis for your research. In a first step, we will explain what the CFSP is and how sanctions fit in among the Union's foreign and security policy (Chap. 3.1.). We will look at what sanctions are, what their legal basis is within the Treaties and set a special focus on how they are adopted (Chap. 3.2.). As already noted in the previous paragraph, sanctions can be mandated by the UNSC or adopted by the EU autonomously, this differentiation will also be deepened. In a second step, we will highlight some of the major issues in the current sanctions framework. These issues include a discussion on Qualified Majority Voting (henceforth QMV) for the adoption of sanctions (Chap. 4.1.), problematic developments with regards to the content of sanctions (Chap. 4.2.) and finally some considerations regarding the export of sanctions through an alignment process (Chap. 4.3.). The fifth and final chapter will line out some major questions for this committee that you should work with in your preparations for the conference. The reading guide at the end will help you to find additional sources and refine your position for the debates.

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<sup>11</sup> Eckes, 2018, 206.

<sup>12</sup> European Commission (n.d.).

<sup>13</sup> Eckes, 2009, 18.

## 3. What Is the CFSP and How Do Sanctions Fit In?

### 3.1. The Common Foreign and Security Policy (CFSP)

The CFSP covers all areas of foreign policy, including the progressive framing of a common defence policy.<sup>14</sup> Yet, some policy areas of EU external action fall beyond the scope of the CFSP such as the common trade policy, development cooperation with third countries, and humanitarian aid.<sup>15</sup> The CFSP is fundamentally different from other policy areas of the EU as it does not involve a transfer of sovereignty rights from the Member States to the EU; rather its purpose is to bundle foreign policy measures that are in the common interest of the Member States while portraying a united front towards third countries.<sup>16</sup> The CFSP is thus often referred to as an ‘intergovernmental’ area of EU decision-making.<sup>17</sup>

#### 3.1.1. Actors and Competences in the CFSP

Accordingly, the CFSP is subject to specific rules and procedures which are outlined under Title V Chapter 2 of the TEU. The most important actors in the CFSP are the European Council and the CoE: While the European Council defines the strategic lines and general guidelines for the CFSP (Art. 26[1] TEU), the CoE is responsible for adopting the concrete decisions necessary for implementing the strategic lines and guidelines of the European Council (Art. 26[2] TEU).<sup>18</sup>

A unique position in the CFSP is attributed to the High Representative for Foreign Affairs and Security Policy (High Representative). Currently, the High Representative is Josep Borrell from Spain.<sup>19</sup> The High Representative has a ‘dual mandate’: On the one hand, the High Representative presides over the Foreign Affairs Council, i.e., the configuration of the CoE in which the foreign ministers of the Member States are represented. On the other hand, the High Representative is one of the Vice-Presidents of the Commission. According to Art. 27 TEU, the High Representative shall contribute through his proposals to the development of the CFSP and ensure the implementation of the decisions adopted by the European Council and the CoE. Moreover, he represents the Union for matters relating to the CFSP.

Meanwhile, the Commission and the European Parliament are only attributed a very limited role in the CFSP by the Treaties. Pursuant to Art. 36 TEU, the European Parliament has to be informed about important developments in the CFSP and is consulted by the High Representative. The Parliament may also address questions or make recommendations in the field of the CFSP to the CoE or the High Representative.<sup>20</sup> Pursuant to Art. 24(1) TEU, the Court of Justice of the European Union (CJEU) has no jurisdiction with respect to the provisions of the CFSP. However, as an exception to this rule, Art.

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<sup>14</sup> Art. 24(1) TEU.

<sup>15</sup> Herdegen, 2018, 501.

<sup>16</sup> Herdegen, 2018, 523.

<sup>17</sup> Keukeleire & Delreux, 2014, 63.

<sup>18</sup> Herdegen, 2018, 524.

<sup>19</sup> Herdegen, 2018, 525.

<sup>20</sup> Art. 36 TEU.



275(2) TFEU stipulates that the CJEU is responsible for the control of restrictive measures, i.e., sanctions against natural or legal persons adopted by the CoE in the framework of the CFSP.<sup>21</sup>

### 3.1.2. Measures and Decision-Making in the CFSP

The Treaties provide for two different kinds of CFSP measures. Firstly, the CoE can define common positions which set the frame for the EU's approach to a particular matter of a geographical or thematic nature.<sup>22</sup> Member States are obliged to ensure that their national policies conform to the EU's common positions.<sup>23</sup> An example is the EU Common Position on Arms Exports: It defines common criteria that Member States have to consider when assessing export licence applications for military technology and equipment; however, the Member States implement these common criteria according to their own national legislation.<sup>24</sup> Secondly, where the international situation requires operational action of the EU, the CoE can adopt Common Decisions.<sup>25</sup> Decisions usually include a whole bundle of measures and commit the Member States in the positions they adopt and in the conduct of their activity.<sup>26</sup> For example, the CoE adopts Common Decisions when establishing Common Security and Defence Policy (CSDP) missions or as a first step when imposing a sanctions regime. However, the Treaties explicitly exclude the adoption of legislative acts in the framework of the CFSP.<sup>27</sup>

The rules on decision-making in the CFSP are defined in Art. 31 TEU. Figure 1 below provides an overview over the different decision-making procedures in the CFSP.

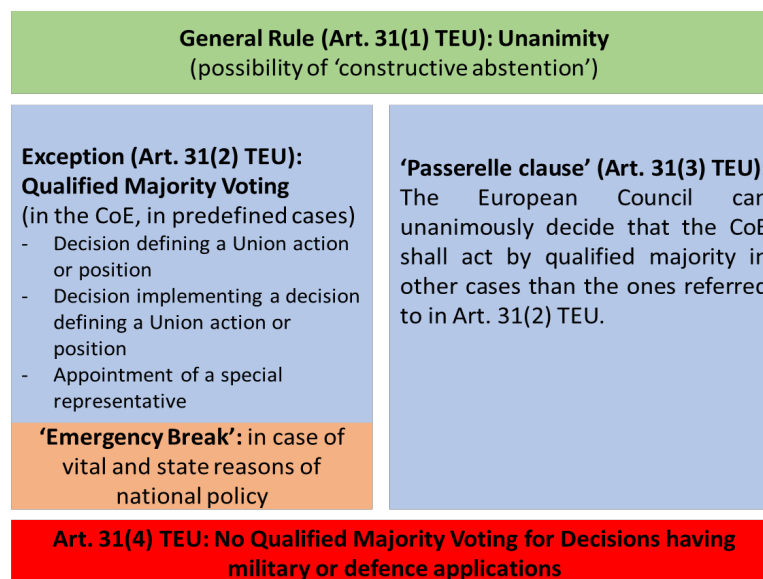


Figure 1: Decision-making procedures in the CFSP (own illustration)

<sup>21</sup> Herdegen, 2018, 526.

<sup>22</sup> Art. 29 TEU.

<sup>23</sup> Art. 29 TEU.

<sup>24</sup> The Greens/EFA in the European Parliament, 2021, 5

<sup>25</sup> Art. 28(1) TEU.

<sup>26</sup> Art. 28(2) TEU; Herdegen, 2018, 525.

<sup>27</sup> Art. 24(1) TEU; Art. 31(1) TEU; Herdegen, 2018, 524. The exception to this explicit rule is the adoption of sanctions (cf. Chap. 3.2.2.).

As a general rule, decisions in the CFSP are taken by the European Council and the CoE acting unanimously unless the TEU provides otherwise. Therefore, every Member State holds a ‘veto power’ and can block a common position or decision. However, to allow for more flexibility, Art. 31(1) TEU foresees the possibility of a ‘constructive abstention’: a Member State may abstain from a unanimous vote in the CFSP and qualify its abstention by making a formal declaration. In that case, the Member State does not have to apply the decision. Yet, the Member State is obliged to refrain from actions that would impede the EU’s efforts to implement the decision in question.<sup>28</sup> In practice, constructive abstention has, however, only ever been used once when Cyprus abstained in a vote on the establishment of the EU’s rule of law mission EULEX Kosovo in 2008.<sup>29</sup>

Art. 31(2) TEU lists the limited number of exceptions where the CoE decides on CFSP matters by means of QMV. QMV is enabled when the CoE adopts a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union’s strategic interests and objectives or on a proposal which the High Representative has presented following a specific request from the European Council. Moreover, Art. 31(2) TEU requires the use of QMV when the CoE adopts any decision implementing a decision defining a Union action or position<sup>30</sup> or when the CoE appoints a special representative. However, Art. 31(2) TEU foresees an ‘emergency break’: If a Member State objects to a decision being taken by QMV for “vital and stated reasons of national policy”, a vote will not take place.<sup>31</sup>

At the same time, the Lisbon Treaty introduced the possibility to extend the use of QMV in the CFSP without the need to change the Treaties. The so-called ‘passerelle clause’ in Art. 31(3) TEU states that “the European Council may unanimously adopt a decision stipulating that the CoE shall act by a qualified majority in cases other than those referred to in the second paragraph [Art. 31(2) TEU]”. In other words, the European Council can decide unanimously that the CoE will use QMV instead of unanimity in certain predefined cases. However, Art. 31(4) introduces an additional safeguard for Member States: Neither Art. 31(2) TEU nor Art. 31(3) TEU may be applied to decisions having military or defence applications. For military and defence matters, decision-making by QMV is thus precluded by the Treaties.<sup>32</sup>

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<sup>28</sup> Art. 31(1) TEU; European Commission, 2018, 7 et seq.

<sup>29</sup> Koenig, 2020, 5.

<sup>30</sup> Cremer, 2022b, para. 12. Note that in this third case a QMV decision “implementing a decision defining a Union action or position” is based on a previous unanimous decision of the CoE defining a Union action (Art. 28[1] TEU) or a Union position (Art. 29 TEU). Meanwhile, in the first and the second case, the QMV decision of the CoE is based on a previous decision by the European Council which was adopted by unanimity or consensus.

<sup>31</sup> Art. 31(2) TEU; European Commission, 2019, 7 et seqq.

<sup>32</sup> Art. 31(3) TEU; Art. 31(4) TEU; European Commission, 2018, 9 et seq.

**Reminder – voting procedures in the Council of the European Union (CoE)**

**Qualified majority (Art. 16(4) TEU):** A qualified majority is defined as “a majority of 55% Member States, comprising at least 15 of them and representing Member States comprising at least 65% of the population of the Union”.

**Unanimity (Art. 238(4) TFEU):** A decision by unanimity is reached if no Member State votes against a decision. Abstentions do not prevent the adoption of decisions taken by the CoE acting unanimously.

## 3.2. Sanctions

### 3.2.1. Definition

“European Union (EU) sanctions or restrictive measures are unilateral tools at the disposal of the Union in the conduct of its foreign policy.”<sup>33</sup> Sanctions are used as part of the CFSP to achieve general policy goals. These goals include safeguarding the EU’s values, fundamental interests and security, the preservation of peace, the consolidation and support of democracy, the rule of law, human rights, principles of international law and the prevention of conflicts.<sup>34</sup> To achieve these general policy goals,<sup>35</sup> individualised decisions targeting a government of a non-EU country may be directed against an entity such as a company, a group, an organisation, or an individual.<sup>36</sup>

### 3.2.2. Adoption Procedure

The CoE adopts a sanction through a ‘two-steps procedure’.<sup>37</sup> First – upon a proposal by the High Representative or a Member State<sup>38</sup> –, a unanimous CFSP Decision is taken by the CoE, to “define the approach of the Union to a particular matter of a geographical or thematic nature”.<sup>39</sup> Second – upon a joint proposal by the High Representative and the European Commission –, the CoE adopts a Council regulation by qualified majority.<sup>40</sup> Guided by the *Basic principles on the use of restrictive measures*

<sup>33</sup> Wouters et al., 2021, 177.

<sup>34</sup> European Council, 2022a; cf. Eckes, 2018, 206.

<sup>35</sup> Cf. Art. 21 TEU setting out the CFSP objectives.

<sup>36</sup> Eckes, 2018, 206; European Council, 2022a.

<sup>37</sup> Directorate-General for External Policies Policy Department, 2018, 11; cf. Figure 1 for an overview.

<sup>38</sup> Such a proposal is usually based on strategic decisions laid out by the European Council (cf. Art. 26 (2) TEU; Hummer, 2018a, para. 8; Ramopoulos, 2019, para. 2).

<sup>39</sup> Art. 29 TEU; Cremer, 2022a, paras. 2-3, 10; Eckes, 2018, 206; Hummer, 2018a, para. 9; Ramopoulos, 2019, para. 6; Wouters et al., 2021, 178. While Art. 29 TEU forms the legal basis for the content of a CFSP Decision eventually leading to a sanction, the adoption is regulated by Art. 30 TEU and therefore, a unanimous decision is needed (Erlbacher, 2019, para. 8).

<sup>40</sup> Art. 215 TFEU. There are also other mechanisms to adopt autonomous EU-sanctions. However, the discussion for this meeting of the European Council should focus on the adoption procedure through Art. 215 TFEU.

(sanctions),<sup>41</sup> the CoE regulation may include sanctions against a third State<sup>42</sup> or “against natural or legal persons and groups or non-State entities.”<sup>43</sup>

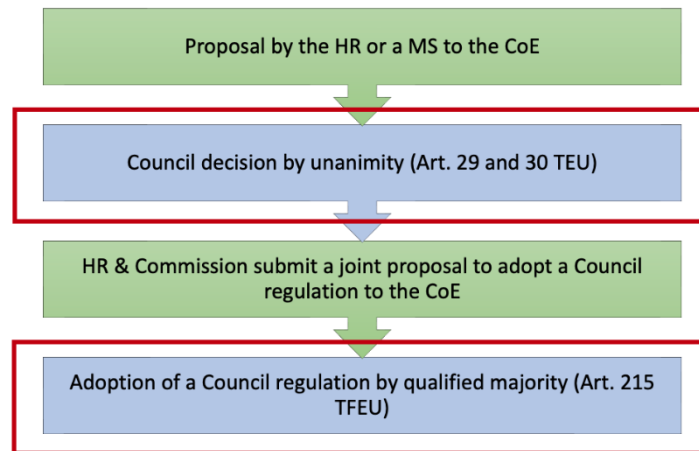


Figure 2: EU sanctions adoption process (own illustration)

One may wonder, why the CoE must vote twice to adopt a sanction. The reason behind this procedure is that the CFSP Decision is not a legislative act of the EU.<sup>44</sup> The CFSP Decision binds the High Representative and the Member States to design their respective foreign and security policies.<sup>45</sup> However, such a duty of designing a policy does not yet affect the rights and duties of individuals.<sup>46</sup> The CFSP Decision is the legally necessary impulse to activate a decision under Art. 215 TFEU, which in turn may produce a binding regulation with direct effect towards individuals.<sup>47</sup>

### 3.2.3. Types

Sanctions in a narrow sense vary from arms export embargos for a certain region to asset freezes of a natural or legal person.<sup>48</sup> From a general and systematic perspective, different types of sanctions can be identified regarding their policy or content, their link to sanctions enacted by the UNSC and finally by their target.<sup>49</sup> Sanctions may be directed towards a certain thematic threat, such as the use of chemical

<sup>41</sup> Cf. Council of the European Union, 2004.

<sup>42</sup> Art. 215 (1) TFEU. Natural or legal persons with a sufficient link to the targeted country such as the rulers, entities controlled by the rulers and individuals in the military or police may also be sanctioned under subparagraph 1 (cf. Judgement in *Kadi and Al Barakaat International Foundation v Council and Commission [Kadi I]*, C-402/05 P and C-415/05 P, EU:C:2008:461, para. 166; Judgement in *Johannes Tomana and Others v Council and Commission*, C-330/15 P, EU:C:2016:601, para. 84; Judgement in *Pye Phyo Tay Za v Council of the European Union*, C-376/10 P, EU:C:2012:138, paras. 63 et seq.; for an overview Wouters et al., 2018, 178 et seq.; Erlbacher, 2019, para. 16; Cremer, 2022c.

<sup>43</sup> Art. 215 (2) TFEU.

<sup>44</sup> Cf. Art. 24 (1) TEU.

<sup>45</sup> Cremer, 2022a, paras. 4 et seqq.

<sup>46</sup> Opinion of AG Wathelet in *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, C-72/15, EU:C:2016:381, para. 72; Cremer, 2022a, para. 9; Eckes, 2018, 207.

<sup>47</sup> Cremer (2022a), para. 10.

<sup>48</sup> European Commission, n.d.; European Council, 2022d; Council of the European Union, 2018, para. 14; cf. Erlbacher, 2019, paras. 11-14; Hummer, 2018b, para. 3. Consult the [EU Sanctions Map](#) for an overview on all EU sanctions currently existing.

<sup>49</sup> Cf. Figure 2.

weapons,<sup>50</sup> or can be geographically oriented towards a (group of) third States, which, so far, was the more common approach.<sup>51</sup> Distinguishing EU sanctions by their UN link essentially comes down to the question of how much autonomy the EU has, to decide the content of a sanction. Three general categories can be identified: (i) Decisions on implementing a sanctions regime adopted by the UNSC without discretion,<sup>52</sup> (ii) mixed sanctions regimes where the EU “reinforce(s) UN sanctions by applying measures in addition to those imposed by the UNSC”<sup>53</sup> and (iii) autonomous regimes where the EU decides sanctions on its own initiative “to counter the extraterritorial effects of legislation and actions of third States.”<sup>54</sup> A final distinction is made by the TFEU in targeting on the one hand third States through para. 1 and on the other “natural or legal persons and groups or non-State entities” through para. 2. This final category does not have an impact on the decision-making procedure. However, the distinction matters with regards to the rights of individual natural or legal persons, whether they are targeted through para. 1 or 2, as the applicability of para. 1 depends on the relation between the individual and the targeted third State.<sup>55</sup>

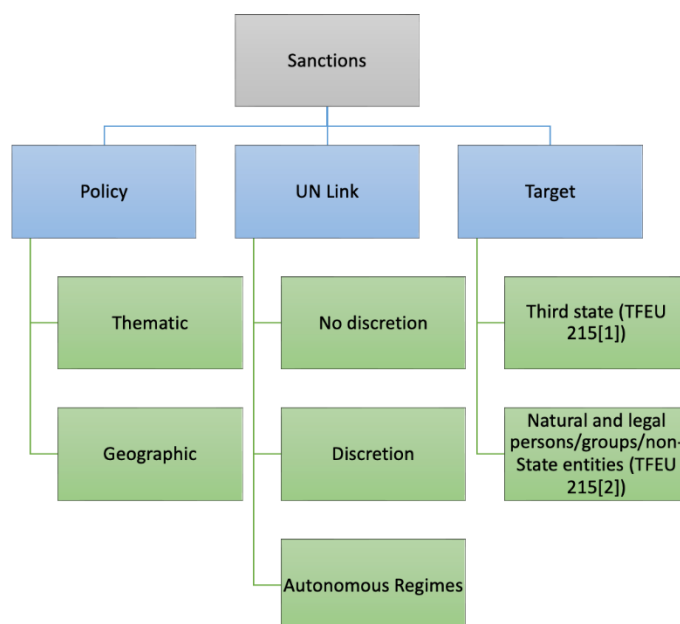


Figure 3: Different types of EU sanctions (own illustration)

<sup>50</sup> Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons (which targeted natural and legal persons in connection with chemical weapons programmes in Syria as well as individuals involved in the Novichock attack against Sergei Skripal on 4 March 2018), followed by Council Regulation (EU) 2018/1542 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons.

<sup>51</sup> See for example most recently Council Decision (CFSP) 2022/1271 of 21 July 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine followed by Council Regulation (EU) 2022/1269 of 21 July 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine; cf. European Council, 2022d) for an overview on sanctions enacted against Russia, Belarus, Iran and North Korea; Wouters et al., 2018, 180.

<sup>52</sup> See for example *supra* note 42.

<sup>53</sup> European Council, 2022a; Wouters et al., 2018, 180. See for example sanctions taken against Lybia and North Korea.

<sup>54</sup> Wouters et al., 2018, 177; European Council, 2022a. See *supra* note 43 for an example of an autonomous regime.

<sup>55</sup> Cf. *supra* note 34 on Art. 215(1) TFEU; Wouters et al., 2018, 178.

#### *3.2.4. Frame of Discussion*

The following chapter outlines issues primarily concerned with autonomous regimes or at least sanctions where the EU possesses the discretion to deploy sanctions in addition to measures taken by the UNSC. The reason behind this approach is to focus on institutional and material questions in deciding on EU sanctions and less on issues, such as increasing effectiveness of implementing UN sanctions.

## 4. Issues

### 4.1. Decision-Making Procedure on Sanctions

As outlined in Chap. 3.1.2., decisions in the CFSP are generally taken by the European Council and the CoE acting unanimously. This also includes CoE decisions on the establishment of new sanctions regimes.<sup>56</sup> Thus, every EU Member State possesses a veto right and can block CFSP Decisions. According to the Commission, the requirement for unanimity “has not prevented the Union from being active and taking strong positions on foreign policy matters”. However, the unanimity rule has “increasingly affected the speed and ability of the EU to act in the global arena”.<sup>57</sup> Therefore, in the view of the Commission, the EU must enhance the efficiency of its decision-making in the CFSP to fulfil its ambition of becoming a stronger global actor as set out in the 2017 Rome Declaration.<sup>58</sup>

#### *4.1.1. Illustration: One or Few Member States Blocking Common EU Decisions in the CFSP*

In the past years, there have been several instances where one or very few EU Member States have blocked, slowed down or diluted important CFSP Decisions including on sanctions. In 2017, Hungary blocked the renewal of an arms embargo against Belarus until all other Member States agreed to exempt a certain category of small arms. When the embargo had to be extended again a year later, Hungary conditioned its approval to the extension of the exception to another category of arms. Meanwhile in the summer of 2017, Greece delayed the adoption of targeted sanctions against Venezuela in response to President Nicolas Maduro dissolving the democratically elected National Assembly of the country. The sanctions were only adopted in November 2017 after the situation in Venezuela had further deteriorated. Similarly, individual Member States have blocked common positions of the EU on human rights issues as well as decisions on civilian CSDP missions. These situations have in common that the Member States in question did not threaten to or used their veto because of differences in long-term interests, but for reasons that were not always related to the specific issue at stake.<sup>59</sup>

A high-profile example of how Member States may use their national veto for their own particular interests is provided by the debate on the adoption of sanctions against Belarussian persons following the presidential elections in 2020. Cyprus, at first, blocked the establishment of a sanctions regime targeting 40 Belarussian persons that were accused of having been involved in the election fraud and the violent suppression of the peaceful protests that followed the election. The country’s government actually agreed with the sanctions in principle, however, Cyprus stated that it would only support the Decision if the other 26 Member States also agreed to impose sanctions on Turkey for illegally searching

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<sup>56</sup> Chap. 3.2.2.

<sup>57</sup> European Commission, 2018, 2.

<sup>58</sup> European Commission, 2018, 2.

<sup>59</sup> European Commission, 2018, 4 et seqq.; Koenig, 2020, 2.

for natural gas in Cypriot waters. Cyprus finally withdrew its veto and the sanctions against Belarus were adopted, but the delay put the credibility of the EU's foreign policy in question.<sup>60</sup>

Even more recent is the example of Hungary's opposition against the adoption of an embargo against the import of Russian oil in May 2022 in the context of Russia's invasion of Ukraine. As part of its sixth package of sanctions against Russia, the EU originally wanted to impose a complete embargo against the import of oil from Russia. However, Hungary blocked an embargo on oil citing its dependency on Russian oil. Finally, a compromise was found at the European Council summit on 31 May 2022: The EU imposed an embargo on seaborne imports of Russian oil, but excluded oil imported from Russia via pipelines from the embargo.<sup>61</sup>

#### *4.1.2. The 'Juncker Proposal': Extending the Use of QMV in the CFSP*

Even though the Member States managed to agree on a compromise in the examples mentioned above, the respective discussions on the use of the veto were divisive and damaged the EU's influence and cohesiveness.<sup>62</sup> In the opinion of the Commission, the EU therefore needs to increase the efficiency in its foreign policy. In his 2017 State of the Union Address, then Commission President Jean-Claude Juncker, called upon the Member States to discuss for which CFSP Decisions QMV instead of unanimity could be applied.<sup>63</sup> The proposal gained traction in 2018 when Germany and France agreed to explore possibilities of using QMV in the CFSP in the so-called Meseberg Declaration.<sup>64</sup>

On 12 September 2018, the Commission published a Communication (COM[2018] 647) entitled "A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy" which contained a proposal to enhance the efficiency of decision-making in the CFSP.<sup>65</sup> Firstly, the Commission encouraged the Member States to exploit the potential of the Treaty provisions on 'constructive abstention' (Art. 31[1] TEU) and the 'enabling clauses' of Art. 31(2) TEU to their fullest extent.<sup>66</sup> On sanctions in particular, the Commission suggested that the CoE should consistently use QMV for amending the listings of all EU sanctions regimes in accordance with Art. 31(2) TEU (third indent). Secondly, the Commission suggested enhancing CFSP decision-making by using the 'passerelle clause' in Art. 31(3) TEU. The Commission deemed a shift from QMV to unanimity to be realistic in three areas: EU positions on human rights in multilateral fora, the adoption and amendment of EU sanction regimes and, lastly, civilian CSDP missions. On sanctions in particular, the Commission suggested that the European Council unanimously adopts a decision based on Art. 31(3) TEU stipulating

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<sup>60</sup> Ernst, 2020; Keystone-SDA, 2020.

<sup>61</sup> Franke, 2022.

<sup>62</sup> European Commission, 2018.

<sup>63</sup> Juncker, 2017.

<sup>64</sup> Meseberg Declaration, 2018, 1 et seq.

<sup>65</sup> European Commission, 2018.

<sup>66</sup> Cf. Chap. 3.1.2.



that CFSP Decisions establishing a sanctions regime are adopted by the CoE using QMV instead of unanimity.<sup>67</sup>

The Commission invited the Member States' Heads of State and Government to endorse its proposals at the European Council meeting on 9 May 2019 in Sibiu, Romania.<sup>68</sup> Although the proposal of the Juncker Commission was discussed at various levels throughout 2018 and 2019, it was not taken up by the European Council.<sup>69</sup> Nevertheless, Juncker's successor as Commission President, Ursula von der Leyen, continued to push for the extension of QMV in the CFSP: In her first State of the Union Address in 2020, Commission President von der Leyen proposed to use QMV in areas such as sanctions and human rights.<sup>70</sup> Moreover, in her mission letter to the current High Representative, Josep Borrell, she mandated him to make use of Treaty provisions which allow the EU to "overcome unanimity constraints that hamper our foreign policy".<sup>71</sup>

#### *4.1.3. Pros and Cons of Extending the Use of Qualified Majority Voting*

The main argument of proponents for extending the use of QMV is that it allows for quicker decision-making and prevents cases where one or very few Member States paralyse EU foreign policy.<sup>72</sup> Accordingly, the Commission argues in its 2018 Communication that the reason to move from unanimity to QMV is "simple, compelling and has always been the same. [...] when a certain level of ambition is sought in a particular policy area, there comes a moment when the unanimity rule slows down progress and in some cases prevents the EU from adjusting to changing realities".<sup>73</sup> The Commission therefore argues that the use of QMV would make the EU "a stronger, more effective and more credible actor" and "would help the Union to pull its weight acting in concert as more than the sum of its parts".<sup>74</sup> The Commission further pointed out that enhancing the efficiency of decision-making was even more important considering a possible future enlargement of the EU.<sup>75</sup>

Moreover, some scholars argue that the extended use of QMV in CFSP would increase the influence of the High Representative. This would also remove the 'bureaucratic deterrent' of working through the EU and incentivize smaller Member States to initiate proposals and build coalitions around them. In addition, it has been argued that QMV would eliminate the risk that an external actor exerts influence on an individual Member State to compromise an EU decision. On the other hand, scholars have pointed to the risk of smaller Member States being marginalised if CFSP Decisions are adopted by a qualified

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<sup>67</sup> European Commission, 2018.

<sup>68</sup> European Commission, 2018, 13.

<sup>69</sup> Koenig, 2020, 3.

<sup>70</sup> Von der Leyen, 2020, 16.

<sup>71</sup> Von der Leyen, 2019, 5; cited in Latici, 2021, 3.

<sup>72</sup> Latici, 2021, 4.

<sup>73</sup> European Commission, 2018, 2.

<sup>74</sup> European Commission, 2018, 3.

<sup>75</sup> European Commission, 2018, 3.

majority. Many smaller Member States have reservations about surrendering their national veto which they see as an 'insurance policy' to protect their national interests.<sup>76</sup>

Furthermore, the President of the European Council, Charles Michel, has publicly defended the unanimity rule arguing that it "pushes us to work unrelentingly to unite the Member States".<sup>77</sup> In his opinion, the strength of the EU lies in its unity through a "lasting commitment by the 27 countries" to the adopted decision.<sup>78</sup> Moving from unanimity to QMV could thus potentially weaken EU unity and reduce the political leverage of a decision.<sup>79</sup> The Commission as well as High Representative have tried to dissuade such concerns. They argue that, in practice, even in policy areas which fall under QMV, the vast majority of decisions are de facto taken by consensus.<sup>80</sup> In their opinion, the prospect of a vote by qualified majority would incentivize Member States to find compromises that are acceptable to all.<sup>81</sup>

Lastly, some scholars have warned that a move towards QMV would potentially weaken the democratic legitimacy of CFSP Decisions. The veto available to every Member State enables national parliaments to hold their respective governments accountable. Under QMV, however, this 'chain of legitimacy' is broken as individual governments might be outvoted. Scholars therefore argue that a potential democratic deficit resulting from the introduction of QMV in the CFSP could be counteracted by enhancing the involvement of the European Parliament in CFSP decision-making. In fact, the introduction of QMV in other policy areas has often coincided with the extension of the competences in the European Parliament in the same field.<sup>82</sup>

#### *4.1.4. Member State Positions on Extending the Use of QMV in the CFSP*

As mentioned in the previous section, the proposal of the Juncker Commission has not been taken up by the European Council. Based on confidential accounts from diplomatic sources, Nicole Koenig has managed to group the preferences of Member States on the proposal, as they were expressed in various meetings in the 2018–2019 period, into four broad groups (see table in the appendix).<sup>83</sup> The proposal was supported by Germany, Finland, Belgium, Spain, Sweden and the Netherlands as well as France. The proponents of extending QMV to the CFSP thus were a clear minority and only included Western European Member States. Koenig further classified eleven Member States as being in the 'grey zone', i.e., they were ambiguous or sceptical about the proposal or they did not have a finalised position. Lastly, ten Member States, mostly from Eastern and Southern Europe, constituted the group of opponents.

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<sup>76</sup> Latici, 2021, 4 et seqq.

<sup>77</sup> Latici, 2021, 6.

<sup>78</sup> Latici, 2021, 6.

<sup>79</sup> Latici, 2021, 4.

<sup>80</sup> European Commission, 2018, 3.

<sup>81</sup> European Commission, 2018, 3.

<sup>82</sup> Latici, 2021, 6; Linke, 2020, *passim*.

<sup>83</sup> Koenig, 2020, 3 et seq.

Notably, this included Hungary, Cyprus and Greece, which had previously blocked or delayed the adoption of sanctions regimes.<sup>84</sup>

To conclude, the proposal of the Juncker Commission presented a bundle of measures to reform decision-making in the CFSP to increase its efficiency. The Heads of State and Government at the European Council in St. Gallen are invited to consider the ‘Juncker proposal’ as a basis for their discussion on decision-making regarding sanctions. However, the Presidency also encourages the Heads of State and Government to come up with different proposals based on their own research.

## 4.2. Material Challenges

### 4.2.1. Content of Sanctions

The content of sanctions can be broken down into three different parts: (1) the target of the sanction, (2) the effect/nature of the sanction and (3) the ultimate objective behind the sanction. Restrictive measures can target either specific individuals (natural persons or entities), in this instance they are called targeted measures, or a State itself, then they are called comprehensive measures. In regard to their nature, we differentiate between economic and non-economic sanctions<sup>85</sup>. Under non-economic sanctions the following measures are to be understood:

- Arms embargoes
- Restrictions on admission; of listed persons (amounts to a travel ban). The targeted persons cannot enter the EU if the person is outside of the EU or travel between the Member States if the said person is in the EU.

They are non-economic since they do not target a specific economic activity or harm individuals or the State in an economic manner. Under economic sanctions the following measures are to be understood:

- Freezing of assets: assets belonging to listed persons or entities. Assets of these persons or entities within the EU are frozen and thereby no longer accessible. Vice versa persons or entities within the EU cannot make funds available to listed persons or entities.
- Economic sanctions: concern specific sectors of economic activity, including import or export bans on certain goods, investment bans, prohibitions on supplying certain services.<sup>86</sup>

The EU follows different objectives with its sanctioning system. The Commission lists these objectives as the promotion of international peace and security, preventing conflicts, supporting democracy, the rule of law and human rights<sup>87</sup> and defending the principles of international law.<sup>88</sup>

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<sup>84</sup> Cf. Chapter 4.1.2.; Koenig, 2020, 3 et seq.

<sup>85</sup> See Meissner, 2022 for more information on the differentiation between economic and non-economic sanctions.

<sup>86</sup> Meissner, 2022, 6 et seq.

<sup>87</sup> The values enshrined in Art. 2 TEU.

<sup>88</sup> European Commission (n.d.).

#### 4.2.2. *Fundamental Rights and Sanctions*

As we have seen in the previous paragraph, sanctions are used for various purposes, mainly to achieve a certain political outcome in another state. However, sanctions are not without issues and there is an intrinsic difference between legal rules and procedures and political objectives. They are a forceful tool imposing direct obligations on private parties that interfere with the fundamental rights of these individuals.<sup>89</sup>

The differentiation between targeted and comprehensive sanctions has already gone a long way in easing the infringements on fundamental rights of individuals. Prior to 2000, comprehensive measures were the common sanctioning tool, but they came with great cost as the entire population was made responsible for the acts of very few. Enabling institutions to specifically target certain individuals partially solved this problem, yet other issues remain.<sup>90</sup>

Sanctions are the only CSFP strand that have the potential to directly affect the rights of individuals, including impacts of a severe manner. In the words of Advocate General (AG) Sharpston: “It is worth recalling that the consequences of listing are very serious. Funds and other financial assets of economic sources are frozen [...] for a person, entity or group that is named in the [...] list, normal economic life is suspended.”<sup>91</sup> These words of AG Sharpston illustrate quite well the gravity of the EU-sanctions regime and the way in which they affect the life of the targeted individual. Others even suggested that the effect of sanctions targeting an individual is comparable to punishments under criminal law.<sup>92</sup>

#### 4.2.3. *Two Problematic Developments*

The interplay between objectives of the CoE to target specific individuals and fundamental rights of persons listed gained attention through the *Kadi* case, decided in 2008.<sup>93</sup> Without going into details of the case, the European Court of Justice (ECJ) annulled the listing of Mr Yassin Abdullah Kadi due to a violation of his due process rights including the right to be heard and the right to effective judicial review.<sup>94</sup> The main problem was that the CoE was unable to substantiate the reasons and the evidence for Mr Kadi’s listing.<sup>95</sup> This landmark decision led to a series of cases, making questions regarding restrictive measures one of the most frequent issues heard by the CJEU.<sup>96</sup> Between 2014 and 2017, the CoE only won a third of cases.<sup>97</sup> This trend was reversed in 2015 due to two developments: First, the CoE changed its standard formulation of listing criteria to broader categories of potential individuals.<sup>98</sup>

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<sup>89</sup> Eckes, 2018, 206.

<sup>90</sup> Eckes, 2018, 218.

<sup>91</sup> Opinion of AG Sharpston in *Council v LTTE*, C-599/14 P, EU:C:2016:723, para. 102.

<sup>92</sup> Eckes, 2018, 2018.

<sup>93</sup> Judgement in *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402 & 415/05 P, EU:C:2008:461.

<sup>94</sup> Cf. Directorate-General for External Policies Policy Department, 2018, 12.

<sup>95</sup> Eckes, 2018, 219.

<sup>96</sup> Directorate-General for External Policies Policy Department, 2018, 12.

<sup>97</sup> Bishop, 2017, cited in Directorate-General for External Policies Policy Department, 2018, 12.

<sup>98</sup> Cf. Directorate-General for External Policies Policy Department, 2018, 15.

Second, the CJEU increasingly accepted lower thresholds of the evidentiary standard to be met by the CoE.<sup>99</sup>

With regards to the first observation, the Council revised its standard sanctions listing formulation from “persons whose activities seriously undermine democracy, human rights and the rule of law”<sup>100</sup> to “those identified as responsible for the policies or actions that have prompted the EU decisions to impose restrictive measures and those benefiting from and supporting such policies and actions.”<sup>101</sup> The latter formulation of the listing guidelines offers the CoE the possibility to target a significantly higher circle of individuals, which could in principle extend to all sympathisers of sanctioned State’s leadership.<sup>102</sup> Critic voices draw attention to the fact that such a broadening exercise not only stands against the idea of a ‘targeted sanction’ and combine this worry with the lack of effective delisting mechanisms.<sup>103</sup> Sanctions aim to cause a change in behaviour. If a government, as part of a comprehensive sanction is targeted, a change in behaviour in its policy development may lead to a delisting.<sup>104</sup> However, it is difficult to imagine how a delisting of an individual ‘supporting certain policies’ could work.<sup>105</sup>

With regards to the second observation, the CJEU first found in *Tay Za*, that the link between the affected person and the relevant State’s conduct had to be established by means of a set of sufficiently specific, precise, concrete and individualised evidence.<sup>106</sup> A listing based on an assumption was rejected.<sup>107</sup> However, the CJEU held in *Afrasiabi* that merely a set of indicia was sufficient to discharge the CoE from its burden of proof.<sup>108</sup> In *Anbouba* and *Maklouf*, the CJEU went even further and rejected submissions by the applicants that the CoE’s allegations were merely based on presumptions. The CJEU accepted a listing based on a presumption and combined with ‘rules of general experience’.<sup>109</sup> This development led to a threshold regarding the burden of proof below ‘probable cause’.<sup>110</sup> Such a practice may open the door to a restriction of rights comparable to criminal punishments without a need to ever having to put forward any evidence or reasons for a listing.<sup>111</sup>

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<sup>99</sup> Eckes, 2018, 225; Pantaleo, 2016, 191 et seq.

<sup>100</sup> Directorate-General for External Policies Policy Department, 2018, 15.

<sup>101</sup> Council of the European Union, 2018, para. 13.

<sup>102</sup> Directorate-General for External Policies Policy Department, 2018, 16; to illustrate see Judgement in *Central Bank of Iran v Council*, C-266/15 P, EU:C:2016:208 and Judgement in *National Iranian Oil Company v Council*, C-440/14 P, EU:C:2016:128.

<sup>103</sup> Eckes, 2018, 220 et seqq.

<sup>104</sup> See for example *Council Decision 2013/160/CFSP of 27 March 2013 amending Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe*.

<sup>105</sup> Eckes, 2018, 220 et seq.

<sup>106</sup> Judgement in *Tay Za v Council*, C-376/10 P, EU:C:2012:128, para. 70.

<sup>107</sup> Pantaleo, 2016, 191.

<sup>108</sup> Judgement in *Afrasiabi and Others*, C-72/11, EU:C:2011:874.

<sup>109</sup> Judgement in *Anbouba v Council*, C-605/13 P, EU:T:2013:427, paras. 35–39, 48; Judgement in *Mohammad Maklouf v Council*, T-509/11, EU:C:2015:411, para. 75.

<sup>110</sup> Eckes, 2018, 226.

<sup>111</sup> Eckes, 2018, 227.

#### 4.2.4. *Rethinking Targeted Sanctions*

Admittedly, the robustness of listing decisions has improved in front of the CJEU since 2015. Some argue however, that this robustness should not be a result of broader listing criterias and low evidentiary standards.<sup>112</sup> Regarding listing criterias of sanctions, one may use for example the analytical capacities of the European External Action Service and the Commission structures surrounding the design of individual sanctions.<sup>113</sup> Another option that could be included in a new guideline for listing criterias could be regular listing reviews, not only concerning the pertinence of the listing but also with regards to the existence of sufficient evidence to justify a listing in front of the CJEU.<sup>114</sup> Finally, when it comes to the evidentiary basis, one may discuss whether the current practice of the CJEU is satisfactory.<sup>115</sup>

### 4.3. Export of Sanctions Through Alignment

#### 4.3.1. *Alignment to CFSP Decisions*

So far, this guide focused on the procedure leading to the adoption of a sanction and questions relating to the effects of a sanction on targeted entities. However, an analysis on the use of sanctions as part of CFSP cannot be limited to an isolated sender-target approach. As shown above, sanctions are used as a mechanism to promote and enforce the EU's CFSP values.<sup>116</sup> To reach this goal on a broader scale, the EU, since the 1990s, has requested third countries to publicly declare support for EU sanctions through the *Alignment Process*.<sup>117</sup> After a (CFSP) Decision is made, a pool of candidate States to the EU, potential candidate States and Member States of the European Free Trade Association (excluding Switzerland) is invited to align.<sup>118</sup> Alignment is formally noted through a declaration communicated by the High Representative to a CFSP Decision of the CoE.<sup>119</sup>

Inviting third parties to join a sanctions regime offers the EU a practical method to export its CFSP values to 'bystanders' which in turn receive an opportunity to show "normative proximity".<sup>120</sup> Alignment therefore plays a significant role in the EU enlargement process<sup>121</sup> and is monitored by the Commission in its annual reports on candidate States.<sup>122</sup> Theoretically, alignment is a chance for the EU

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<sup>112</sup> Directorate-General for External Policies Policy Department, 2018, 28.

<sup>113</sup> Directorate-General for External Policies Policy Department, 2018, 29.

<sup>114</sup> Directorate-General for External Policies Policy Department, 2018, 28.

<sup>115</sup> Cf. Eckes, 2018, 228 et seq.

<sup>116</sup> Cf. Chap.3.2.1; Art. 21(1) TEU.

<sup>117</sup> Beaucillon, 2021, 197; Hellquist, 2016, 1000.

<sup>118</sup> Hellquist, 2016, 1009; Marciacq & Jaramillo, 2015, 208. Alignment is not offered to Switzerland as it has a policy of never aligning itself with EU statements (Marciacq & Jaramillo, 2015, 212; cf. Directorate-General for External Policies Policy Department, 2018, 17).

<sup>119</sup> See for example Council of the European Union, 2022. However, expectations towards alignment may already be set at the level of the European Council (see for example European Council, 2022b, para. 5 where the European Council called upon "all countries to align with EU sanctions, in particular candidate countries").

<sup>120</sup> Hellquist, 2016, 998; Marciacq & Jaramillo, 2015, 204; cf. Beaucillon, 2021, 197.

<sup>121</sup> Cf. Tusk, 2015.

<sup>122</sup> See for example European Commission, 2021a, 127 noting that Albania has a "good level of preparation". Serbia in turn received a rating of "moderately prepared" (European Commission, 2021b, 124).

to assume wider leadership in the European neighbourhood and to build a block for a truly continental foreign policy.<sup>123</sup> Practically, however, alignment with sanctions cannot be described as an overwhelming success. So far, only Norway and Albania declared alignment on every occasion following an invitation.<sup>124</sup>

#### 4.3.2. Alignment Challenges

Criticism to alignment has been raised from both a procedural and a material perspective. From a procedural perspective, alignment is an asymmetrical process which may particularly instrumentalize EU neighbours.<sup>125</sup> From a material perspective, alignment can be understood as a generalisation of unilateral sanctions with possibly negative impacts on human rights.<sup>126</sup>

The alignment procedure does not leave room for negotiation.<sup>127</sup> The CoE takes a decision, and third countries are invited to align.<sup>128</sup> Though not a legal accession obligation, non-alignment is seen as an act of disloyalty and as an impediment to further partnership negotiations.<sup>129</sup> Exemplifying for alignment as political conditionality is the inclusion of alignment policy in the annual report on candidate States, followed by improvement expectations.<sup>130</sup> The Commission justifies its approach with the idea, that “Member States must be able to conduct political dialogue, to align with EU statements [...] and to apply agreed sanctions and restrictive measures”<sup>131</sup>. However, a State’s decision not to align with a CFSP Decision (possibly making way to adopt sanctions) is not automatically a rejection or opposition to the political issue in question. Take for example the EU’s sanctions regime against Russia, beginning in 2014. States such as Serbia, North Macedonia and Armenia supported the UN General Assembly resolution 68/262 of 23 March 2014 on the territorial integrity of Ukraine. However, they initially completely rejected the sanctions regime by the EU against Russia. The decision of non-alignment can therefore not be identified as an act of disloyalty or an act of position. Regarding the political dialogue, there was no disagreement on the issue. Rather, unilateral EU leadership and the use of sanctions as a tool were rejected.<sup>132</sup>

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<sup>123</sup> Cardwell, 2015, 304 and 309.

<sup>124</sup> Hellquist, 2016, 1012; European Commission 2021a, 128.

<sup>125</sup> Hellquist, 2016, 1001; Marciaq & Jaramillo, 2015, 208.

<sup>126</sup> Cf. Beaucillon, 2021, 202.

<sup>127</sup> See for example Serbian Prime Minister Vucic on the question of solidarity with Ukraine in 2014: “*Solidarity in what? We were not consulted when sanctions against Russia were introduced, nor when Russia responded by imposing counter-sanctions. Is it possible that we, who had no part in any of that, are now considered to be responsible by both sides?*” (Poznatov, 2014).

<sup>128</sup> Hellquist, 2016, 1011; Marciaq & Jaramillo, 2015, 208.

<sup>129</sup> Beaucillon, 2021, 214; Stasiukevych & Malovec, 2022, 19.

<sup>130</sup> Cf. European Commission, 2021a, 128; European Commission, 2021b, 124.

<sup>131</sup> European Commission, 2021a, 127.

<sup>132</sup> Hellquist, 2016, 1001.

Materially, increasing or even unconditional alignment logically leads to a proliferation of sanctions, possibly outside of monitoring procedures established by the EU.<sup>133</sup> Therefore, concerns exist that a tool, once deemed as an exceptional measure, is transformed into ordinary practice.<sup>134</sup>

#### 4.3.3. *Rethinking the Export of Sanctions*

Not aligning to a sanction or counter-sanction mechanism may be understood as an expression of disloyalty.<sup>135</sup> To avoid such ultimate classifications, a more substantiated approach could be suggested by the European Council. Is it possible to move from a unilateral export approach to a concerted multilateral approach?<sup>136</sup> One solution may include the idea of institutionalised consultation processes with third countries prior to an invitation to alignment. Institutionalisation could be organised through addressing the question of alignment in CFSP expert seminars (existing since February 2021). Another solution to overcome challenges rooted in the alignment procedure may be to institutionalise informal briefings which openly address the question of alignment.<sup>137</sup>

Apart from measures aiming to improve communication between EU Member States and third States in alignment questions, the European Council could address ideas on how to make sanctions alignment more attractive to third States, especially candidate and potential candidate States. Such ideas may include additional support as part of the Economic and Investment Plan for Western Balkans to mitigate economic shocks created by the war or the implementation of sanctions.<sup>138</sup> To the contrary, it is also imaginable to take a firmer, merit-based or conditional approach on financial support to candidates and potential candidates depending on their alignment track record.<sup>139</sup>

Concluding, a consideration of such steps requires a discussion on the flexibility of the EU in its CFSP positions and, therefore, ultimately on the willingness to include States beyond EU-membership in a reciprocal conversation. Whether such a conversation is even desired may also form part of the debate.

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<sup>133</sup> Beaucillon, 2021, 213.

<sup>134</sup> Douhan, para. 16.

<sup>135</sup> Hellquist, 2016, 998.

<sup>136</sup> Beaucillon, 2021, 197 and 213 and seq.

<sup>137</sup> Stasiukevych & Malovec, 2022, 20; Cf. Marcillac & Jaramillo, 2015, 209.

<sup>138</sup> Stasiukevych & Malovec, 2022, 19.

<sup>139</sup> Stasiukevych & Malovec, 2022, 20.



## 5. Guiding Questions

The following questions aim to provide you, esteemed Heads of State and Government, with some guidance in your preparation for the committee and during the committee sessions. Ideally, the Conclusions which you will adopt at the end of the Conference will address these questions:

- Should the European Council adopt a decision based on the ‘passerelle clause’ in Art. 31(3) TEU providing that decisions establishing a sanctions regime are adopted by a qualified majority by the CoE?
- Should the European Council mandate the CoE to consistently use qualified majority voting for amending for all EU sanctions regimes – in accordance with the procedures in Art. 31(2) TEU?
- Which issues should the CoE consider in updating its *Basic principles on the use of restrictive measures (sanctions)*?
- Should the European Council reconsider the EU’s approach to sanctions alignment of third states?

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## Annex

Table 1: Preferences on the use of the passerelle clause for CFSP<sup>140</sup>

Member State	Position
Austria	Ambiguous/sceptical/position not finalised
Bulgaria	Ambiguous/sceptical/position not finalised
Belgium	In favour
Croatia	Opposed
Cyprus	Opposed
Czech Republic	Opposed
Denmark	Ambiguous/sceptical/position not finalised
Estonia	Opposed
Finland	In favour
France	Issue linkage
Germany	In favour
Greece	Opposed
Hungary	Opposed
Ireland	Ambiguous/sceptical/position not finalised
Italy	Ambiguous/sceptical/position not finalised
Latvia	Opposed
Lithuania	Opposed
Luxembourg	Ambiguous/sceptical/position not finalised
Malta	Opposed
The Netherlands	In favour
Poland	Opposed
Portugal	Ambiguous/sceptical/position not finalised
Romania	Ambiguous/sceptical/position not finalised
Slovakia	Ambiguous/sceptical/position not finalised
Slovenia	Ambiguous/sceptical/position not finalised

<sup>140</sup> Koenig, 2020, 3.

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Spain	In favour
Sweden	In favour
UK (before Brexit)	Ambiguous/sceptical/position not finalised

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