The Impact of the Lisbon Treaty on the Legal Competences of the EU in International Affairs

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Paper prepared for the EU in International Affairs Conference, Brussels, April 24-26, 2008 (work in progress)

1. Introduction

On 18 December 2007 the representatives of the 27 Member States of the European Union signed the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. The Treaty of Lisbon has seven Articles only. Articles 1 and 2 list all amendments to – respectively – the current Treaty on European Union (EU Treaty) and the Treaty establishing the European Community (EC Treaty); Articles 3-7 contain some final provisions on, inter alia, the duration of the treaty, the ratification procedure and the renumbering of articles. Thus, in contrast to the 2004 Treaty establishing a Constitution for Europe, the Lisbon Treaty does not intend to replace the current treaties, but rather to amend them. After the entry into force (foreseen by the treaty itself for 1 January 2009), we will have new, consolidated versions of both the EU Treaty and the EC Treaty (which will be renamed to Treaty on the Function of the European Union).

The reason for the conclusion of the Lisbon Treaty can be found in its preamble: “to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action.” As is well known, entry into force of the 2004 Constitutional Treaty was blocked by the impossibility of certain Member States to ratify this treaty due to negative referenda. The preamble of the Lisbon Treaty makes clear that improving the Union’s role in the world is one of the reasons for its conclusion. Indeed, coherence of the EU’s external action is currently seriously hampered by the institutional structure of the Union, in which external competences in all three pillars (the European Communities, the Common Foreign and Security Policy, and the Police and Judicial Cooperation in Criminal Matters) are artificially kept apart. In that respect the dissolution of the pillar structure and the merger of the European Union and the European Community potentially adds to the coherence of the Union’s external action.

The purpose of the present contribution is to map the changes made by the Lisbon Treaty in the area of the Union’s foreign, security and defence policy. The legal changes will be analysed with a view to their impact on the Union’s competences in international affairs. A comparison
will be made to the current situation on the basis of the EU Treaty and not to the Constitutional Treaty. In that respect the focus will be on a number of issues: general changes (section 2), institutional issues (section 3), external representation (section 4), and security and defence policy (section 5). Section 6 will be used for an overall assessment of the changes in relation to the EU’s role in international affairs.

2. **The Place of CFSP and ESDP in the new Treaty Structure: Continued Inconsistency?**

The Lisbon Treaty integrates the European Community\(^1\) into the European Union and the new Treaty on European Union (TEU) explicitly provides that “The Union shall have legal personality” (Art. 7), thus making an end to the academic discussion on the legal status of the Union.\(^2\) That there is still some uneasiness on the part of some Member States, is reflected in Declarations No. 24, attached to the Lisbon Final Act: “The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.” Like many Declarations, this one also states the obvious. After all, the principle of attributed (or conferred) powers forms a starting point in international institutional law and is even explicitly referred to in the new TEU, this time with no exception for the Common Foreign and Security Policy (CFSP): “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.” (Art. 5).\(^3\)

The new TEU contains all institutional provisions, whereas all policy areas (including the current EU third pillar on Police and Judicial Cooperation in Criminal matters) will be part of the reformed EC Treaty, the new *Treaty on the Functioning of the European Union* (TFEU). It is therefore striking that both the Common Foreign and Security Policy and the European Security and Defence Policy (ESDP) will remain part of the TEU. Indeed, the current second pillar will be the *only* policy area that will continue to have a separate status in EU law and even within Title V on the ‘General Provisions on the Union’s External Action’ there is a special section on ‘Special Provisions on the Common Foreign and Security Policy’. The reasons for this continued separation could already be found in the mandate for the Lisbon Intergovernmental Conference, in which Member States could not agree on a transfer of the CFSP provisions from

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1. The European Atomic Energy Community (Euratom) will not be part of the new structure and will continue to be a separate international organization. See also Protocol 2 annexed to the Treaties.


3. On the basis of Art. 5 TEU the principles of proportionality and subsidiarity also apply to all Union policy areas, although the Protocol on the Application of the Principles of Subsidiarity and Proportionality seems to focus on ‘legislative acts’ only and these acts cannot be used for CFSP matters.
the TEU to the TFEU. From a legal institutional point of view this does not make too much sense. After all, with the end of the separation between Union law and Community law possible fears of a further ‘communitarisation’ of CFSP are unfounded and even within the new TFEU specific provisions (including the role of the institutions, voting rules and available legal instruments) are laid down for different policy areas.

The separation of CFSP from other external policies is also awkward with a view to the fact that the original CFSP tasks have been supplemented by a number of new purposes which go beyond CFSP stricto sensu (below in italics). Article 21 of the new TEU provides:

“The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

(h) promote an international system based on stronger multilateral cooperation and good global governance.

On the basis of these principles and objectives, the European Council will identify the strategic interests and objectives of the Union, which will relate to both the common foreign and security policy and to other areas of the external action of the Union (Art. 22 new TEU). However, for parts falling under the CFSP, the High Representative of the Union for Foreign Affairs and Security Policy (HR) will be responsible for proposals for Council decisions, whereas for other areas of external action it will be the Commission. Article 22, paragraph 2 does, however, seem to call for joint proposals, which would force the HR and the Commission to produce a consistent plan, thereby adhering to the demand that “The Union shall ensure
consistency between the different areas of its external action and between these and its other policies.” (Art. 21, par. 3).

From the outset (the 1992 Maastricht Treaty), consistency problems were the obvious consequence of the choice for a pillar structure in which both the EU and the EC had separate external competences and decision-making procedures. The division between political (CFSP) and other/economic (EC) external relations was never easy to make, but at the same time the Union and the Community were forced to use different instruments and decision-making procedures, thereby challenging the Union’s potential as a cohesive force in international relations. There are numerous examples in which the institutional separation between CFSP and EC led to problematic decision-making and unclear situations for third parties. Apart from the cases concerning the anti-terrorism measures against individuals, in a recent Opinion, Advocate General Mengozzi pointed to possible solutions in a case in which the Commission challenged a Council Decision to deal with security issues in Africa on the basis of CFSP, rather than as part of the Community’s ongoing development cooperation in that area. If taken over by the European Court of Justice, the principle will remain ‘Community first, as long as a competence exists’. It is equally clear, however, that CFSP has its own place and that – as in this case – issues which are primarily concerned with international security are to be based on CFSP even if they are related to Community competences (such as development cooperation).

This seems to be reflected in the new delimitation provision in Article 40 new TEU, which not only underlines the need for a preservation of the acquis communautaire (as in current Art. 47 TEU), but seems to add that the CFSP competences should also be respected:

“The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of

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4 Cf. also Art. 30 new TEU, which refers to “the High Representative with the Commission’s support”.


7 Opinion of AG Mengozzi in Case C-91/05 Commission v Council (‘ECOWAS’), 19 September 2007.

8 Mengozzi argues that even if there is a connection between Community and CFSP issues, “such a connection cannot lead to including in the scope of development cooperation measures which would lead to disregarding the distribution of competences in the framework of the pillar architecture of the European Union.” (par. 170).
the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.
Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.” (CFSP).

Thus, this provision no longer subjects CFSP to any Community competence, but equally calls for all other policies not to affect CFSP. One could argue that this provision places CFSP on an equal footing as other Union policies and at least no longer puts other Union policies in a default setting.

The classic example of a cross-pillar policy – economic sanctions – returns in Article 215 TFEU. As in the current Article 301 TEC, economic (and financial) sanctions may only be imposed after a CFSP decision to that end has been taken. An innovation can be found in the rule that the final legislation to that end can only be adopted by the Council (acting by a qualified majority) on a joint proposal by the HR and the Commission. The involvement of the HR in this procedure may guarantee an even better combination of political and economic questions. In addition, paragraph 2 makes clear that restrictive measure cannot only be imposed on states but also “against natural or legal persons and groups or non-State entities.” Finally, the debate on the legal protection of individuals and groups on sanctions lists resulted in a new paragraph: “3. The acts referred to in this Article shall include necessary provisions on legal safeguards.”

3. The Role of Institutions and Individual Actors

In terms of decision-making in CFSP, the Lisbon Treaty will only introduce minor changes. The Council – in its configuration as “Foreign Affairs Council”⁹ – will remain the key decision-making organ, which, unlike the other Council configurations, shall not be chaired by Member State representatives, but by the HR (Art. 18, par. 3 new TUE). In the new Union qualified majority voting (QMV) is the rule,¹⁰ except for CFSP, where unanimity continues to form the basis for decisions, “except where the Treaties provide otherwise” (Art. 24, par. 1 new TUE). In that respect it is interesting to point to the fact that apart from the already existing

⁹ According to Art. 16, par. 6 new TUE, “The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

The Foreign Affairs Council 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.”

¹⁰ See also Art. 16, par. 4 new TUE: “As from 1 November 2014, a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.”
possibilities for QMV under CFSP, it will become possible for the Council to decide on this basis on a proposal submitted by the HR (Art. 31, par. 2 new TEU). This proposal should, however, follow a specific request by the European Council, in which, of course, Member States can prevent this possibility. In addition QMV may be used for setting up, financing and administrating a start-up fund to ensure rapid access to appropriations in the Union budget for urgent financing of CFSP initiatives (Art. 41, par. 3 new TEU).

So far, most proposals in the area of CFSP came from Member States, with a particular active role of the Presidency. In that respect it is striking that the Member States are not mentioned in the new Art. 22, par. 2, which refers to joint proposals by the HR and the Commission only. However, this seems to be made up by Art. 30, par. 1, which lays down the more general rule that “Any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission’s support, may refer any question relating to the common foreign and security policy to the Council and may submit to it initiatives or proposals as appropriate.” It is in particular this new role of the Commission that may trigger new possibilities for the EU in its external affairs. Whereas the Commission so far virtually refrained from making use of its competence to submit proposals on CFSP issues (Art. 22 TEU), the creation of the competence to submit joint proposals with the HR may enhance its commitment to this area. This is strengthened by the fact that the person holding the position of HR will at the same time be a member (and even a Vice-President) of the Commission (Art. 17, paras. 4 and 5).

This combination of the functions of High Representative and Vice-President of the Commission is, without doubt, one of the key innovations of the Lisbon Treaty. The potential impact of this combination on the role of the EU in international affairs lies in the fact that there could be a more natural attuning of different external policies. In other words: the weekly (breakfast) meetings between the Commissioner for External Affairs and the HR will lose their relevance. At the same time, the continued separation between CFSP and other Union issues may very well lead to a need for different legal bases for decisions, and hence for the use of distinct CFSP and other Union instruments. This does not only hold true for the outcome of the decision-making process, but also for the process itself, where both the

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11 These exceptions return in Art. 31, par. 2 new TEU and are phrased as follows:
– when adopting 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, as referred to in Article 22(1),
– when adopting any decision implementing a decision defining a Union action or position,
– when appointing a special representative in accordance with Article 33.

12 See D. Spence, ‘The Commission and the Common Foreign and Security Policy’, in D. Spence (Ed.), The European Commission (3rd ed.), London: John Harper, 2006. Spence quotes former Commissioner Chris Patten on this issue to provide the reason: “Some of my staff [...] would have preferred me to have a grab for foreign policy, trying to bring as much of it as possible into the orbit of the Commission. This always seemed to me to be wrong in principle and likely to be counterproductive in practice. Foreign policy should not in my view [...] be treated on a par with the single market. It is inherently different” (at p. 360).
relevant Commission DG and the CFSP section in the Council Secretariat continue to exist. Much will depend on the way in which the legal provisions will be used. Over the past fifteen years, practice revealed a process of ‘institutional dynamics’ in which a growing together of Community and CFSP decision-making and institutional involvement proved unavoidable. Interestingly enough, the HR may continue its functions even in case all Commission members are forced to resign following a motion of censure from the European Parliament (Art. 17, par. 8 new TEU).

With regard to the European Parliament, its relation to CFSP will not change substantially. Apart from the rule that the High Representative and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament (Art. 17, par. 7), the task of consulting the European Parliament ‘regularly’ on CFSP issues moves from the Presidency to the HR (Art. 36 new TEU). This shift is related to the creation of the position of a fixed Presidency of the European Council, which replaces the current system of rotating Presidencies (Art. 15, par. 5 new TEU). One could argue that this is a further step in the ongoing ‘Brusselization’ that one could witness in relation to CFSP over the past years, in line with the replacement of the Political Committee by the permanent Brussels based Political and Security Committee (PSC) and the increased role of the Council Secretariat. As ‘legislative’ acts are excluded from the area of CFSP, the formal influence of the European Parliament continues to stand in stark contrast to its competences in other policy areas.

Indeed, whereas Article 16 (new) provides that the Council shall, jointly with the European Parliament, exercise legislative and budgetary functions, Art. 24 makes clear that CFSP is subject to “specific rules and procedures” and that the “adoption of legislative acts shall be excluded”. This seriously limits the formal role of the EP in the CFSP decision-making process. At the same time it continues the complexity in situations where (perhaps of the basis of a joint proposal by the Commission and the HR) decisions need to cover both CFSP and other Union issues. In those cases, the ‘specific rules and procedures’ in CFSP would necessarily result in two (or more) separate decisions on the basis of different legal bases, which again complicates the relation with third states and other international organizations.

Although not termed ‘legislative acts’ the CFSP instruments are ‘decisions’, which – despite their ‘non-legislative’ nature – continue to be binding on the Member States, or as phrased in


Art. 28: they “shall commit the Member States in the positions they adopt and in the conduct of their activity”. The familiar labels ‘Joint Action’ and ‘Common Position’ will disappear, although all three current forms of CFSP decisions will reappear: the new CFSP ‘decisions’ may define (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii) (Art. 25 new TEU). The somewhat unclear – and unnecessary – difference between Joint Actions and Common Positions thus comes to an end, which again adds to a further streamlining of CFSP.

The separation of CFSP is also reflected in the continued exclusion of the European Court of Justice in CFSP matters. However, Art. 24 new TEU provides that this is “with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.” Art. 40, first of all, reflects to the current ‘preservation of the acquis communautaire’ clause and states that the implementation of CFSP shall not affect the other policy areas of the Union and vice versa. Article 275 TFEU provides the other exception and allows for the Court to review the legality of decisions providing for restrictive measures against natural or legal persons (the famous sanctions against persons and groups on the anti-terrorism lists of the EU).

Most of the changes relate to the position of the High Representative for the Common Foreign and Security Policy, which will be renamed to High Representative of the Union for Foreign Affairs and Security Policy. This name change reflects the fact that it has become clear that the HR indeed represents the Union and not the (collective) Member States. His (or her) competences are clearly laid down in the Union treaty and form part of the institutional framework. Although the term ‘Foreign Minister’, that was used in the Constitutional Treaty, has been abandoned, the new provisions make clear that the HR will indeed be the prime representative of the Union in international affairs. Even the President of the European Council will exercise its external competences “without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.” (Art. 15, par. 6(d)). The HR is to be appointed by the European Council (with the agreement of the President of the Commission) by qualified majority voting. This again underlines his role as Union representative, who is competent to act even in the absence of consensus among the Member States. The HR is to “conduct” the Common Foreign, Security and Defence Policy; he shall contribute by his proposals to the development of that policy, and preside over the Foreign Affairs Council (Art. 18 new TEU). In addition, his de facto membership of the European Council is codified in Art. 15 new TEU (although strictly speaking it is stated that the HR only ‘takes part in the work’ of the European Council). He is to assist the Council and the Commission in ensuring the consistency between the different areas of the Union’s external action (Art. 21 new TEU) and together with the Council ensures compliance by the Member States of the CFSP obligations (Art. 24, par. 3 new TEU). All in all, the position of High Representative has been upgraded to allow for a stronger, independent, development and implementation of CFSP, which – potentially – allows for a stronger and more coherent role for the EU in international affairs.
4. External Representation and the Conclusion of Agreements

The introduction of Article 24 by the 1997 Amsterdam Treaty in the Treaty on European Union was meant to provide an explicit legal basis for the Union to conclude agreements with third states and other international organizations. It is not that well known that the Union made full use of this competence and already concluded more than ninety agreements.\(^\text{15}\) By using the Article 24 competence (in conjunction with Article 38 in the case of agreements in the area of police and judicial cooperation in criminal matters), the European Union entered the international stage as a legal actor with obligations and responsibilities that can be viewed in distinction from those of its Member States. This turns the provision into the general legal basis for the Union’s treaty-making, which may even be used to conclude cross-pillar agreements.\(^\text{16}\) In practice the treaty-making competence has proven to facilitate the EU’s role in international crisis management as most agreements relate to the Union’s security and defence policy.

This development paved the way to an explicit recognition of the Union’s legal status in the Lisbon Treaty, which simply provides that “The Union shall have legal personality” (Art. 47 new TEU). That this was still not easy to accept for certain Member States is reflected in Declaration 24, included in the Lisbon Final Act: “The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.” Taken into account that the principle of conferred powers is explicitly mentioned in Article 5, par. 2 new TEU,\(^\text{17}\) this Declaration does not seem to have any distinct legal relevance.


\(^{16}\) Ibid. So far eight agreements are based on Council Decisions which used both Art. 24 and 38 TEU as a legal basis. The Agreement between the European Union, the European Community and the Swiss Confederation, concerning the Swiss Confederation’s association with the implementation, application and development of the Schengen acquis is the only agreement based on both EU and EC legal bases.

\(^{17}\) “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.” The same holds true for Declarations 13 and 14, which underline that the CFSP provisions do not affect the responsibilities of the Member States.
The treaty-making competence of the Union is maintained, but a distinction is no longer made between agreements based on CFSP and other agreements. On the basis of Article 216 TFEU “The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding act of the Union or is likely to affect common rules or alter their scope.”\textsuperscript{18} The end of separate EU and EC agreements may certainly improve the consistency of the Unions’ external relations. At the same time ‘vertical’ consistency may be enhanced by the fact that paragraph 2 of Article 216 states that the agreements shall be binding on both the Institutions and the Member States. With regard to the EU agreements the current legal regime is far from clear on the question of whether Member States are bound by agreements to which only the Union is a party, although it may be argued that Member States are bound by these agreements as a matter of ‘Union law’.\textsuperscript{19}

A difference is, however, maintained with regard to the conclusion of international agreements. Whereas the general rule is that the Commission takes the lead, for agreements which relate “exclusively or principally” to CFSP, the High Representative shall submit a recommendation to the Council (Art. 218, par. 3 TFEU). It is striking that the Commission will no longer be the default negotiator. It is simply provided that the Council “shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union’s negotiator or the head of the Union’s negotiating team.” In practice, however, one may assume that CFSP agreements will be negotiated by the High Representatives or by one of the Special Envoys in his/her team.\textsuperscript{20} In any case, Article 218 makes clear that the general procedure to conclude international agreements does not apply where agreements relate exclusively to CFSP. Interestingly enough no procedure is mentioned for the conclusion of CFSP agreements, which would lead to the conclusion that in those cases the general CFSP decision-making rules apply.

The combination of CFSP and other external relations was a reason to rethink the external representation of the Union. Currently, Community representation is in the hands of the Commission, whereas the HR represents the Union on CFSP issues. The Lisbon Treaty foresees the creation of an External Action Service, which “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

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\textsuperscript{18} Cf. also Art. 37 new TEU: “The Union may conclude agreements with one or more States or international organisations in implementation of this Chapter.”


\textsuperscript{20} Cf. also Art. 17 new TEU, which refers to the fact that the “With the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union’s external representation.”
seconded from national diplomatic services of the Member States.” (Art. 27, par. 3 new TFEU). The Treaty is completely silent on the role of the External Action Service and merely provides that its organization and functioning shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative, but in a special Declaration (No. 15) attached to the Lisbon Final Act it was agreed that, as soon as the Treaty of Lisbon is signed, the HR, the Commission and the Member States should begin preparatory work on the European External Action Service. In case the Service turns out to be a body in which CFSP, other Union external policies and Member States external relations are coordinated with a view to enhance consistency, there would certainly be a reason to applaud this initiative.  

Consistency may also be improved by the fact that the delegations of the Commission in third states and at other international organizations will be replaced by ‘Union delegations’ (Art. 221, par. 1 TFEU). The ‘Union-wide’ competences of the HR are underlined by the fact that all delegations will be placed under his/her authority. In fact, the HR will be responsible for all relations with other international organizations, including the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development (Art. 220 TFEU). The fact that these competences found a basis in the TFEU rather than in the TEU puts the separate position of CFSP in the Union’s external relations into perspective and may very well lead to a further integration of this policy field in the general external relations of the Union.

5. The EU as a Defence Organization

5.1 A Collective Defence Obligation?

The Nice Treaty provided a basis for a European Security and Defence Policy through a modification of Article 17 TEU. Whereas originally the implementation of EU decisions with defence implications was left to the Western European Union (WEU), the Nice Treaty deleted all references to the WEU. From that moment on the Union had been given the competence to operate within the full range of the so-called Petersberg tasks: “humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking” (article 17, paragraph 2). In that respect it is odd that article 17 still refers to the “progressive framing of a common defence policy” after that same policy has entered into force on the basis of the same article. Provisions like these reveal the fact that, although a final consensus was reached on a European Security and Defence Policy, some member states are more eager to lay everything down in treaty arrangements than others. Nevertheless one cannot overlook the gradual development from the first provision in the Maastricht Treaty (“the eventual framing of a common defence policy, which might in time lead to a common defence”), to the Amsterdam Treaty (“the progressive framing of a common defence policy, which might lead to

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a common defence”), and finally to Nice were all references to the WEU were deleted, thereby making the EU itself responsible for the elaboration and implementation of decisions and actions which have defence implications.

The Lisbon Treaty can certainly be seen as a further step in this development. For the first time a special Title is devoted to ESDP (Chapter 2, Section 2 of the new TEU). On the basis of Article 42 “The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.” The Petersberg tasks have been extended to, inter alia, include the fight against terrorism: “joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.”

However, with regard to the ‘defence’ part of ESDP, the Treaty remains ambiguous. The current provision reappears in the new Treaty: “The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides.” (Art. 42, par. 2 new TEU). Nevertheless, the Lisbon Treaty does offer reasons to conclude that something has changed. First of all – and despite the claim that a ‘common defence’ is not yet included in ESDP – Article 42, paragraph 7 provides the following:

“If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.”

Taking into account that according to the Helsinki (1999) and Laeken (2001) Declarations “the development of military capabilities does not imply the creation of a European army”, it is puzzling what it is the European Council will have to decide on. One may argue that we are not yet dealing with strict obligations for all Member States. This would be confirmed by the second part of paragraph 7 which states that “Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.” While this would indeed allow the ‘neutral’ states Austria, Finland, Ireland and Sweden, not to participate, the collective defence obligation does not really differ from Article 5 of the NATO Treaty or Article V of the WEU Treaty.²²

²² Art. 5 of the North Atlantic Treaty reads: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and
The feeling that something similar to a collective defence obligation has been created (although somewhat hidden in par. 7 of Art. 42) becomes stronger when the so-called ‘solidarity clause’ is taken into account. It is somewhat peculiar that this clause is separated from the collective defence clause and is included in the TFEU (Art. 222) rather than together with the ESDP provisions in the TEU. The clause does not restrict common defence to ‘armed aggression’, but in fact extends the obligation to terrorist attacks:

“The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) – prevent the terrorist threat in the territory of the Member States;
– protect democratic institutions and the civilian population from any terrorist attack;
– assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.”

Paragraph 2 adds the following:

“Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.”

Paragraph 3 refers to a coordinating role of the Council as well as the procedure: the arrangements for the implementation of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the HR.

While the wording of the solidarity clause leaves room for both the Member States and the Council regarding the type and scope of their reaction, it may be seen as an innovation to the current legal regime, where no obligations for the Member States or competences of the Council form part of the treaties. However, after the Madrid terrorist attacks in March 2004, the European Council issued a ‘Declaration on Solidarity Against Terrorism’, in which the solidarity clause is already incorporated, although the Declaration does not refer to a role for the Union as such, but to the ‘Member States acting jointly’. In addition, the Declaration leaves

23 consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. [...]”

Art. V of the modified Brussels Treaty (WEU) reads: “If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.”

it to the Member States to “choose the most appropriate means to comply with this solidarity commitment.”

5.2 A European Army?

In addition to the ad hoc flexibility referred to in Article 44 new TEU (“the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task”), paragraph 6 of Article 42 introduces the notion of ‘permanent structured cooperation’ for “those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions.” The permanent structured cooperation is further elaborated by Article 46 and by a special Protocol. According to this Protocol the permanent structured cooperation can be seen as an institutionalised form of cooperation in the field of defence policy between able and willing Member States. In that sense it may be regarded as a special form of enhanced cooperation, although the term is not used. It shall be open to any Member State which undertakes to (Article 1):

“(a) proceed more intensively to develop its defence capacities through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the Agency in the field of defence capabilities development, research, acquisition and armaments (European Defence Agency), and

(b) have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including transport and logistics, capable of carrying out the tasks referred to in Article 43 of the Treaty on European Union, within a period of 5 to 30 days, in particular in response to requests from the United Nations Organisation, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.”

Obviously, no reference is made to the creation of a ‘European army’. Any explicit hints in that direction would have been unacceptable for certain Member States. Nevertheless, the tasks of the participating Member States come close to at least a harmonisation of the different national defence policies. According to Article 2 of the Protocol, Member States undertake to:

(a) cooperate, as from the entry into force of the Treaty of Lisbon, with a view to achieving approved objectives concerning the level of investment expenditure on defence equipment, and regularly review these objectives, in the light of the security environment and of the Union’s international responsibilities;

(b) bring their defence apparatus into line with each other as far as possible, particularly by harmonising the identification of their military needs, by pooling and, where appropriate, specialising their defence means and capabilities, and by encouraging cooperation in the fields of training and logistics;

(c) take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces, in particular by identifying common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures;
(d) work together to ensure that they take the necessary measures to make good, including through multinational approaches, and without prejudice to undertakings in this regard within the North Atlantic Treaty Organisation, the shortfalls perceived in the framework of the ‘Capability Development Mechanism’;

(e) take part, where appropriate, in the development of major joint or European equipment programmes in the framework of the European Defence Agency.

Moreover, the ‘Headline Goal 2010’ includes the establishment of so-called ‘battlegroups’: “force packages at high readiness as a response to a crisis either as a stand-alone force or as part of a larger operation enabling follow-on phases.” On decision making, the ambition of the EU is to be able to take the decision to launch an operation within 5 days of the approval of the so-called Crisis Management Concept by the Council. On the deployment of forces, the ambition is that the forces start implementing their mission on the ground, no later than 10 days after the EU decision to launch the operation. In practice this seems to come close to what could be called an ‘army’, irrespective of the fact that – for political reasons – the documents stressed that the concept would not amount to “the creation of a European army”. Interestingly enough this phrase does not return in the Lisbon treaty.

6. Conclusion: A New Role of the EU in International Affairs?

When we assume that the phrase “improving the coherence of its action” in the preamble of the Lisbon Treaty refers primarily to the Union’s role in international affairs, it is indeed this aspects that needs to be assessed. The pillar structure introduced an inherent risk of inconsistency by dividing the Union’s external relations over two different legal treaty regimes. In that respect the fact that CFSP will still be in another treaty than all other Union policies may be seen as a missed opportunity. Both with regard to the decision-making procedures and the available instruments it will remain difficult to combine CFSP with other Union policies; which means that part of the Union’s energy in international relations will continue to be devoted to internal delimitation questions.

On the other hand, the above analysis reveals that a number of things will change in CFSP and that the Lisbon Treaty can certainly be seen as yet another step in the ongoing integration process in this policy field. The upgraded role of the High Representative is certainly the most innovating aspect. Apart from his extensive role as the key representative of the Union in (all) international affairs, his function has the potential of bridging the currently existing divide between Community and CFSP external relations. The same holds true for the External Actions Service, although at this stage it is far from clear what its competences will entail.

The special section in the new TEU devoted to the European Security and Defence Policy confirms the grown-up status of this policy. The Lisbon Treaty not only extends the possibility of the Union in this area (e.g. by extending the so-called Petersberg tasks), but also introduces something of a collective defence obligation, albeit perhaps in statu nascendi. Together with the European Defence Agency (which is already operational) and the possibility of Permanent
Structured Cooperation the new ESDP will allow the Union to further develop its presence as a military actor.

By now, available legal competences and possibilities can hardly be blamed for a modest role of the EU in international affairs. And – as the history of CFSP shows – not so much the political will of Member States, but rather the Union’s own institutional dynamics will trigger the coming of age of the Union’s international capacities.