

## CFSP/ ESDP AND THE NEW EU TREATY

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### Abstract

*This article aims to analyse the new EU Treaty's effects and implications on external relations, especially those aspects relating to the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP). For this purpose, it starts its analysis with examining the unified structure which has been established by unification of the Union's external action under a single set of principles and objectives and the existence of a single international legal personality which has always been presented as a serious obstacle for EU foreign policy's coherence. Then, it studies the amendments and developments with regard to CFSP, and it finds that the success of a more effective EU foreign policy still depends, to a great extent, on the decisions of the most influential member states in the Union. As regards to the ESDP, it questions whether the treaty can strengthen the foundation for a common defence policy examining the new and specific mechanisms which it includes. Based on its analysis, it makes it clear that it can strengthen the legal foundation, but the implementation of activities in this field inevitably relies on most influential member states' wills like in the CFSP field. As a conclusion, it argues that the new treaty, with its contributions, should be accepted as a positive step for EU coordination and consistency in external relations, but it is not yet sufficient to accomplish a successful CFSP/ESDP.*

### Key Words

Common Foreign and Security Policy (CFSP), European Security and Defence Policy (ESDP), Reform (or Lisbon) Treaty.

### Introduction

The constitutional treaty was adopted by the heads of government of the 25 member states and the 3 candidate countries unanimously on 18 June 2004 and then signed on 29 October of the same year. However, it has been ratified only by 18 of the 27 member states. Five others, Denmark, Ireland, Sweden, United Kingdom and Portugal delayed ratification in an

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uncertain future. Moreover, Poland and Czech Republic have “called for a new constitution.”<sup>1</sup> More important, the people of France and the Netherlands rejected it on 29 May and 1 June 2005 respectively by national referendums. Consequently, the constitutional treaty could not take effect, as to take effect, it had to be ratified by all member states in accordance with their own constitutional procedures (art.IV-447, Treaty Establishing a Constitution for Europe (TECE), and Declaration 30).

After this failure of the constitutional treaty, although the process of ratification has not been abandoned, it was seen more appropriate to initiate a “period of reflection” in order to make explanations and discussions on ratification of the constitutional treaty in all member states until the Brussels European Council, 2006. In the Brussels European Council, it was emphasised that the EU should focus on the “delivery of concrete results and implementation of projects”. Therefore, the “period of reflection” on the constitution has ended and the “two-track” stage has been initiated. That means, while the Union has been using “the possibilities offered by the existing treaties in order to deliver the concrete results that citizens expect”, at the same time, the German EU Presidency would prepare a report regarding the constitutional treaty and examine possible future developments. It was estimated that the “necessary steps for the constitutional treaty’s ratification will have been taken during the second semester of 2008 at the latest”. The European Parliament (2006) also stated that the necessary constitutional settlement should be established when the citizens of the Union are called to the European elections in 2009. However, in Brussels European Council, 21-22 June 2007, EU leaders met to agree a new outline of the constitutional treaty. The German Presidency here circulated a document saying the bloc aims at establishing a “Reform Treaty”, in which there is general consensus among member states that it will avoid state-like terminology such as the “constitution” and “foreign minister”.<sup>2</sup> In the following Intergovernmental Conference (IGC) in late July, an outline of the whole new treaty with a strict list of items which were thought to be dropped from the current text was discussed. Very recently, on 19 October 2007, the agreement on the treaty’s final text was reached at an informal summit in Lisbon. The treaty was set to be signed by European leaders on 13 December 2007, after which each member state of the Union would have to ratify it. On 13 December 2007,

<sup>1</sup> K. Lorant, “EU Constitution Ratification in Delay,” EUWatch, Issue I, 2006, pp. 20-21. Available at: [http://indemgroup.org/fileadmin/user\\_upload/groupdocs/euwatch/EUWatch-June2006.pdf](http://indemgroup.org/fileadmin/user_upload/groupdocs/euwatch/EUWatch-June2006.pdf) (accession in August 2007).

<sup>2</sup> R. Goldirova, “Germany gives ear to Poland in ‘Reform Treaty,’ talks,” Available at: <http://euobserver.com/9/21868> (accession in August 2007).

European leaders signed the Lisbon or Reform Treaty, which amended the current EU and EC treaties. If it is ratified by all EU member states according to schedule, it will come into force on 1 January 2009.

Although this treaty has some differences from the constitutional treaty (the basic one is that the constitutional treaty would have created an entirely new legal order for the EU, sweeping away earlier treaties, whereas this one only amends them), it keeps most of the institutional innovations that were agreed on in the constitutional treaty, such as a permanent EU president, a full legal personality, a reduced number of commissioners, a foreign minister (renamed High Representative of the Union for Foreign Affairs and Security Policy). Most importantly, the provisions on CFSP/ESDP of both treaties are pretty much the same. The analysis of these provisions is necessary, because of the fact that, like for other policy fields, the provisions and reform options of the treaty will remain the point of reference for any future treaty reforms under the label of a “constitution” or under a “Reform Treaty”.<sup>3</sup>

This article starts its analysis with examining the unified structure which has been established by unification of the Union’s external action under a single set of principles and objectives and the existence of a single international legal personality which has always been presented as a serious obstacle for EU FP’s coherence. After studying the amendments and developments with regard to CFSP, it questions whether the EU treaty can strengthen the foundation for a common defence policy examining the new mechanisms it includes. As a conclusion, it argues that the treaty, with its contributions, should be accepted as a positive step for EU coordination and consistency in external relations, but it is not yet sufficient to accomplish a successful CFSP/ESDP.

## **I. Reform Treaty and the EU’s External Policy<sup>4</sup>**

### **1. Pooling Under a Single Set of Objectives and Values**

The provisions relating to the Union’s external action in the treaty are not grouped under a title, but placed in a number of different places

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<sup>3</sup> N.Klein and W. Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” *EU Constitutionalisation: From the Convention to the Constitutional Treaty 2002–2005, Anatomy, Analysis, Assessment*, in Lenka Rovná and Wolfgang Wessels (eds.), European Institute for European Policy, Prague, 2006, p.200.

<sup>4</sup> Reform Treaty, hereinafter, will refer to the Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community (Reform Treaty- Draft) 2007, Available at: [http://www.consilium.europa.eu/cms3\\_fo/showPage.asp?id=1317&lang=en&mode=g](http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1317&lang=en&mode=g) (accession in October 2007).

as different from the constitutional treaty. That is, there is an unclear link between the sections, namely, development cooperation, the CFSP or the trade policy like in the previous treaties. Therefore, current EU law, which is composed of various treaties amending each other, continues to be difficult to understand. However, within the treaty, as different from the previous EC treaties, the founding values (art.2) and objectives (art.3) of the EU seem to be defined in a very clear manner as in the constitutional treaty (and also in the ESS, the so-called “Solana doctrine”)<sup>5</sup> and It seems that article 3 dedicates a whole paragraph (par. 5) to the relations the Union has with the wider world which is directly linked to external policy. In this paragraph (art. 3(5)),<sup>6</sup> it is underlined that “in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens”. That means, the Union will not only safeguard and advance its values in its external action, but also it will have to uphold them. This implies that in seeking to influence the third countries, the actions of the Union itself must be based on its values mentioned in this article. When the EU itself is based on these values such as human rights, sustainable development and peace with its strong commitment, it is possibly seen more credible by the third countries. Then, it is expected that the candidates, and also the third countries, may be more diligent and willing to comply with these standards of the EU. Then, it can be accepted that with the common definition of general principles and objectives for all fields of EU external action, the treaty reflects its intention to enhance clarity to the public and the wider world.

Article 10a(3) TEU also states that the Union will respect the principles and pursue the objectives (set out in paragraphs 1 and 2) in the development and implementation of the different areas of the Union’s external action covered by this Title and Part Five of the Treaty on the Functioning of the Union (TFEU), and of the external aspects of its other policies. Thus, all the policies of external action, not only development policy but also trade policy, associations with third countries and the CFSP will have a common set of objectives for the whole field of external relations (art. I-3(5), art.

<sup>5</sup> On 12 December 2003, the European Council in Brussels adopted the European Security Strategy. It represents a first attempt to define the EU’s global interests and how the Union proposes to defend/promote them. It also identifies the new threats and challenges that the EU is currently facing in the world (Brussels European Council, 2006). For information on ESS see J. Howorth, “From Security to Defence: The Evolution of the CFSP,” *International Relations and the European Union*, in Hill, C. and Smith, M. (eds.), Oxford University Press, Oxford and New York, 2005, p.195. Also C.Bretherton and J. Vogler, “Common Foreign and Security Policy: A Political Framework for EU External Action?,” *The European Union as a Global Actor*, Routledge, New York, 2006, pp.181-186.

<sup>6</sup> In the constitutional treaty, it does not include “contribute to the protection of its citizens” as different from the reform treaty.

10a(3) TEU). This expresses the general attempt of the treaty to unify the Union's external action under a single set of principles and objectives.

Although it does not pool the provisions relating to the Union's external action under a single title, the reform treaty clarifies the values and the objectives of the EU, unifies the Union's external action under a single set of principles and objectives. These all show that the treaty recognises the necessity of consistency<sup>7</sup> between all external policies. So, it explicitly states that the Union should "ensure consistency between the different areas of its external action and between these and its other policies." Also it states that this consistency and cooperation will be ensured by the Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy (art. 10a(3)TEU).

## 2. A Single Legal Personality

According to the current EU law, the EU consists of the Communities (the Community, EURATOM, and the ECSC), a CFSP and cooperation on JHA. Therefore, the EC has a legal personality (art. 281 EC treaty (ex-art. 210)), but the EU has only a framework of political cooperation without legal personality. As the EU does not have a legal personality, it can not be a signatory part of an international treaty.<sup>8</sup> The reform treaty will change this situation, since it will grant for the first time legal personality to the EU (art. 32 TEU). Of all of the innovations to come out of the treaty, this is perhaps one of "the most dramatic" for external relations,<sup>9</sup> because by having a legal personality, the EU will be able, as an organisation, to enter into international agreements, to represent Europe in international relations, and to conclude treaties.<sup>10</sup> Thus, the EU will have the opportunity to take legal actions about itself. So, the treaty confirms that the Union can establish and maintain relations with international organizations in its articles (188p-188q TFEU). In addition, it specifies how and when the Union can negotiate international agreements in articles 188i-188o TFEU). It states that the

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<sup>7</sup> See A. Clapham, "Where is the EU's Human Rights Common Foreign Policy, and How is It Manifested in Multilateral Fora?", *The EU and Human Rights*, in Alston, P. (ed.), Oxford University Press, New York, 2006, pp.627-683 for the concerns for the consistency on different issues (pp.636-41), the importance of the consistency in multilateral fora (pp.641-65), and for the recommendations to ensure consistency (pp.665-83).

<sup>8</sup> Under the Constitution, the European citizens would no longer be just honorary or notional citizens of an EU that has no legal personality. A. Coughlan, "Political Integration: The Ultimate Politic Goal," *EUWatch*, Issue 1, 2006, p.4. Available at: [http://indemgroup.org/fileadmin/user\\_upload/groupdocs/euwatch/EUWatch-June2006.pdf](http://indemgroup.org/fileadmin/user_upload/groupdocs/euwatch/EUWatch-June2006.pdf) (accession in May 2007).

<sup>9</sup> S. Duke, "The Convention, the Draft Constitution and External Relations: Effects and Implications for the EU and Its International Role," 2003. Available at: <http://www.eipa.eu/files/repository/product/2003w02.pdf> (accession in August 2007).

<sup>10</sup> For a detailed information about the effects of legal personality on the EU's foreign policy, *ibid.*, pp.5-14.

Union may conclude an agreement (art. 1881 TFEU), and it sets out clearly the procedure to be followed (art. 188n TFEU).

Although a single legal personality undoubtedly provides a uniform appearance for the Union and “paves the way for the reinforcement of the common aspects of the pillar structures,”<sup>11</sup> at the same time, it raises a number of questions with regard to the conclusion of international agreements in the field of CFSP.<sup>12</sup> Although the procedure for concluding international agreements is found in the same article as other areas of Union competence, there is some procedural differentiation in the sense that the consultation of European Parliament is not required and the decision to conclude the agreement will normally be taken unanimously. Under article 188n(8), unanimity is required “when the agreement covers a field for which unanimity is required for the adoption of a Union act”, a situation which would normally apply to the CFSP. If this were to be applied strictly, unanimity would be required for all agreements where there is a CFSP element, which would greatly reduce the use of qualified majority voting. CFSP agreements once concluded, will probably have the same status within the Union legal order as other Union agreements. It is not clear, however, whether the general exclusion of the ECJ from jurisdiction in relation to the CFSP will apply to CFSP agreements.<sup>13</sup>

## II. Common Foreign and Security Policy

### 1. Its Place in the EU’s Competences, and Its Instruments: ‘Special Status’ from Other

While the previous treaties do not clarify who has the competence for which policy, the reform treaty clarifies the Union’s competences. It divides them into five categories (art.2 TFEU), exclusive competence of the Union (art.3 TFEU), competence shared between the Union and the member states (art.4 TFEU), competence on coordination of the employment and employment policies of the Member States (art.5 TFEU), competence on the areas where the Union carries out supporting, coordinating or complementary

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<sup>11</sup> *Ibid.*, p.5.

<sup>12</sup> A. Hable, “The European Constitution and the Reform of External Competences,” *EU Constitutionalisation: From the Convention to the Constitutional Treaty 2002–2005, Anatomy, Analysis, Assessment*, in Rovná, L. and Wessels, W. (eds.), European Institute for European Policy, Prague, 2006, p.148.

<sup>13</sup> M. Cremona., “A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty,” EUI Working Paper Law, No. 2006/30, 2006, p.19.

actions (art. 6 TFEU), and competence in matters of CFSP (art.2 (4) TFEU).<sup>14</sup> In another article 11(1), it also underlines that the EU has competence in matters of common foreign and security policy which will cover all areas of foreign policy, all questions regarding the Union's security and its common defence.

The treaty grants a “special status”<sup>15</sup> (or “specific status”,<sup>16</sup> “sui generis category”,<sup>17</sup> or “unique phenomenon”<sup>18</sup>) to the CFSP. An important expression of this “special status” is constituted by article 25 TEU. It provides that “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 the Union competences” and vice-versa. Thus, the CFSP is placed in between the “areas of shared competence” (art. 4) and “areas of supporting, coordinating and complementary action” (art. 6), though “[s]uch a choice was not inevitable.”<sup>19</sup> Instead of putting the CFSP into a special status, it can be preferred to allocate it into the category of shared competence without pre-empting national sovereignty like a parallel competence used for development cooperation and humanitarian aid, or into the supporting, coordinating or supplementary action, which should not harmonize the policy of member states by legally binding acts.<sup>20</sup>

Article 2(4) merely holds that the Union will have competence, in accordance with the provisions of the TEU, “to define and implement” a CFSP, including the “progressive framing” of a common defence policy, yet, it does not make it clear that to what extent the principles of direct effect might be applied.<sup>21</sup> In the absence of direct effect, it is hard to see how it might be applied. The interpretation of the ECJ can be thought as a way,

<sup>14</sup> In the constitutional treaty, the Union's competence in matters of CFSP would be governed by a separate article (art. I-16).

<sup>15</sup> Cremona, “A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty,” p.16.

<sup>16</sup> Hable, “The European Constitution and the Reform of External Competences,” p.161.

<sup>17</sup> Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” pp.198, 205.

<sup>18</sup> J.C. Qhrgaard, “International Relations or European Integration: Is the CFSP Sui Generis?,” *Rethinking European Union Foreign Policy*, in Tonra, B. and Christiansen, T.(eds.), Manchester University Press, Manchester and New York, 2004, pp.27-32.

<sup>19</sup> Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.205.

<sup>20</sup> *Ibid.*, p.205.

<sup>21</sup> M. Cremona, “External Relations and External Competence: The Emergence of an Integrated Policy,” *The Evolution of EU Law*, in Búrca, G. & Craig, P.(eds.), Oxford University Press, Newyork, 1999, pp.152-55. See Cremona for information on the pre-emption and exclusivity. She points out that the principle pre-emption cannot be applied to the CFSP, although there is no clear statement which shows CFSP action by the Union does not exclude or pre-empt Member State action. That is because pre-emption can be applied to shared competence, and the CFSP is not shared competence.

however, the ECJ has no jurisdiction over the CFSP. So, there can be no situation in which the Court would have the opportunity to examine a CFSP act directly effective or having primacy over conflicting domestic acts. On the other hand, in national courts, CFSP measures can be raised directly or indirectly, and the national courts can examine them to resolve conflicts between national law and CFSP acts. Nevertheless, it remains still a question how national courts would deal with such a question without being able to refer to the ECJ.<sup>22</sup>

In regards to CFSP instruments, it should be firstly mentioned that, under CFSP which was established as the second pillar of the EU through the TEU, the EU and its member states have had a variety of instruments of which “legal effect are unclear, but which have consequences under international law.”<sup>23</sup> They have been available to reach CFSP objectives (art. 12 (ex-art. J2) TEU). Three of them, common strategies (art. 13), joint actions (art. 14 TEU) and common positions (art. 15), have been mentioned in the treaty.<sup>24</sup> They all have enabled the Union to undertake concrete actions. However, there have been other instruments of the CFSP which have not been mentioned in the treaty.<sup>25</sup> There have also been Council decisions which have been required for implementing joint actions and common positions (art. 23(2)TEU).<sup>26</sup>

In the reform treaty, there is not a crucial innovation about CFSP instruments. Only the current common strategies, common positions and joint actions give way to the decision which will be the main instrument applicable in the CFSP (article 11(1) par.1 TEU). In this sense, then, the Union will conduct the CFSP by defining the general guidelines, adopting decisions, defining actions and positions to be taken by the Union, arrangements for the implementation of the European decisions as well as strengthening systematic cooperation between member states in the conduct of policy (art.12 TEU). The treaty deliberately excludes the adoption of legislative acts (art. 11(1) par.2, art.17(1) TEU). Basic difference between decisions and the legislative

<sup>22</sup> Cremona, “A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty,” p.17.

<sup>23</sup> P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, Oxford University Press, New York, 2004, p.407.

<sup>24</sup> For the detailed information concerning the common positions, joint actions and common strategies, see Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, pp.398-407 and T. Bilgiç, *Myth or Reality: Human Rights Protection in Common Foreign and Security Policy of the European Union*, Ankara University Press, Ankara, 2003, pp.22-25.

<sup>25</sup> For detailed information concerning the instruments which are not mentioned in the treaty such as political statements, declarations, démarches and dialogues and consultations, see Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, p.407 and Bilgiç, *Myth or Reality: Human Rights Protection in Common Foreign and Security Policy of the European Union*, pp.28-30.

<sup>26</sup> Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, p.407.



acts is that the legislative acts require the ordinary legislative procedure set out in article 249a(1) or special legislative procedures set out in article 249a(2) applied for the adoption of such acts (art.I-34(2)).

In this sense, it is clear that there is a dividing line between the CFSP and other policies related to both legal instruments and in the EU's competences. This briefly implies that traditional pillar structure continues to exist both in the legal instruments and in the EU's competences.

## **2. Decision-Making Rules in CFSP: Unanimity or Majority?**

The Council has been the most important actor for the conduct of the CFSP, its powers have been more than the other institutions (see art. 13(3)TEU). CFSP decisions have been taken by the Council. These decisions have been subject to unanimous votes (art. 23(1) TEU). This position is maintained in the reform treaty, in articles 11 (1) and 17(1). That is, the treaty continues to state as a rule that the CFSP will be subject to specific procedures. It will be defined and implemented by the European Council, decisions under the matters of CFSP shall be taken by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. Moreover, the adoption of legislative acts shall be excluded (art.11(1) and art. 17(1)).

As a flexible alternative to fully blocking decisions requiring unanimity, the treaty adopts the option of "qualifying abstention" which has been already accepted by art.23(1) TEU. According to this option, any member state is authorised to make a formal declaration, which means that it will not have to apply the decision, while accepting that the Union as such is bound by it. As different from TEU, the treaty emphasizes that the decision will not be adopted if the members of the Council qualify their abstention by representing at least one third of the member states comprising at least one third of the population of the Union (art. 17(2) TEU).

There are a small number of complex exceptions in articles 11 (1) and 17(1) to the unanimity rule. One of them also offers the new High Representative of the Union for Foreign Affairs and Security Policy(HR) to have an opportunity to present a proposal for voting by qualified majority, but only on a "specific request" from the European Council (art. 17 (2) TEU). However, these exceptions cannot be applied when a member state rejects a majority vote "for vital and stated reasons of national policy" (art. 17 (2). In its third paragraph, article 17 also enables the European Council to adopt a

decision assuring that the Council of Ministers can act by a qualified majority in cases other than in paragraph 2. Nevertheless, for using this opportunity, firstly, a national parliament should have not made its opposition known within six months of the date of such notification (art.33 (3) TEU). Secondly, it should not be a decision which has military or defence implications, because, the treaty also states that the possibilities for QMV do not apply to decisions having military or defence implications (art. 33 (3) TEU).

Thus, despite a set of complex exceptions and the extension on the the nomination procedures for the President of the European Council and of the High Representative which might help to achieve “a faster consensus”,<sup>27</sup> the treaty explicitly supports “the rule of unanimity”, by involving exceptions of exceptions, probably taking into account the nation states’ concerns. Yet, it should be emphasized here that it has been too difficult for the EU “to develop common policies on matters of general interest,”<sup>28</sup>(Eeckhout, 2004:412), if the insistence on the rule of unanimity continues to be followed.

### **3. Relations Between Institutions in CFSP Matters**

The relations between institutions in CFSP matters do not change in most areas, yet, there are some important changes in few areas (see graph 1). Some scholars define these amendments as simplification or clarification, but on the other hand, some define them as new headaches.<sup>29</sup> In this part of this paper, these amendments within the institutional structure (art.9-9f TEU) will be analysed in the light of the provisions of the reform treaty on CFSP.

#### **3.1. European Parliament (art.9a TEU)**

The reform treaty fails to advance the European Parliament’s participatory powers in the field of CFSP. With articles 11 (1) and 17(1) TEU, it expressly excludes legislative acts in the field of the CFSP, this implies that the CFSP remains the business of the executive. The European Parliament, in principle, is only a supporting actor in this field. It is required to be only consulted and regularly informed, but it has no participation in decision-making. Furthermore, the treaty excludes any powers to ratify international

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<sup>27</sup> Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.209.

<sup>28</sup> Eeckhout, *External Relations of the European Union*, Legal and Constitutional Foundations, p.412.

<sup>29</sup> Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.209.

agreements. Article 188n(3,6) TFEU stipulates that the right of proposing the opening of negotiations, the voting modalities as well as the inclusion of the European Parliament differ, if an agreement exclusively or principally relates to the CFSP. In this context, the effects of international agreements in the CFSP are also questionable, as the special procedures and characteristics of Union agreements under art. 24 TEU have been abolished. Another open question concerns whether agreements in the CFSP should have the same binding force as agreements falling under the current Community sphere or whether they should maintain a specific character similar to the whole field of the CFSP. Given the exclusion of the ECJ's jurisdiction in the CFSP 11(1) TEU, it is also questionable who would determine the effect of Union agreements in the CFSP sphere.<sup>30</sup> In brief, there are various controversial issues about international agreements in the CFSP, but it is the fact that the EP is not even consulted before the adoption of international agreements which relate exclusively to the common foreign and security policy. Thus, the CFSP remains the only field where the EP does not have to be consulted by the Council for the conclusion of international agreements (art. 188n(3,6) TFEU).

With the reform treaty, the High Representative (HR) and the permanent chair of the European Council become the contact persons for the EP. The HR can consult and inform the EP in line with art.21(1)TEU. In addition, the EP can ask questions to the Council and to the HR or make recommendations to them (art.21(2)TEU). The president of the European Council presents a report to the EP after each session, which is most likely to include CFSP matters (art. 9b (6d)). That is unfortunately all; the EP has not seen any appreciable increase in its powers of scrutiny and its participatory powers in the field of CFSP/ESDP. It can even be argued that “the European Parliament (EP) has less influence over these aspects of external relations than before”, due to the decrease of influence of the Presidency over external relations.<sup>31</sup>

Klein and Wessels<sup>32</sup> explain these limitations set for the EP in CFSP matters by two lines of arguments. First one is “the DDS Syndrome (discreet and discretionary action, highly loaded with sovereignty symbols)”. Because

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<sup>30</sup> Hable, “The European Constitution and the Reform of External Competences,” p.164.

<sup>31</sup> Duke, “The Convention, the Draft Constitution and External Relations: Effects and Implications for the EU and Its International Role,” 2003, p.33.

<sup>32</sup> Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.213.

the CFSP usually demands fast, discrete and discretionary decision-making, the marginal rights of the EP can be an obstacle for its operation. The other one is that since the EP is not seen “as legitimating factor for this central area of the Union”, national governments and diplomats, deriving their general mandate from domestic sources, are perceived to be the legitimated actors.

### **3.2. The Foreign Affairs Council (art. 9c(6) TEU)**

The new treaty creates a separate independent Foreign Affairs Council. The task of this council is “to 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” (art.9c(6) par.3 TEU). This formation also has a presidency different from the other Council formations with the HR as permanent chairperson (art. 9c(9)). However, the selection of chairpersons below the Council is controversial. Some argue that the Political and Security Committee (PSC) and working groups in the CFSP area should also be chaired by civil servants of the HR, yet, others argue that they should be chaired by some kind of rotating presidency. The prevalent idea is that civil servants of the HR should have the competence to be chairs.<sup>33</sup>

### **3.3. The European Commission and Its President (art.9d TEU)**

Although the reform treaty envisages “joint proposals” submitted to the Council by the High Representative “for the area of common foreign and security policy” and the Commission, “for other areas of external action” (art. 10b(2)), it seems that the role of the Commission is still not as strong as it is in other fields of Community competences. In CFSP issues, the dominant actors remain the European Council and the Council of Ministers. Furthermore, the Commission is losing considerably its importance by the treaty’s innovations of the HR and the European External Action Service (EEAS). It is also losing its autonomy presenting the EU to the outside world in its international relations and handling the EU’s external relations, by obviously stating that it can ensure the Union’s external representation, with the exception of the common foreign and security policy, and other cases provided for in the treaties (art.9d(1)).

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<sup>33</sup> *Ibid.*, p.211.

### 3.4. The European Council and Its President (art.9b TEU)

Under the current regime, the European Council has not made extensive use of its power under the CFSP. It merely lays down the strategic guidelines applicable in the CFSP under article 13(1) TEU, thus acted by legally non-binding instruments. Moreover, it is entitled to define common strategies which are limited to the field of CFSP under article 13 (2) TEU. The reform treaty, on the other hand, empowers the European Council for the EU in general (art. 9b (1)), for the External Action (art. 10b(1)) and for the CFSP (art. 13 (1)) in particular. It has an opportunity to identify the strategic interests and objectives of the Union on the basis of the principles and objectives in the field of external relations set out in article 10a TEU. These strategic interests and objectives of the Union can relate to the CFSP and to other areas of the external action of the Union. The European Council would thereby act by way of decisions, thus legally binding acts (art.10b(1)). In such a situation, the Council of Ministers can act by qualified majority (art. 17 (2)), on the basis of this decision adopted by the European Council.

Another innovation brought with the treaty is the fulltime chair of the European Council (art. 9b(5)TEU) who is elected for a period of two-and-a-half years by a qualified majority of the European Council. The treaty envisages for the President of the European Council to chair the Council and drive forward its work, ensure its proper preparation and continuity and to facilitate cohesion and consensus within the European Council (art. 9b (6)). Of specific importance for the CFSP, it has an additional function. It has authority to ensure the external representation of the EU on issues concerning the CFSP. It states that it is “without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy”(art. 9b (6) par.2 TEU), however, this statement does not seem to be enough to prevent future conflicts between the European Council and the HR.

The reform treaty also provides that legal acts adopted by the European Council, which are intended to produce legal effects vis-a-vis third parties are subject to judicial control by the ECJ (art. 230(1)TFEU). Yet, this review of legality by the Court is limited. Firstly, it only applies to acts by the European Council producing legal effects vis-a-vis third parties. Secondly, it can only refer to the acts or those parts of the acts which do not relate to the CFSP. It is questionable how the ECJ can draw a proper delimitation between the parts of a European decision which relate to the CFSP and which do not relate to it.<sup>34</sup>

<sup>34</sup> Hable, “The European Constitution and the Reform of External Competences,” p.153.

### 3.5. High Representative of the Union for Foreign Affairs and Security Policy (art.9e TEU)

The reform treaty abolishes the pillars division and provides a foreign minister (renamed “High Representative of the Union for Foreign Affairs and Security Policy”) to facilitate positive effects both for horizontal consistency (within and between the EU institutions) as well as vertical consistency (between the EU institutions and the Member States).<sup>35</sup> So, the HR can be defined as the first genuine incarnation of “supranational intergovernmentalism” which aims to meet the requirement of coordination in the broad field of CFSP.<sup>36</sup>

The HR, who is to be appointed by the European Council with the agreement of the Commission President (art. 9e(1)), is accountable to these bodies for its election and during the execution of its office. In addition, it is subject as a body to a vote of consent by the EP (art.9d(8)) like the members and the President of the Commission.

The High Representative merges the post of High Representative for the Common Foreign and Security Policy with the European Commissioner for External Relations and European Neighbourhood Policy. Thus, it not only ensures coordination of the civilian and military aspects of such tasks (art. 28 (2)) in matters of the ESDP and involves in the decision-making procedures or the permanent structured cooperation (art. 31 (2) and (3)), but also “ensures the consistency of the Union’s external action” and to be “responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action” (art. 9e (4) TEU) as one of the vice-presidents of the Commission. Moreover, it is authorized as the chair of the Foreign Affairs Council which has been chaired so far by a national foreign minister during its rotating presidency (art. 9e(3), 13a(1) TEU). Thus, it is endowed with a “double-hat being embedded in the Commission as well as in the Council.”<sup>37</sup> Its tasks also include initiating and executing of European decisions, and also representing the Union, speaking on behalf of the Union with third countries, and also displaying the Union’s position in the international organizations

<sup>35</sup> Duke, “The Convention, the Draft Constitution and External Relations: Effects and Implications for the EU and Its International Role,” p.32.

<sup>36</sup> Howorth, “From Security to Defence: The Evolution of the CFSP,” p.196.

<sup>37</sup> Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.214.

(art. 13a(2) TEU). These tasks of the Minister load a huge burden to the President's shoulders, yet the most challenging one is possibly to reconcile diverging political interests among the member states as the chair of the Foreign Affairs Council. It is under control by governments in the Council and diplomats in the PSC as well as by the President and the other members in the Commission. So, it has to reconcile different demands and interests of Commission departments and relevant interest networks. Moreover, when its right to propose a QMV is thought (art. 17(2)), it seems that it remains dependent on a preceding unanimous agreement in the European Council. Based on these reasons, then, it becomes clear that the HR will have several difficulties while trying to establish a wide acceptance and forge consensus under these institutional and procedural pressures.

Another problematic issue about the HR is that both the President of the European Council and the Commission President have considerable competences in the field of external relations which can result in role conflicts between these institutions. To illustrate, the European Council President "shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy" (art. 9b (6) TEU). The European Commission, on the other hand, "shall ensure the Union's external representation" (art. 9d (1)). It states that it is valid "with the exception of the common foreign and security policy, and other cases provided for in the Treaties", but it is not easy to draw an absolute line given the vast field of external relations. Moreover, the Council and the Commission, assisted by the HR, have to ensure consistency together between the different areas of the Union's external action and its other policies (art. 10a(3) par.2 TEU). In assisting the Council and the Commission, the HR can intervene into major areas of the Commission's or the Council's external issues, and the opposite of this position is also possible.

While doing his tasks, the HR is assisted by a European External Action Service which supports him in "fulfilling his mandate" (art. 13a(3) TEU). The European External Action Service (EEAS) is composed of officials from relevant departments of the General Secretariat of the Council of Ministers and of the Commission, as well as staff seconded from national diplomatic services. Its institutional embedding and the scope of its tasks is not specified in the treaty and remains subject to a decision. With a view to its composition, it can be said that it is an ideal one for the realisation of the consistency

in the field of external action. However, there is a problem about “under whose authority, or respectively structural affiliation” it was established, the Council’s, the Commission’s or the authority of the High Representative.<sup>38</sup> Within the Community, the prevalent idea about establishing the EEAS is that it is necessary to strengthen the structure and coherence of foreign policy. In addition, it is not important whether it is a part of the treaty or whether it depends on the High Representative’s existence. Yet, as “the absence of the Foreign Minister calls the logic of having an EEAS into question”, it may be better to accept it under the HR or at least in a respectively structural affiliation with him.<sup>39</sup>

To conclude, these functions of the High Representative can bring more consistency to the Union’s external action which may enhance its effectiveness and more importantly its credibility in its international relations. Based on these reasons, the Foreign Ministers of the EU, at a meeting in May 2006, thought the creation of a foreign minister as the most important innovation of the proposed institutional structure. In this meeting, the Foreign Ministers questioned how Europe’s voice in the world can be enhanced without the tools provided for by the constitutional treaty, such as a common EU foreign minister and a common diplomatic service.<sup>40</sup> Moreover, most probably these reasons enabled a foreign minister -one of the innovations that were agreed upon in the constitutional treaty- to be kept in the reform treaty’s final text. However, the necessity of reconciling diverging interests between different institutions and networks and serious role conflicts and organisational rivalries between institutions seem to be serious problems for the High Representative in both his tasks about internal and external issues.

### **3.6. European Court of Justice: Jurisdiction of CFSP Issues (art.9f TEU)**

The ECJ has had no jurisdiction in CFSP issues (art. 46 (ex-art. L) TEU). The exclusion of a supervisory role of the ECJ in CFSP has limited the legal aspect of the Union’s foreign policy. The ECJ continues to lack jurisdiction in CFSP matters in the reform treaty as well (art.240a(1) TEU). However, there are now two exceptions. Firstly, it has jurisdiction to rule on proceedings reviewing the legality of restrictive measures against natural or legal persons (art.240a(2) TEU). Secondly, the unified procedure for the

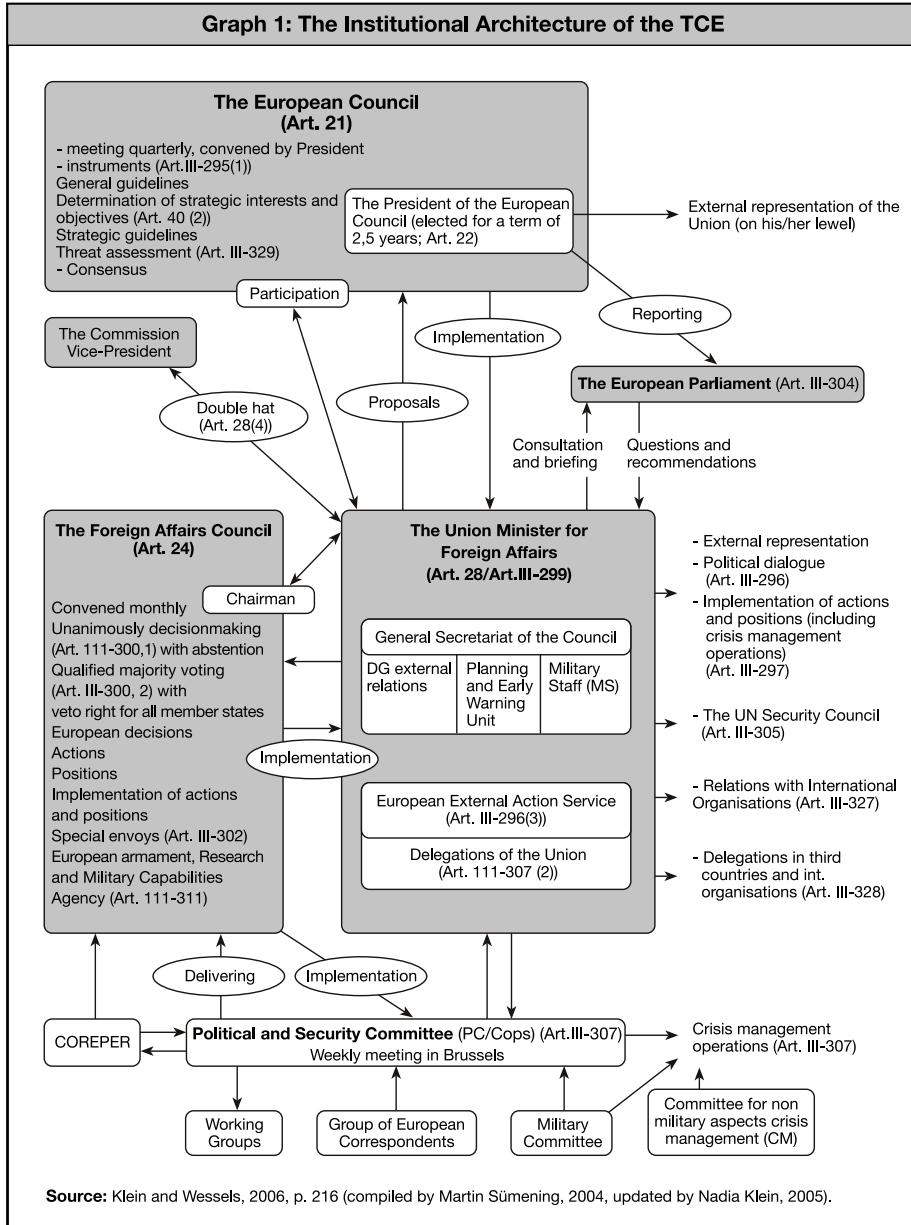
<sup>38</sup> Hable, “The European Constitution and the Reform of External Competences,” p.151.

<sup>39</sup> *Ibid.*, p.151.

<sup>40</sup> M. Beunderman, “Foreign Ministers Hold Cloistered Talks on EU Future,”2006. Available at: <http://euobserver.com/9/21697> (accession in May 2007).



conclusion of international agreements is also vital for the CFSP agreements (art.188n TEU), and this procedure is not outside the Court's jurisdiction.<sup>41</sup> This is not the end of the problem, yet, at least, it can be a step towards a stronger role of the ECJ in CFSP matters.



<sup>41</sup> Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, p.419.

### III. European Security and Defence Policy<sup>42</sup>

The reform treaty has introduced a separate, new section on European Security and Defence Policy for the first time in the history of the EU (articles 27-31 TEU). The general legal basis for ESDP in the treaty is provided in art. 2 (4) TFEU. “The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.” According to article 11(1), this competence covers all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy, which might lead to a common defence. Member states are obliged to support the Union’s common foreign and security policy in a spirit of loyalty and mutual solidarity (art. 11(2)). A first notable difference in the treaty lies in the determination of the political statement contained in article 27(2) TEU providing that the progressive framing of a defence policy will (not only might) lead to a common defence, when the European Council acting unanimously so decides.

For the tasks of the ESDP, the Union can apply to “civilian and military means” (art. 28(1) TEU). The tasks referred to in article 28 (1) TEU involve “joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation”. All these tasks are designed to contribute to the common objective of fighting against terrorism which includes supporting third countries in combating terrorism in their territories. The instruments for operations remain, however, under national control as it states that “member states shall make civilian and military capabilities available to the Union” (art.27 (3)), and also expenditure arising from operations having military or defence implications will not be charged to the Union budget (art.26 (3)). The difference is about the establishment of specific procedures for guaranteeing rapid access to the Union budget, or a “start-up fund”<sup>43</sup> when urgent financing of initiatives emerge in the framework of the common foreign and security policy, and in particular for preparatory activities for security and defence tasks (art. 26 (3)TEU).

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<sup>42</sup> ESDP is relabeled, so it will be known no longer as the “European” but as the “Common Security and Defense Policy” (CSDP).

<sup>43</sup> Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.206.

## **1. New Mechanisms for Closer Cooperation and Flexibility in ESDP**

Within the reform treaty, for more efficiency and operability in ESDP, the unconditional acceptance of enhanced cooperation in the field of CFSP and the introduction of new forms of flexibility on a legal basis is provided. These new and specific mechanisms governing closer cooperation and advancing the profile of CFSP and ESDP have many faces in the treaty.

### **1.1. The Implementation of a Task by a Group of Member States (art. 29 TEU)**

The Lisbon treaty confirms the commitment of the EU to the progressive framing of a common defense policy (art.27/2 TEU). In the treaty, the aim of ESDP is defined as providing the EU with an operational capacity drawing on civilian and military assets (art.27/2 TEU). As for the operational scope of ESDP, the treaty for the first time includes the extended list of Petersberg tasks. In addition to the traditional scope of tasks that includes humanitarian, rescue, peacekeeping, and crisis management (including peacemaking) operations, it refers to joint disarmament operations, military advice and assistance tasks, and the fight against terrorism, including by supporting third countries in combating terrorism in their territories (art.28/1 TEU).

In regards to cooperation, it is known that the debate over the possibility for a group of member states moving on more flexible strategies resulted in the acceptance of rules for “enhanced cooperation” in the Amsterdam summit. The Nice treaty extended them to the CFSP pillar. The reform treaty now reconfirms “enhanced cooperation” (articles 280a-280i, Treaty on the Functioning of the European Union (TFEU)), extending these rules also to ESDP provisions.

It also introduces new mechanisms of flexibility, one of them is the implementation of a task by a group of member states (art. 29 TEU). This form of flexibility refers to the situation in which the Council entrusts the implementation of a civilian or military task to a group of member states “which are willing and have the necessary capability for such a task” (art. 29 (1) TEU). It does not consist of any obligatory minimum number of participants, that is, only two member states are enough to form such a group in order to implement a European task. The participating member states, in association with the High Representative, have to agree collectively on the concrete

management of the task, and they are also obliged to regularly inform the Council of the progress achieved during the operation and consequences in the implementation. The Council is entitled to authorise necessary adaptations to the legal basis of the operation by means of a decision (art. 29 (2) TEU).

## **1.2. Permanent Structured Cooperation (art. 27 (6), art. 31 TEU)**

Willing and able EU member states, those “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” can use the procedure of “permanent structured cooperation”(art.27(6), art.31 TEU).<sup>44</sup> This is another important innovation and improvement of the reform treaty, given the fact that enhanced cooperation in the field of security and defence is explicitly excluded in the TEU (art. 27(b) TEU). According to this new instrument of ESDP, member states which wish to participate to the permanent structured cooperation have to notify their intention to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy (art.31(1)TEU). Yet, to notify their intention, firstly, they have to fulfil the criteria regarding the military capabilities set out in the respective protocol added to the treaty (Protocol (No.4) on Permanent Structured Cooperation). Within three months following such notification, the Council has to adopt a decision establishing permanent structured cooperation and determining the list of participating member states (art. 31 (2) TEU). To this end, the Council acts by qualified majority which is defined (ar.9c (4) TEU) by at least 55 per cent of the members of the Council representing the participating member states, comprising at least 65 per cent of the population of these states. However, all other decisions taken in the framework of permanent structured cooperation other than withdrawal from it are to be adopted by unanimity by the Council (art. 31(6) TEU). Any request to accede permanent structured cooperation, at a later stage, has to follow the same procedure, except of the fact that effective participation to the Council vote is limited to these members representing the participating states (art. 31 (3) TEU).

The permanent structured cooperation only constitutes the legal foundation for cooperation in order to meet its objectives, but not a particular

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<sup>44</sup> It was recently debated whether permanent structured cooperation can be established even in case of the non-ratification of the treaty. It is generally accepted that it does not depend on the ratification, since the implementation of “the EU battle group concept” was specified firstly in November 2004 by the member states at the Military Capability Commitment Conference, before it was incorporated to the treaty. Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,”pp. 221-22.

legal basis for launching civil or military operations in a concrete crisis situation. It contains no binding commitment to deploy troops or towards mutual defense. The quality of execution of military operations is exclusively limited to articles 28 and 29 TEU. Thus, the reform treaty actually encompasses two provisions to carry out civil or military crisis operations, enabling either all member states (art.28 (2) TEU) or groups of them (art. 29 (1) TEU). Here, it has to be emphasized that it is difficult to lead to collective action based on unanimous decision-making by all member states. Therefore, most likely, civil or low-risk operations are expected to be executed by ad-hoc groups according to art.29 (1), while high-risk operations are expected to be carried out by members of permanent structured cooperation equally based on art.29 (1).<sup>45</sup>

### **1.3. Mutual Defence Clause (art. 27(7) TEU)**

Another major innovation of the reform treaty in the ESDP is the mutual defence clause in art. I-41(7) TEU. It obliges all member states to aid and assist “by all the means in their power” another member state that is “the victim of armed aggression on its territory”, in accordance with article 51 of the United Nations Charter. It avoids challenging “the specific character of the security and defence policy of certain member states” taking into account potential political or even constitutional conflicts. Moreover, it avoids challenging the role of NATO by providing that the “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”. By this requirement in art. 27(7), it is clear that commitments in this area have to be consistent with the North Atlantic Treaty Organisation, however, this clause can be a problem particularly for the neutral and non-aligned countries, such as Austria, Finland, Ireland and Sweden, and also Denmark.<sup>46</sup>

### **1.4. European Defence Agency (art. 27(3) par.2 and art.30 TEU)**

This “intergovernmental” defence agency<sup>47</sup> was created to harmonise and support the development of civilian and military capabilities in the EU

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<sup>45</sup> K. Blanck-Putz, “Flexible Integration in the Common Foreign and Security Policy,” *EU Constitutionalisation: From the Convention to the Constitutional Treaty 2002–2005, Anatomy, Analysis, Assessment*, in Rovná, L. and Wessels, W. (eds.), European Institute for European Policy, Prague, 2006, pp.261-64.

<sup>46</sup> Hable, “The European Constitution and the Reform of External Competences,” pp.167-68.

<sup>47</sup> The European Defence Agency (EDA) was already established by a Council Joint Action on 12 July 2004, even before the formal signing of the treaty like “the battle group concept.” It was established on the basis of art. 14 TEU with the task to support

member states for the implementation of the ESDP.<sup>48</sup> So, it aims to take over coordinating and supporting tasks for the member states in the field of defence capabilities development, research, acquisition and armaments.

The Agency, which has legal personality, has to act under the authority of the Council, which presumably refers to the Foreign Affairs Council and the High Representative (art. 30(1)). Its statute, seat and operational rules is to be defined by the Council, acting by qualified majority (art.30(2)). It also has to carry out its task in line with the Commission where necessary (art.30(2)). In regards to the institutions involved, then, it can be said that the Agency provides an “interesting constellation”.<sup>49</sup>

Regarding the Agency’s tasks, article 30(1) involves a detailed catalogue. According to this article, its tasks include contributing to defining the member states’ military capability objectives and evaluating the observance of the capability commitments given by the member states, promoting the harmonisation of operational needs, initiating or coordinating multinational projects or programmes with regard to the objectives in terms of military capabilities and supporting research activities and the industrial and technological base in the defence sector.

Another issue which should be emphasized about the Agency is that it constitutes “a sort of flexible cooperation”,<sup>50</sup> as it is “open to all member states who wish to be part of it” (art. 30(2)). Moreover, “specific groups shall be set up within the Agency bringing together member states engaged in joint projects” (art.30(2)). This indicates that the success of it will presumably depend upon “the political will of EU member states to improve and to pool their military capabilities”.<sup>51</sup>

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the Council and the member states in their effort to improve the EU’s defence capabilities in the field of crisis management and to sustain the ESDP. The Joint Action establishing the European Defence Agency, which is clearly based on art. 14 TEU, will remain in force until it is altered. Therefore, it is not to be expected that the outcome of the ratification process of the treaty will substantially affect EDA. It will continue its work, whatever the result will be. Hable, “The European Constitution and the Reform of External Competences,” p.170. Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.223. Blanck-Putz., “Flexible Integration in the Common Foreign and Security Policy,” p.268.

<sup>48</sup> Blanck-Putz., “Flexible Integration in the Common Foreign and Security Policy,” p.267 and Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.223.

<sup>49</sup> Hable, “The European Constitution and the Reform of External Competences,” p.170.

<sup>50</sup> *Ibid.*, p.169.

<sup>51</sup> Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.223.

## **2. Solidarity Clause (art. 188r TFEU)**

This form of mutual assistance is not regulated within the section on ESDP. Yet, it in fact concerns potential security threats against any of the member states. It establishes an obligation to assist a member state which becomes a victim of a natural or man-made disaster or a terrorist attack, at the request of its political authorities. The objectives of this mechanism are then, the prevention of threats or the assistance in the event of a threat or other disaster in the territory of the member states, and the protection of democratic institutions and the civilian population from any terrorist attack. However, there is an uncertainty related to the scope of obligation under the solidarity clause, similar to the provision on mutual defence. That is, there is no specification as to where such measures are to take place.

In this mechanism, the Union and member states are called to act jointly, “in a spirit of solidarity.” The Union has to mobilise all the instruments at its disposal, which notably includes the military resources made available by the member states.

## **IV. Conclusion**

Based on the analysis on CFSP and the reform treaty, it can be said that the CFSP maintains its special character with persisting differences regarding the procedures, legal instruments, and organs involved in the decision-making process under the reform treaty as well. Besides maintaining its special character, it continues to insist on the rule of unanimity as the principal voting requirement. Moreover, regarding the relations between institutions in CFSP matters, firstly, it fails to advance the European Parliament’s participatory powers. Also, the role of the Commission continues to be not as strong as it is in other fields of Community competences. It provides a single foreign minister (HR) whose functions can bring more consistency to the Union’s external action enhancing its effectiveness, and more importantly its credibility, in its international relations. However, given the institutional innovations of the European Council President and the HR, but also the strengthening of the President of the Commission, it is expected that the reform treaty can result in “personalisation and politicisation”, which can lead to a considerable power struggle between these institutions, and their presidents.<sup>52</sup> Therefore, it is not clear how the various actors should relate to

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<sup>52</sup> Klein and Wessels, “A ‘saut constitutionnel’ out of an Intergovernmental Trap? The Provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy,” p.221.

one another for consistency and also coherence.<sup>53</sup> Finally, the exclusion of a supervisory role of the ECJ in CFSP continues to limit the legal aspect of the Union's foreign policy.

Based on these findings, it is hardly possible to claim that the CFSP is not dominated by the intergovernmental sphere under the reform treaty. The amendments with regard to CFSP have not yet moved it into the supranational level. Due to its nature, and due to its strong link to the notion of national sovereignty, it is in fact impossible to form a pure supranational CFSP. National states are apparently not willing to transfer sovereignty, even if it is of a limited dimension. The defence of national sovereignty still prevents a leap towards a more functional, effective, credible and coherent CFSP, so the gap between goals, expectations and capabilities continue to remain wide. It seems that there is still a long road ahead towards a more effective EU foreign policy, as the success of it still depends, to a great extent, to the decisions of the most influential member states in the Union.<sup>54</sup> However, to exist as a global actor in the international area, it is essential for the EU to have a CFSP allowing the Union to speak with one voice.

In regards to ESDP, the reform treaty also provides important amendments. Firstly, it broadens the enhanced cooperation by overcoming the existing limitations of enhanced cooperation. In addition, it involves several new legal bases assuring a flexible integration. It also provides comprehensive obligations of mutual defence and solidarity assistance. Finally, it facilitates the development of the CFSP in the institutional setting of the EU (not outside the treaty framework) by means of the existence of the mechanisms of closer cooperation and flexible integration. Therefore, it can be defended that the reform treaty can "strengthen the legal foundation for a common defence policy to a considerable degree."<sup>55</sup> Nevertheless, while defending this idea, it should not be forgotten that as long as the principle of unanimity within the framework of CFSP/ESDP is maintained, it can protect only the members' national interests, not an autonomous "European interest."<sup>56</sup> Moreover, as long as the member states continue to prevent substantial transfer of their

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<sup>53</sup> Consistency and coherence are both essential to develop an integrated external policy, as "coherence may be said to imply consistency, but to require something more." Cremona, "External Relations and External Competence: The Emergence of an Integrated Policy," p.169. For also information on the problems consistency and coherence, see Bretherton and Vogler, "Common Foreign and Security Policy: A Political Framework for EU External Action?," pp.174-177.

<sup>54</sup> F. Cameron, "The Future of the Common Foreign and Security Policy," 2003, p.124. Available at: <http://www.watsoninstitute.org/bjwa/archive/9.2/EU/Cameron.pdf> (accession in September 2007).

<sup>55</sup> Hable, "The European Constitution and the Reform of External Competences," p.170.

<sup>56</sup> Qhrgaard, "International Relations or European Integration: Is the CFSP Sui Generis?," pp.32-34.



sovereign rights in the field of external and security policy to the EU, the implementation of activities in this field inevitably relies on “progressive groups of a few” who deal with sensitive issues according to their political will, financial and operational capacities.<sup>57</sup>

Overall, based on this analysis, it can be claimed that the reform treaty, with its contributions to the CFSP/ESDP, has the potential to transform EU external relations and even to enable the Union to more effectively play its role on world affairs. Taken together, the combined effects of legal personality by the Union, the creation of a High Representative for Foreign Affairs and Security Policy and the supporting European External Action Service, also by new mechanisms of closer cooperation and flexible integration, indeed, have the potential to much improve the effectiveness of EU external relations. On the other hand, it is a fact that the successful development of CFSP/ESDP can be achieved by pooling resources and sovereignty powers, involving mechanisms of joint exercise of these pooled sovereignty powers and delegation of sovereignty powers to EU institutions. However, there is still a long way to go before the EU reaches that stage mainly due to the lack of unity among EU members, and their general reluctance to cooperate and harmonise. So, the reform treaty, with its contributions, should be accepted as a positive step for EU coordination and consistency in external relations, but it is not yet sufficient to accomplish a successful CFSP/ESDP.

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<sup>57</sup> Blanck-Putz, “Flexible Integration in the Common Foreign and Security Policy,” pp.240-256.