

ТЕОРІЯ ТА ІСТОРІЯ ДЕРЖАВИ І ПРАВА, МІЖНАРОДНЕ ПРАВО

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TASKS AND POWERS OF THE HIGH REPRESENTATIVE OF THE EUROPEAN UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY: THEORETICAL AND LEGAL ASPECTS

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***The purpose** of this paper is to analyze tasks and powers of the High Representative of the European Union for Foreign Affairs and Security Policy, describe his foreign policy authority and reveal relationship with the other Union institutions. **Research methods** of the study are based on scientific and specifically legal approaches of knowledge, which were used to analyze doctrinal understanding of institutional structure, relations and theoretical and legal basis of providing foreign affairs and security policy in the EU. **Results:** this work seeks to provide an answer how in the context of an actual institutional structure of EU High Representative coordinates the relationship with the other Union institutions for the purpose of implementing efficient common foreign policy. **Discussion:** this work is dedicated to the role and position of High Representative of the Union for Foreign Affairs and Security Policy, particularly, during the exercise of foreign policy powers and interaction with other institutions of the European Union.*

***Key words:** foreign policy; the European Union; security policy; inter-institutional relations.*

Introduction. In order to fulfill the objective of maintaining peace and strengthening international security, the Union has equipped itself with a Common Foreign and Security Policy (CFSP).

CFSP of the European Union was established by the Treaty on European Union (TEU) in 1993 with the aim of preserving peace, strengthening international security, promoting international cooperation and developing and consolidating democracy, the rule of law and respect for human rights and fundamental freedoms.

The TEU introduced the «three-pillar system», with the CFSP as the second pillar. The 1997 Trea-

ty of Amsterdam established a more efficient decision-making process, including constructive abstention and qualified majority voting (QMV). In December 1999, the European Council established the role of High Representative for the CFSP. The 2003 Treaty of Nice introduced further changes to streamline the decision-making process and mandated the Political and Security Committee (PSC), which had been established under a Council decision in January 2001, to exercise political control and strategic direction of crisis management operations.

Problem statement and its relevance. The Treaty of Lisbon, which entered into force on 1 January 2009, provided the Union with legal personality and an institutional structure for its external service. In addition, it eliminated the pillar structure introduced by the TEU in 1993. The Treaty created a range of new CFSP actors, including the High Representative of the Union for Foreign Affairs and Security Policy who also serves as Vice-President of the Commission (VP/HR), and the new permanent President of the European Council. Moreover, it created the European External Action Service (EEAS) and upgraded the Common Security and Defence Policy (CSDP), which forms an integral part of the CFSP.

1. Tasks and powers of High Representative of the Union for Foreign Affairs and Security Policy under the Treaty of Lisbon

The Treaty of Lisbon (hereinafter referred to as or «the Lisbon Treaty», or «TL») was signed on 13 December 2007 and came into force on 1 January 2009, pending ratification by all Member States. The Treaty incorporates most elements of the failed EU Constitution, including those relating to the external representation of the EU, and will have a significant effect on the formulation and presentation of policies in this area. The Treaty of Lisbon is a consequence of the failure of the Constitution. From a legal standpoint the Treaty of Lisbon amends the Treaty on the European Union («TEU») and the Treaty on the Functioning of the European Union («TFEU»).

The post of High Representative for Common Foreign and Security Policy was originally created under the Treaty of Amsterdam. The first holder was Javier Solana, Secretary General of the Council of the European Union.

The HR is, first and foremost, the most important figure in the implementation and coordination of, not only the CFSP, but also all other external policies of the Union. The HR conducts, puts into effect and safeguards the principles of the CFSP, and also contributes to its evolution through proposals [1, Article 18 paragraph 2, Article 24 paragraphs 1 and 3].

The High Representative conducts the common foreign and security policy, including the common security and defense policy, chairs the Foreign Af-

fairs Council and is one of the Vice-Presidents of the European Commission. This ensures the consistency of the external activities of the EU. In the Commission, she is responsible for the duties assigned to her mission in external relations, as well as for the coordination of other aspects of the EU's external activities [2, p. 28].

The Supreme Representative is appointed by the European Council by a qualified majority with the consent of the President of the Commission for a 5-year mandate.

In carrying out his mission, the High Representative is supported by the European External Action Service. This service works in cooperation with diplomatic services of EU countries. It includes officials and agents from the EU, as well as personnel seconded from national diplomatic services.

According to Article 18 of the Treaty on the European Union, the High Representative:

- conducts the Union's common foreign and security policy;
- contributes by her proposals to the development of that policy, which she will carry out as mandated by the Council, and ensures implementation of the decisions adopted in this field;
- presides over the Foreign Affairs Council;
- is one of the Vice-Presidents of the Commission. She ensures the consistency of the Union's external action. She is responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action.
- represents the Union for matters relating to the common foreign and security policy, conduct political dialogue with third parties on the Union's behalf and expresses the Union's position in international organisations and at international conferences.
- exercises authority over the European External Action Service and over the Union delegations in third countries and at international organizations [1, Article 18].

According to Article 27, TEU function of the High Representative of the Union for Foreign Affairs and Security Policy are following:

1. The High Representative of the Union for Foreign Affairs and Security Policy, who shall

chair the Foreign Affairs Council, shall contribute through his proposals to the development of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.

2. The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences.

3. In fulfilling his mandate, the High Representative shall be assisted by a EEAS. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the EEAS shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission [1, Article 27].

2. Role and position of the High Representative as a foreign policy authority

The European Union's foreign policy is rapidly developing, and is heavily criticized at the same time. Internationally, the EU would not be able to bear the fruits of its economic power. Its position would be undermined by a lack of military capabilities and Member States being unable to unite over important foreign policy questions [3, p. 15]. The various formats it uses for external representation, reflecting various degrees of Community competence and independent national powers of EU Member States, causes confusion among outsiders. Complex decision-making structures and a diffuse allocation of responsibilities are moreover at the root of turf wars between (staff working for) EU Member States, the Commission, the Council Presidency and the High Representative of the EU's CFSP. The entry into force of the Lisbon Treaty would allegedly improve the situation [4, p. 32].

The Lisbon Treaty gives the High Representative the power to propose to the Council the appointment of Special Representatives, «with a man-

date in particular policy issues», who will then be under his or her authority. This function is held for the purpose to create comprehensive and effective foreign policy authority [5, p. 17].

From the articles of the Lisbon Treaty it becomes clear that the Union High Representative function is aimed at creating a new person in charge of co-ordinating the work of the Commission and the Council – the two major institutions responsible for the Union's external affairs [6, pp. 83]. The High Representative is also to serve as the person representing the Union. To this effect the High Representative fulfills his/her function with the aid of the European External Action Service [1, Article 27 paragraph 3], is the head of the Special Representatives of the Union [1, Article 33] and the chief of the Union's delegations in third countries and at international organizations [1, Article 221 paragraph 2].

However, these responsibilities for co-ordination and representation in external relations, together with the Articles establishing them, leave room for doubt as to how the HR will relate to other officials tasked with very similar responsibilities.

On 30 October 2009, the European Council agreed on guidelines for the European External Action Service (EEAS), composed of national diplomats and Commission and Council staff dealing with external and foreign policy (doc. 14930/09).

The future High Representative was invited to present a proposal for the organisation and functioning of the EEAS as soon as possible after the entry into force of the Lisbon Treaty, with a view to its adoption by the Council at the latest by the end of April 2010.

The High Representative is supposed to bring unity and has been equipped with competences to that end, but at the same time new posts like the President of the European Council have been introduced. Also, placing the High Representative in the Commission has strengthened the role of the Commission President in relation to the High Representative. Therefore, in practice shaping a common representation in this setting will be largely dependent on the people involved. This fault is a common feature in the analysed provisions. The future success of the High Representative depends too much on delicate negotiations, power struggles and

personal choices, and too little on clear and precise legal structures. This provides more flexibility, but less certainty. In these circumstances the ability, willpower and perseverance of the High Representative will be vital in order for her to establish a proper role within the new framework of the Union. The position of the High Representative will possibly be the most demanding of all, and considering the enormous workload it might prove too much to handle [6, p. 106].

3. Relationships of the High Representative with the other Union institutions

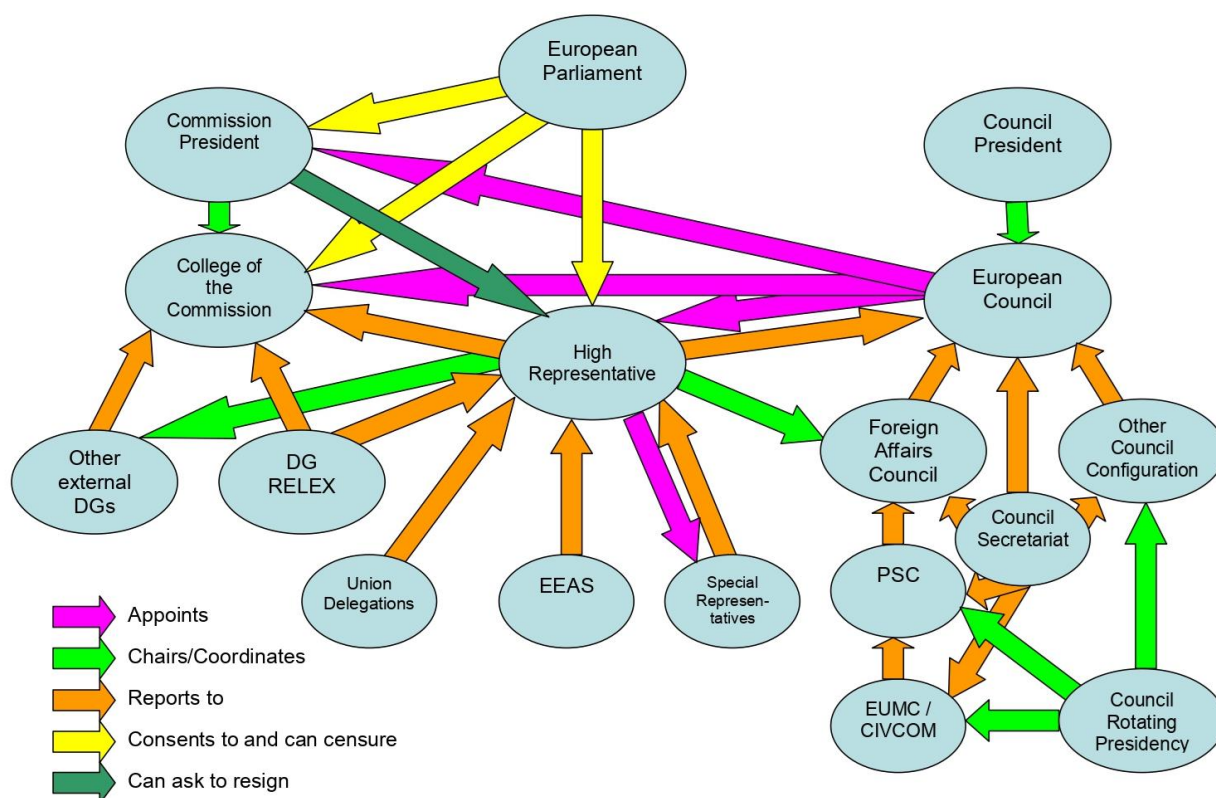
According to Article 13 TEU-L, the institutional framework of the Union will comprise seven institutions: the European Parliament, the European Council, the Council, the European Commission and the Court of justice of the European Union.

The scheme below shows complex relations of interaction of European institutions regarding foreign and security policy issues.

3.1. Relationship with the European Parliament

The European Parliament retains its mostly supervisory and consultative role in foreign policy under the Lisbon Treaty (although in other areas it increases its status with the extension of the co-decision procedure). It still has the power to censure the Commission and force their resignation and this will apply now to the High Representative as well. The High Representative has a duty to regularly consult the Parliament and ensure that its views are taken into consideration in the formulation of external policy.

The EU's External Representation Post-Lisbon



The scheme is provided by the European Peacebuilding Liaison Office. See: *The Lisbon Reform Treaty and its effect on CFSP/CSDP*.

In particular the European Parliament will be consulted by the High Representative regarding the establishment of the EEAS before he submits his proposal to the Council. In addition, the Parliament is specifically mandated to hold a debate on imple-

menting CFSP and CSDP twice a year. If the EEAS is funded under the general Union budget, the Parliament will also be able to play its traditional role of budgetary supervision, including the ability to reject the budget if it sees fit.

Furthermore, this institution has the right to pass a motion of censure on the activities of the Commission. If such a motion is carried, the members of the Commission shall resign as a body according to Article 17, paragraph 8, TEU-L and the High Representative shall resign from the duties that he or she carries out in the Commission.

The High Representative shall regularly consult the European Parliament on the main aspects and the basic choices of the CFSP and inform it of how those policies are evolving. He or she shall ensure that the views of the Parliament are duly taken into consideration [1, Article 36 (1)]. At the same time, the Parliament may ask questions to the Council or make recommendations to it and to the High Representative. Twice a year the Parliament shall hold a debate on progress in implementing the CFSP as well as the CSDP.

Furthermore, the European Parliament may exercise political control through its budgetary authority with regard to the CFSP issues where an action of the Union is charged to the EU budget? [1, Article 14 (I)]. The importance of such a power should not be underestimated.

3.2. Relationship with the European Council

The European Council plays a very important role in relation to the High Representative simply as a result of the appointment procedure whereby his or her appointment requires a decision adopted on the basis of qualified majority with the agreement of the President of the Commission [1, Article 18 (1)].

The very tight link between the European Council and the High Representative may also be explained by the fact that during his or her mandate, the latter shall take part in the work of the European Council. He or she will sit beside the Heads of State or Government of the Member States, together with the President and the President of the Commission [1, Article 15 (2)].

Under the Lisbon Treaty, the relations between the High Representative and the President of the European Council are not clear. According to Article 27, paragraph 1, TEU-L, the High Representative shall contribute through the making of proposals addressing the preparation of the CFSP and shall at the same time ensure implementation of the decisions adopted by the European Council and the

Council. How will these two powers of initiative on one hand, and of implementation on the other be combined concretely on a day-to-day basis? No precise answers are given by the texts.

Furthermore, as chairperson of the Foreign Affairs Council, the High Representative shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent [1, Article 16 (6)].

According to the EU Treaty, the President of the European Council shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning the common foreign and security policy, without prejudice to the powers of the High Representative [1, Article 15 (6)]. What is the exact meaning of this? Does it mean that the President of the European Council will represent the Union in CFSP and CSDP summits, in which the Heads of third States participate and the High Representative will represent the Union in other meetings which take place at a lower level? The question remains open and only practice will give an answer.

3.3. Relationship with the Council

Although the Council is not involved in the appointment procedure of the High Representative, it is interesting to note that according to Article 247 TFEU and on application by this institution acting by a simple majority, the High Representative, as a member of the Commission, may be retired by the Court of justice if he or she no longer fulfills the conditions required for the performance of his or her duties or if he or she has been guilty of serious misconduct

Otherwise, the High Representative will preside over the Council for Foreign Affairs. He or she will participate in the elaboration of the Union's external action in that respect. The Council will work on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent

According to Article 21, paragraph 3, the Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative, shall ensure consistency and shall co-operate to that effect. The

Council and the High Representative shall ensure compliance with the spirit of loyalty and mutual solidarity in the field of CFSP [1, Article 21 (3)]. In the same manner, both shall ensure the unity, consistency and effectiveness of Union action [1, Article 26 (2)].

The High Representative, chairing the Foreign Affairs Council, shall contribute through his or her proposals towards the preparation of the CFSP and shall ensure implementation of the decisions adopted by the European Council and the Council [1, Article 27 (1)].

According to Article 31, paragraph 2, in the case of a declaration by a member of the Council to the effect that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. Here, the High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. This is clearly a mediation role given to the High Representative. If he or she does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity [1, Article 31 (2)].

Under the Lisbon Treaty there is the possibility, on proposal by the High Representative, for the Council to appoint a special representative with a mandate in relation to particular issues. The special representative shall carry out his or her mandate under the authority of the High Representative [1, Article 33].

In the field of CFSP, a Political and Security Committee shall monitor the international situation and contribute to the definition of policies by delivering opinions to the Council at the request of the Council, the High Representative or on its own initiative. This Committee shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative. It also exercises, under the responsibility of the Council and of the High Representative, the political control and strategic direction of crisis management operations referred to in Article 43 [1, Article 38].

The Council shall adopt a decision establishing the specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the

CFSP, and in particular for preparatory activities for the tasks referred to Articles 42, paragraph 1 and Article 43 related to missions outside the European Union for peace-keeping, conflict prevention and strengthening international security. The preparatory activities which are not charged to the budget of the Union shall be financed by a start-up fund made up of Member States' contributions. The decisions establishing the procedures for setting up and financing the start up fund, for administering the start-up fund and the financial control procedures are adopted by the Council on a proposal from the High Representative [1, Article 41 (3)].

Decisions relating to CSDP, including those initiating a mission as referred to in Article 42, shall be adopted by the Council acting unanimously on a proposal from the High Representative on an initiative from a Member State [1, Article 42 (4)].

When the European Union is to make use of civilian and military means in the tasks referred to in Article 42, paragraph 1, the Council shall adopt the relevant decisions as regards the definition of the objectives, scope and general conditions of the implementation. In that respect, the High Representative, acting under the authority of the Council and in close and constant contact with the Political and Security Committee, shall ensure co-ordination of the civilian and military aspects of the tasks [1, Article 42 (1)]. The High Representative will then play a coordinating role in that respect.

The Member States wishing to participate in the permanent structured co-operation and which fulfil the criteria and have made the commitments on military capabilities set out in the Protocol on permanent structured co-operation, shall notify their intention to the Council as well as to the High Representative [1, Articles 42 (6) and 46 (1)].

3.4. Relationship with the Commission

The appointment of the High Representative requires the agreement of the President of the Commission [1, Article 18 (1)]. At the same time, he or she may be requested by the President of the Commission to resign in accordance with Article 17, paragraph 6, TEU-L. In this case, the procedure laid down in Article 18 is applicable and a decision of the European Council is required, acting by a qualified majority. Furthermore, on application by the Commission, the High Representative, as a member

of this body, may be retired by the Court of justice if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she has been guilty of serious misconduct as is provided for in Article 247 TFEU.

It is also provided that the High Representative shall be one of the Vice-Presidents of the Commission [1, Articles 18 (4) and 17 (4 and 5)]. As such, he or she will be responsible for handling external relations and for co-ordinating other aspects of the Union's external action. The High Representative shall, and only in relation to these responsibilities, be bound by Commission procedures to the extent that this is consistent with Article 18, paragraphs 2 and 3, TEU-L.

The High Representative also shares with the Commission the task of external representation of the Union in matters other than CFSP. Indeed, the task of external representation is shared by three entities: the President of the European Council, the Commission and the High Representative. As to the idea of improving EU external representation in the world and to the question of Henry Kissinger joke «Europe ... what telephone number?», the Union will go from a situation with no phone number to one with at least three phone numbers [7, p. 121].

In the field of CFSP, the High Representative, or the High Representative with the Commission's support, may refer any question relating to the CFSP to the Council and may submit to it initiatives or proposals as appropriate [1, Article 30 (1)]. This is fundamental. As we know, the right of initiative is essential because it gives its holder a tremendous power in the definition of policy and in this way, it rests mainly with the High Representative.

In the economic aspects of the external action, according to Article 215 TFEU which deals with restrictive measures that may be adopted to interrupt or reduce, in part or completely, economic or financial relations with one or more third states, the Council acts by a qualified majority on a joint proposal from the High Representative and the Commission to adopt the necessary measures. Here again, the right of proposal is attributed to the High Representative but is systematically shared with the Commission.

In the procedure for concluding international agreements, the Commission or the High Representative where the agreement envisaged relates exclusively or principally to the CFSP shall submit recommendations to the Council which shall adopt the decision authorising the opening of the negotiations and the nominating of the Unions' negotiator or the head of the Union's negotiating team [1, Article 218 (3)]. In the same way, it is on a proposal of the Commission or the High Representative that the Council shall adopt a decision suspending the application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement. This occurs when that body is called upon to adopt acts having legal effects with the exception of acts supplementing or amending the institutional framework of the agreement [8, Article 218 (9)].

Finally, the High Representative and the Commission together are responsible for the implementation of the Union's relations with international organisations, such as the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Co-operation in Europe and the Organisation for Economic Co-operation and Development [8, Article 220 (2)].

3.5. Relationship with the Court of Justice of the European Union

The CFSP is subject to specific rules and procedures [1, Article 31]. The Court of justice shall have no jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 TEU-L and to review the legality of certain decisions as provided for by Article 275, paragraph 2, TFEU. So the reduced role of the Court of justice is maintained under the new Treaties.

As far as Article 40 TEU-L is concerned, the Court shall ensure that the implementation of CFSP does not affect the application of the procedures and the extent of the powers of the institutes laid down by the Treaties for the exercise of the Union commences referred to in Articles 3 to 6 TFEU [9].

According to Article 263, the Court shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions

and of acts of the European Parliament and of the European Council intended to produce legal effects vis-a-vis third parties. At the same time, any natural or legal persons will be entitled to institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures. This last mentioned possibility is important in relation to the cases of restrictive measures that may be adopted against natural or legal persons on the basis of Article 215, paragraph 2, TFEU [10].

Furthermore, as provided for by Article 247 TFEU the Court of justice is the authority that may be referred to in order to retire the High Representative as a member of the Commission, on application of this institution or on application by the Council, if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she has been guilty of serious misconduct.

Conclusions. Comprehensive coherence and consistency across the board will not be achieved, however, simply by setting up the EEAS, following the appointment of the new President of the European Council and of the High Representative whose task it is to supervise and ensure the unity and continuity of EU external action. There will still be a need to get EU Member States to overcome their different perspectives on key foreign policy issues [11] (e.g. concerning the war in Europe, which was started on February, 24, 2022) and to develop a common approach.

The same actors do not always play the central role, solidarity among Europeans is sometimes more challenging to engineer, and the requirements to make the overall project more resilient can point in different directions. Such findings show that any argument that Europe is forged through crisis is unlikely to tell us much about what Europe is or where it may be headed [12].

Europe has been the site of much and heterogeneous terrorist activity in the twentieth and twenty-first centuries, from the Provisional Irish Republican Army (PIRA) through the German Red Army Faction (RAF) and the Croatian Ustasha movement to al-Qaeda- and Daesh-inspired and affiliated individuals and groups. These experiences have provided European states with considerable experience in combating terrorism [13, p. 36].

Despite the threat that it poses to European states, the issue of terrorism needs to be placed into perspective [13, p. 1]. The provisions of the Lisbon Treaty are no panacea to cure the shortcomings resulting from the many disguises of how the EU operates and represents itself internationally. The benefits [...] depend to a large extent on the implementation of the provisions [13, p. 117].

Thus, the example with the Russia's brutal war of aggression against Ukraine showed lack of instruments in the CFSC mechanism. In November 2022 European Parliament adopted a resolution, which recognises Russia as a state sponsor of terrorism and as a state that «uses means of terrorism». However, this and other measures could not stop ongoing deliberate attacks and atrocities committed by Russian forces and their proxies against civilians in Ukraine, the destruction of civilian infrastructure and other serious violations of international and humanitarian law, which amount to acts of terror and constitute war crimes. It is crucial to emphasize amendment to strengthen the role of the High Representative and strengthen CFSP measures aimed at security and anti-terrorist activities of the European Union.

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ЗАВДАННЯ ТА ПОВНОВАЖЕННЯ ВЕРХОВНОГО ПРЕДСТАВНИКА ЄВРОПЕЙСЬКОГО СОЮЗУ ІЗ ЗАКОРДОННИХ СПРАВ ТА ПОЛІТИКИ БЕЗПЕКИ: ТЕОРЕТИКО-ПРАВОВІ АСПЕКТИ

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Метою даної роботи є аналіз завдань і повноважень Верховного представника Європейського Союзу із закордонних справ і політики безпеки, опис його зовнішньополітичних повноважень та виявлення взаємовідносин з іншими інституціями Союзу. **Методи дослідження** ґрунтуються на науковому та конкретно-правовому підходах до знання, які були використані для аналізу доктринального розуміння інституційної структури, відносин і теоретико-правових основ забезпечення зовнішньополітичної діяльності та політики безпеки в ЄС. **Результати:** спільну зовнішню політику та політику безпеки Європейського Союзу було засновано Договором про Європейський Союз у 1993 році з метою збереження миру, зміцнення міжнародної безпеки, сприяння міжнародній співпраці та розвитку та зміцнення демократії, верховенства права та поваги до прав людини та основних свобод. Дана стаття прагне дати відповідь, як у контексті фактичної інституційної структури Верховний представник ЄС координує відносини з іншими інституціями Союзу з метою реалізації ефективної спільної зовнішньої політики. **Обговорення:** ця робота присвячена ролі та позиції Високого представника ЄС із закордонних справ і політики безпеки, зокрема, під час виконання зовнішньополітичних повноважень та взаємодії з іншими інституціями Європейського Союзу. Приклад з жорстокою загарбницькою війною росії проти України показав відсутність інструментів у механізмі Спільної зовнішньої політики та політики безпеки. Важливо наголосити на посиленні ролі Високого представника та посиленні заходів Спільної зовнішньої політики та політики безпеки, спрямованих на безпеку та антитерористичну діяльність Європейського Союзу.

Ключові слова: зовнішня політика; Європейський Союз; політика безпеки; міжінституційні відносини.

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