



## The impact of the Lisbon Treaty on CFSP and ESDP

Number 37, March 2008

*The Lisbon Treaty is an attempt to overcome the impasse caused by the failure of the Treaty Establishing a Constitution for Europe.<sup>1</sup> It aims to create an enhanced institutional architecture and to offer better opportunities for strengthened collective action. Among the various new provisions it contains, many do not challenge the essential inter-governmental nature of foreign and security policy decision making. Nevertheless, this article concludes that it does introduce a number of important institutional changes that require further discussion and elaboration before the Treaty enters into force.*

### 1. From constitution to treaty

Most of the provisions relating to the Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP) (previously called ESDP – see section 3) that were contained in the Constitutional Treaty are similarly reinserted into the Lisbon Treaty that replaced it. At the behest of certain Member States, however, the more ‘Constitutional’ aspects have been tightened up to ensure a stricter interpretation of institutional competences. For example, the revision of Article 15b now explicitly spells out the exclusion of legislative acts in the domain of the Union’s external action, and Article 3b paragraph 2<sup>2</sup> now emphasises the prevalent role of the Member States over the Union.

Whereas the Constitutional Treaty gathered together the *acquis* and new provisions within a single document, the Lisbon Treaty demarche is in keeping with past practice of Treaty reform i.e. it is not a substitute for the existing treaties (treaty of the EU and treaty of the EC)<sup>3</sup> but amends them, thereby conserving the treaty traditional *dual* structure.

### 2. Towards a consolidated institutional framework

In an attempt to offer greater coherence, the Lisbon Treaty introduces some innovations aimed at rationalising the EU’s institutional architecture.

#### 2.1 Rationalisation of EU actor competences

Currently, the EU’s external action is exercised by a multiplicity of actors, which tends to dilute the establishment of common and coordinated practice. The Lisbon Treaty attempts to overcome this lack of coherence and effectiveness by reorganising the institutional framework in a number of ways.

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<sup>1</sup> Hereafter the ‘Treaty Establishing a Constitution for Europe’ will be referred to as the Constitutional Treaty.

<sup>2</sup> Article 3b, paragraph 2 states: “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 word “only” was inserted in the Lisbon Treaty – it was not in the Constitutional Treaty.

<sup>3</sup> The treaty of the EU keeps its name, while the treaty of the European Community is now called the *Treaty on the Functioning of the EU*.

### *New President of the European Council*

The Lisbon Treaty seeks to respond to the lack of continuity inherent within the six-month rotating presidency system, by inaugurating a permanent President within the European Council. He or she will be elected by qualified majority voting (QMV) for a period of two and a half years - renewable once (Treaty of Lisbon (ToL), Article 9B paragraph 5).

This new position aims to give better visibility and stability in *'the preparation and the continuity of the work of the European Council'* and *'the external representation of the union on the CFSP issues'* (ToL, Article 9B paragraph 6). It is not possible to tell at this stage how powerful a position this might become: this partly depends on the personality of the incumbent and the degree to which the Member States permit him or her to take the initiative.

### *New High Representative*

The creation of a 'High Representative (HR) of the Union for Foreign Affairs and Security Policy' - called the 'EU Minister of Foreign Affairs' in the now defunct Constitutional Treaty - is another innovation. Essentially, the purpose is to achieve greater coherence across the first and second pillars within the EU; creating a post that straddles the Council and the Commission, by combining the roles of the present High Representative for CFSP in the Council (Javier Solana) and the Commissioner for External Relations in the Commission (Benita Ferrero-Waldner).

Appointed by the European Council - with the agreement of the President of the Commission and the consent of the European Parliament – the HR will act in accordance with a Council mandate, and be responsible for harmonizing and coordinating the EU's external action between the Commission and Council (ToL, Article 9E paragraph 4). The new HR will become a significant figure in his or her own right with enhanced representative and participatory roles in the CFSP. The new HR will:

- Conduct security and foreign policy on behalf of the Council (ToL, Article 9E, paragraph 2) and, in addition to the powers exercised by the current HR for CFSP, the new HR will preside over the External Relations Council (ToL, Article 9E, paragraph 3)<sup>4</sup>.
- Participate in the elaboration of CFSP, having a new right to *"submit proposals on his own initiative or jointly with the Commission"*, and may *"submit questions to the Council and convoke extraordinary meetings on emergency matters"*.
- Have a representative role in the *"conduct of political dialogue with third parties, and shall express the Union's position in International Organisations and at intergovernmental conferences"* (ToL, Article 13a paragraph 2).
- Have responsibility for facilitating the harmonisation of Member states' views.

### *New External Action Service.*

In support of his/her new mission, the HR will be assisted by the creation of a European External Action Service (EEAS) (ToL, Article 13a paragraph 3). Composed of officials from the Council, Commission and diplomatic services of Member States, the EEAS will seek to streamline the EU external services by combining all those involved in foreign affairs.

### *Confined powers for the Commission and the Parliament*

The Commission and the European Parliament have seen their competences strictly delimited and will not be able to extend them in the sensitive area of CSFP (as indicated in Declaration 14 of the ToL *"the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament"*).

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<sup>4</sup> Whereas the rotating presidency-in-office currently chairs all meetings of the General Affairs and External Relations Council (GAERC), under the Lisbon Treaty, this Council will become two – with the new HR chairing the External Relations Council and the rotating presidency-in-office continuing to chair the General Affairs Council.

Nevertheless, the European Parliament will acquire a degree of additional democratic control over the new HR in his/her role as a Commissioner because the Parliament's consent is required vis-à-vis his/her appointment. The European Parliament also retains its right to apply a censure motion on the whole Commission<sup>5</sup> (Treaty on the Functioning of the European Union, Article 201.2, and ToL, Article 9D, paragraph 8). As previously, the views of the European Parliament must be “*duly taken into consideration*” and it is to be informed of “*the main aspects and the basic choices*” of CFSP and or CSDP (ToL, Article 21 a).

Through its creation of a new HR (who partly represents the Commission), the Lisbon Treaty has elevated the Commission's voice in CFSP. However, whereas in the current EU Treaty, the Commission has the right to submit proposals to the Council (current EU treaty, Article 20, paragraph 1) and was “*fully associated*” with CFSP (current EU treaty, Article 18, paragraph 4), under the Lisbon Treaty it will lose this right – this now being associated solely with the HR.

In parallel to these institutional reorganisations, the Lisbon Treaty also seeks to address some of the questions surrounding decision-making processes in an enlarged Europe.

### 3. Limited new decision-making opportunities

Although the essential intergovernmental nature of decision-making in relation to CFSP and CSDP looks set to prevail, nevertheless, there are new provisions to ‘facilitate’ that process in a Union of 27 Member States.

By granting the Union a legal personality (ToL, Article 46A) for the first time, the Lisbon Treaty will enable it to sign treaties or international agreements towards which it has actively participated in the elaboration and negotiation.<sup>6</sup> Nonetheless, the use of its legal personality will be restricted only to those competences that the Member States have specifically conferred to the Union,<sup>7</sup> and CFSP will still be governed by specific decision-making procedures.

The Lisbon Treaty also facilitates decision-making procedures in a number of important ways. For instance:

- The Treaty introduces a fourth exception to the unanimity rule in CFSP. Member States will now be entitled to adopt a decision on proposals presented by the HR - acting on his/her own or with the support of the Commission (Article 15b, paragraph 2 i) - on the basis of QMV.
- The Treaty also includes a provision that will enable Member States to extend further the use of QMV vis-à-vis CFSP - called the ‘*passerelle*’ provision - but again only on the basis of unanimity among Member States at the European Council. (Article 15b, paragraph 3).
- In the same spirit, the ‘*constructive abstention*’ provision (introduced in the Amsterdam Treaty) is maintained within the Lisbon Treaty. This procedure allows a Member State to abstain on a vote without blocking an otherwise unanimous decision in the CFSP area, thereby enabling actions that are supported by the majority of Member States to continue.

The significance of QMV is that it overcomes the national veto i.e. QMV enables a majority of states to push through a decision against the opposition of a minority. In relation to the first bullet

<sup>5</sup> Gerrard Quille, *The Lisbon Treaty and its implications for CFSP/ESDP*, Directorate-General for External Policies of the Union, Directorate B, Policy Department, European Parliament, February 2008.

<sup>6</sup> This overcomes the anomaly whereby the EU had to find roundabout ways to fulfil its international responsibilities, for example, when the EU Special Envoy was obliged to sign the Dayton agreements as a “witness”.

<sup>7</sup> Declaration 24 in the Lisbon Treaty stipulates: *European Union has a legal personality will not in any way authorize the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaty.*

point above, however, a crucial caveat is attached. If a Member State is opposed to a vote by QMV for what is defined as “vital reasons” and is reluctant to apply the constructive abstention provision, it may refer the question to the European Council, which would then take the decision on the basis of unanimity. This provision thereby reasserts the prevalence of Member States in CFSP (ToL, Article 15 b, paragraph 2). In addition the passerelle clause is excluded from CSDP.

QMV also intrudes into the domain of the new Common Security and Defence Policy (CSDP). It has been introduced for the following provisions: the establishment of permanent structured cooperation (ToL, Article 28 E - see more below), and the establishment of start-up financing for a defence policy mission (ToL, Article 28, paragraph 3).

Although the CFSP and CSDP remain strongly intergovernmental, these provisions seem to reflect a willingness on the part of the Member States to create more, albeit limited, opportunities for the EU to act more coherently and to produce a decision-making process that works in an EU of 27 Member States.

## 4. CSDP

### 4.1 Common policy for a common defence?

The Lisbon Treaty also presents key innovations specific to the defence field. CSDP (formerly called ESDP) now has its own section within the Lisbon Treaty and is symbolically ‘upgraded’ from a ‘European’ to a ‘Common’ Security and Defence Policy (while still being within CFSP).

If this change indicates a greater willingness by the Member States to develop a ‘military arm’ of the EU, it does not push it towards a more integrationist approach. The reference to NATO as the foundation of the Member States’ security policy is proof of their ambivalence here. In the same spirit, the upholding of Article 17 of the current Treaty of the EU reasserting the “*progressive framing of a common Union defence policy*” that “*will lead to a common defence, when the European Council, acting unanimously, so decides*” (ToL, Article 28A, paragraph 2) reminds one of the embryonic nature of CSDP.

### 4.2 Aligning the law with practice

The Member States have developed their defence policies and instruments outside the EU treaties, and defence remains a very sensitive topic - touching on national sovereignty and also opening up questions about transatlantic relations, for example. Although the Lisbon Treaty does not address these fundamental issues, it does nonetheless attempt to align the law with the practices in those areas where Member States can agree.

Hence, the Lisbon Treaty now better reflects the nature of extant ESDP missions, by extending the scope of the so-called Petersberg tasks to: “*joint disarmament operations; military advice and assistance task, peace-making and post-conflict stabilisation; conflict prevention and post-conflict stabilization missions*” and also contribute to combating terrorism “*in supporting third countries in their territories*” (ToL, Article 28 B, paragraph 1).

The European Defence Agency (EDA), created in July 2004, is also now inserted within the legal framework of the CSDP (ToL, Article 28 D), thereby seemingly reinforcing the leading role that the Member States want to assign it in pushing forward the development of EU operational capabilities and the EU as a military actor on the international scene.

The Lisbon Treaty also institutionalizes the “*implementation of a mission*” by a group of Member States that are “*willing and have the necessary capability for such a task*” on behalf of the Union

and “*entrusted*” by the Council. This provides (ToL, Article 28A, paragraph 5 and Article 28 C) formal recognition of the *Artemis* mission led by the French in the Democratic Republic of Congo in September 2004; thereby institutionalizing the development of such practice.

### 4.3 Assistance and solidarity measures

The mutual defence clause and the solidarity clause are important innovations that promote the principles on which the EU is based i.e. solidarity with, and assistance to, other Member States. The mutual defence clause in the Lisbon Treaty (Article 28, A7) - echoing the former Western European Union (WEU) - binds all Member States to provide aid and assistance “*by all means in their power*” in the event of another Member State becoming a victim of armed aggression, without prejudicing the neutrality or relationship to NATO that some Member States may enjoy.

The solidarity clause represents a new legal mechanism of assistance (188R of the Treaty on the Functioning of the EU) between Member States when one of them is the victim of a terrorist attack, natural or man-made disaster. The EU will mobilize all the instruments at its disposal, including military resources made available by Member States, to assist. This is in addition to the new provision on civil protection.

### 4.4 Flexibility measures: alternatives to the intergovernmental system

In order not to hold back its most willing Member States, the Lisbon Treaty extends the scope of ‘enhanced cooperation’ to the defence and security field by encouraging a hard core of particularly capable states, to be achieved by what is known as ‘permanent structured cooperation’ – another major innovation.

#### *Enhanced cooperation*

The enhanced cooperation mechanism (ToL, Article 10), established by the Treaties of Nice and Amsterdam, enables a group of willing states to deepen their cooperation within CFSP. This enhanced cooperation requires the support of one-third of Member States i.e. nine states. Any such group of states would put its request to develop enhanced cooperation to the Council for its approval; the HR and the Commission would also give their opinion and the European Parliament would be informed (ToL, Article 280D, paragraph 2).

The Lisbon Treaty now lifts the ban on using enhanced cooperation in defence matters (CSDP) as well: the stipulation in Article 27B of the current EU Treaty “*that it shall not relate to matters having military or defence implications*” has now been deleted.

#### *Permanent Structured Cooperation*

‘Permanent structured cooperation’ (ToL, Article 28E and the ‘Protocol on Permanent Structured Cooperation’) is intended to allow those Member States “*whose military capabilities fulfill higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework*”. (These higher criteria are not defined.)

Specifically designed for the CSDP, ‘permanent structured cooperation’ is referred to as a flexible, unique and permanent measure, which, unlike ‘enhanced cooperation’, does not require a threshold of participants to proceed. The creation of such a mechanism will require clarifications before the Treaty enters into force, and the forthcoming French presidency of the EU could play a useful role here.

Pierre Lellouche, defence spokesman for UMP (Union pour un Mouvement Populaire) explained that 'permanent structured cooperation' aims to create "a *hard core*" of the six biggest EU countries - France, the UK, Spain, Germany, Poland and Italy - referred to as a "*Defence G6*".<sup>8</sup> As a pre-condition for joining this hard core, Lellouche proposes that the participating Member States should: devote two per cent of their GDP to defence; establish a common procurement market for defence equipment; further develop the battle group concept (each comprising 10,000 troops); and launch major defence infrastructure projects, such as space and intelligence technology, and missile defence.

One of the points against this new mechanism is that it might create a two-speed Europe,<sup>9</sup> excluding the smaller countries that may have the will but not the human or financial resources to achieve the stated objectives.<sup>10</sup> The idea of creating an exclusive club over the long term appears to be contrary to the principles on which the EU is based. The potential way round this might be eventually to enlarge permanent structured cooperation, using it as a motor to push the other Member States into taking enhanced responsibilities themselves and to match the level of effort made by the most willing.

## 5. Questions and implications

The current pillar structure within the EU dilutes the achievement of common and coordinated EU action. The Lisbon Treaty, through its rationalisation of the EU institutional architecture, is clearly an attempt to dismantle the pillars in order to create more policy coherence, effectiveness and visibility.

A number of ambiguities remain, however, and some of the new arrangements may even create confusion when applied in practice. The initiative of the Slovenian presidency of the EU to prepare for the implementation of the treaty is raising awareness among Member States of some of the outstanding questions that still need to be resolved. For instance:

- How will the new permanent President within the European Council interact with the rotating presidency within the General Affairs Council? Who will prevail in setting the agenda and how will they interact where positions diverge?
- The President will also have shared competences with the HR vis-à-vis representing the Union and elaborating CFSP. Although Article 9B paragraph 6 stipulates that the President will exercise his/her mission 'without prejudice to the powers of the HR', the treaty provisions delineating the competences between both EU actors are unclear.
- Another point of uncertainty concerns the new President's ability to act in the common European interest and in rallying the Member States around EU priorities within the European Council.

Uncertainties over how all of this will work once implemented, requires additional clarification from the Member States vis-à-vis the respective competences attributed to the various EU actors. Past practice has shown us how the personality of the incumbent may determine the remit of his or her functions and competences when the treaty provisions are not sufficiently developed.

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<sup>8</sup> Quoted in '8 propositions pour donner à l'Union une défense commune', *Le Figaro*, 31 January 2008.

<sup>9</sup> Federico Santopinto, 'Réforme des traités : Une « coopération structurée permanente » pour mieux armer l'UE', in Notes d'Analyse, 17 October 2007, <http://www.grip.org/bdg/g0966.html>.

<sup>10</sup> Article 28E defines the establishment of such structure; the member states that fulfill the highest criteria and have the necessary military capability, will notify their intention to the Council, after consultation with the HR. The Council will then adopt a decision establishing permanent structured cooperation on the basis of QMV. The Member States that wish to join the structure at a later stage will notify the Council and the decision on QMV will be taken by those Member States already participating in such cooperation. In addition, Member States that can no longer meet the requirements may be suspended by the other participating states via QMV.

## 6. Conclusion

Among the various new provisions contained in the Lisbon Treaty, many do not challenge the essential inter-governmental nature of foreign and security policy decision making. The divergences between the national policies of 27 Member States on how best to manage common security concerns, and their reticence in seeing their sovereignty challenged by a supranational EU institution, are sufficient explanations for the gradualist approach adopted in the Lisbon Treaty.

The Lisbon Treaty represents an attempt by the Member States to overcome the impasse caused by the failure of the Constitutional Treaty. It is hardly revolutionary: instead, it aims to create an enhanced institutional architecture and to offer better opportunities for strengthened collective action – leaving the door open for the Member States to go further if they so wish. Although opponents claim that the Lisbon Treaty further undermines national sovereignty, proponents believe this is a precise and limited response necessary to make EU foreign and security policy more effective in an EU of 27 Member States – while still preserving national security interests. Whatever the truth is, the Lisbon Treaty contains a number of important institutional changes that require further discussion and elaboration.

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