

# The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?

Wolfgang Wessels and Franziska Bopp

## Abstract

This paper analyses the impact of the Lisbon Treaty on the institutional architecture of CFSP and the overall external action of the Union. The Lisbon Treaty has introduced some remarkable changes which might substantially influence the (inter-)institutional balance in this policy field. The authors offer two different possible readings of the CFSP provisions of the Lisbon Treaty: they could be interpreted as a major step forward in the direction of a strengthened, more coherent and more effective international actor with more supranational elements; but they may also be seen as demonstrating an ever-refined mode of 'rationalised intergovernmentalism'. After an in-depth analysis of the ideas and norms contained in the new treaty, the institutions and the instruments, the authors find more evidence for the second interpretation, but also traces for a 'ratched fusion' as a third alternative explanation.

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# THE INSTITUTIONAL ARCHITECTURE OF CFSP AFTER THE LISBON TREATY – CONSTITUTIONAL BREAKTHROUGH OR CHALLENGES AHEAD? WOLFGANG WESSELS AND FRANZISKA BOPP\*

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## 1. The Union's Common Foreign and Security Policy: Historical and theoretical perspectives on a sui generis policy field

### 1.1 *CFSP/CSDP in the Lisbon Treaty: Steps of treaty-making*

The role of the European Union as a global actor in the international system has always been a central part of the European integration process and continuous efforts have been made to enhance the effectiveness and efficiency of the Union's external action. The Common Foreign and Security Policy (CFSP) and its antecedent, the European Political Cooperation (EPC), are key elements of European integration. They serve as significant points of reference of national foreign policies, especially due to the rapid developments in this field since the end of the 1990s, leading some authors to speak about an "almost revolutionary change in member state commitments" (Smith, 2003: 556). Thus, the provisions for CFSP and, increasingly also the Common Security and Defence Policy (CSDP),<sup>1</sup> can be regarded as the cornerstone of the Lisbon Treaty. Furthermore, the challenges the Union faces within the international system are ever growing and requiring an ever-increasing scope of action across different policy fields, geographical regions and arenas of policy-making. This makes the policy field a very relevant, although sometimes diffusing research area as three types of foreign interactions intertwine: traditional national foreign policy, the foreign policy of the EU as prescribed in the treaty articles on CFSP and CSDP, and the EC external relations, which concentrate on long-standing and mostly economic foreign relations and development policy (cf. Carlsnaes, 2007). The CFSP as 'original' foreign policy is thus embedded in a whole range of other policies with implications for external action. This includes not only traditional community policy fields such as trade or development policy with direct links to external action but also policy fields that are comparatively 'new' on the EU agenda and whose foreign implications seem – at least at the beginning – rather indirect, such as Justice and Home Affairs or Environmental Policy.

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<sup>1</sup> In this article we will use the abbreviation CSDP as the respective chapter is called in the Lisbon Treaty although ESDP has been established even in the official language use.

The perceived problem of lack of coherence and efficiency in the Union's external action rose with its growing scope of tasks around the world (cf. Nuttall, 2005). With the Constitutional Treaty, a first attempt was made to resolve some of these problems – but this project was rejected in the French and Dutch negative referenda in 2005. After the so-called 'reflection phase', the German Presidency re-launched the debate on the future of Europe. In the 2-page 'Berlin Declaration', which was signed during the celebrations of the 50<sup>th</sup> anniversary of the Rome Treaties, the Union repeated its claim to take a "leading role" in the promotion of freedom and development and the fight against poverty, hunger and disease in the world and stressed its commitment "to the peaceful resolution of conflicts in the world".<sup>2</sup>

At the June 2007 European Council in Brussels, the heads of state and government then agreed on a mandate for a new Intergovernmental Conference (IGC), which should draw up a new Treaty and "complete its work as quickly as possible, and in any case before the end of 2007".<sup>3</sup> In the mandate, the IGC was called to draw up a Treaty "with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action".<sup>4</sup> The text further completely rejected the constitutional ambitions: "The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution', is abandoned" (...). The TEU and the Treaty on the Functioning of the Union will not have a constitutional character."<sup>5</sup> Thus leaving aside the ambitious constitutional project, most of the terminology associated with a 'constitution' has been modified: The treaty is not called 'Constitution', the 'Foreign Minister' is renamed 'High Representative of the Union for Foreign Affairs and Security Policy' and the terms 'law' and 'framework law' will be abandoned. Apart from these rather 'cosmetic' changes, the treaty provisions for CFSP in the Treaty of Lisbon are basically the same as in the Constitutional Treaty.<sup>6</sup> Exceptions are an amendment of Art. 24 TEU<sup>7</sup> relating to the exception of jurisdiction of the Court of Justice, a separate clause on data protection within CFSP, and the exclusion of CFSP and CSDP from Art. 352 TFEU,<sup>8</sup> which allows the additional transfer of competences to the Union in order to reach the common objectives (cf. Statewatch Analysis, 2007). Two new declarations concerning CFSP have also been added as had been foreseen by the IGC mandate.<sup>9</sup> The first states that the CFSP does not affect "the responsibilities of the Member States (...) for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations" and that these provisions "do not prejudice the specific character of the security and defence policy of the Member States" (Declaration No. 13). This provision stems from the former Art. 17 (1) TEU (Nice) and the related Protocol. A similar formulation can be found in the new Declaration No. 14 which also stresses that the CFSP provisions "do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament". A first reading of the document indicates that the CFSP – even if perhaps not more a 'second pillar' – is in legal terms still based on a special set of provisions, as also stated

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<sup>2</sup> Presidency of the Council, 2007, part II.

<sup>3</sup> European Council, 2007b: 2.

<sup>4</sup> European Council, 2007b: 15.

<sup>5</sup> European Council, 2007b: 16.

<sup>6</sup> In this paper, we will concentrate on the analysis of the provisions of the Lisbon Treaty in comparison with the current Treaty of Nice without special reference to the Constitutional Treaty. Thus, unless indicated otherwise, the provisions in the Lisbon Treaty are the same as in the Constitutional Treaty.

<sup>7</sup> The numbering of articles in this paper follows the future consolidated version as laid down in Art. 5 of the Lisbon Treaty.

<sup>8</sup> Treaty on the Functioning of the European Union.

<sup>9</sup> European Council, 2007b: 19.

in Art. 24 TEU which stresses that “[t]he common foreign and security policy is subject to specific rules and procedures”.

Before we analyse and assess in detail the new treaty provisions and their impact on the Union’s external coherence and its capability to act in the international system – as the mandate for the IGC 2007 required – some general remarks about the related academic debate will help to conceptualise the issue. Many scientific and political contributions have been made to assess the ‘actorness’ of the Union and, more specifically, its role in the international system (cf. Smith, 2006; Bretherton & Vogler, 2006; Wessels, 2005; Wessels & Regelsberger, 2005; Tonra & Christiansen, 2004; Knodt & Princen, 2003; White, 2001; Rhodes, 1998; and CFSP Forum). Basically, two “indispensable concepts” (Hill, 1993: 308) have been developed: *actorness* and *presence* (cf. Smith, 2006: 290). Whereas the former sees the EU as on its way towards a full-fledged, state-like international ‘actorness’ (Sjöstedt, 1977), the latter qualifies the Union as a growing and increasingly important ‘presence’ in the international system (Allen & Smith, 1990, 1998). A third interpretation sees the Union itself as a process, which structures the EU internally and its external environment (cf. Smith, 2006: 290). Whereas most of the analysts agree that the Union is some kind of global actor<sup>10</sup> – an assumption that is strengthened by the acquisition of legal personality as foreseen in the new Art. 47 TEU – different opinions exist about the quality of this actorness and the genuine identity of the Union: it is an “important though strange actor” (Wessels & Regelsberger, 2005: 91). More and more research focuses on the character of the Union’s identity and the (self)perception of the Union as an international actor.

In the academic as well as political debate, many efforts have been made to conceptualise the EU’s international role, describing it as a “superpower” (Blair, 2000; Galtung, 1973), “civilian power” (Blauberger, 2005; Whitman, 1998; Bull, 1982; Duchêne, 1972), “soft power” (Nye, 2004), “peace power” (Ehrhart, 2005), “normative power” (Scheipers & Sicurelli, 2007; Manners, 2006, 2002), “l’Europe puissance” (Lefebvre, 2004; Solana, 2001) and recently also as a “model power” (Miliband, 2007) or “smart power” (Ferrero-Waldner, 2008). The Union’s identity can thus be based upon its way of acting or of intervening in the international environment (civilian/military), its aims/objectives (promotion of certain norms and values) or upon its economic power. The basic underlying assumption behind many of these categorisations is that the EU is a *sui generis* entity (Bretherton & Vogler, 2006: 35), a kind of “post-modern” unit (cf. Smith, 2003) acting on the basis of other rationales than the modern state and thus trying to pursue its goals by cooperation and dialogue rather than a balance of power logic (cf. Tocci, 2007). The diversity and heterogeneity of the different contributions exemplify the scientific and political efforts that are made to identify, analyse and explain this rapidly changing policy field.

## 1.2 Two contrasting readings

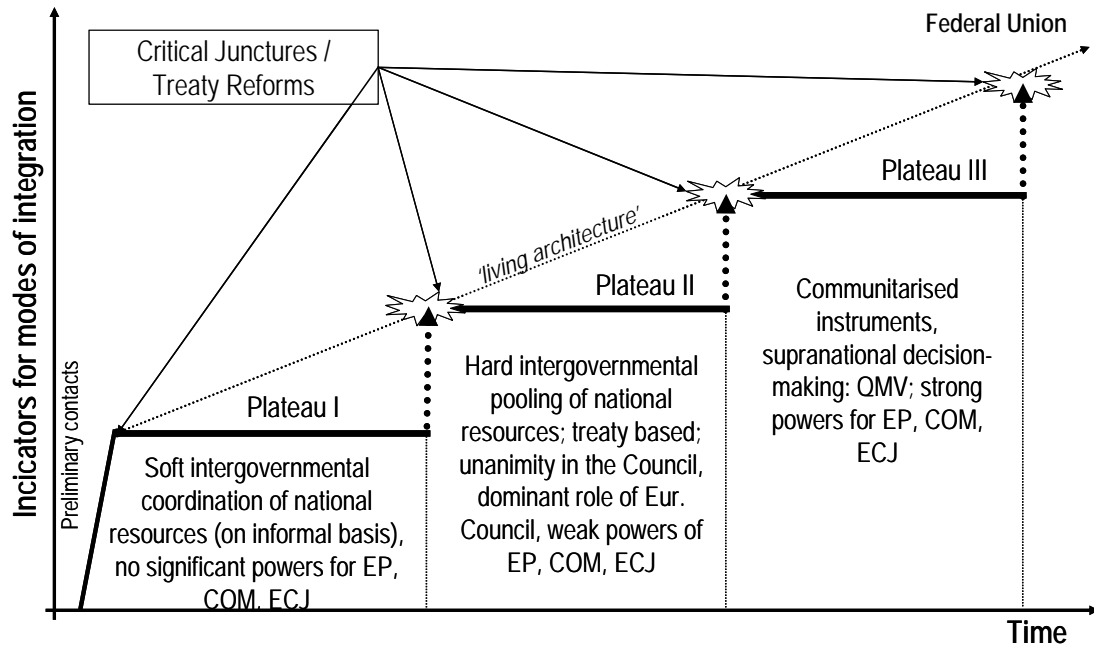
The Lisbon Treaty is the latest result of a range of treaty reforms and its inherent legal construction of the institutional architecture of CFSP and CSDP allows for a range of different readings and interpretations. In this paper we will start from two antagonistic perspectives. The first interprets the CFSP provisions of the Lisbon Treaty as a major step forward towards the establishment of a growing and strengthened global identity of the EU which – despite the complexity of the treaty provisions – has strengthened its international identity as an actor with increased military capacities for implementation of its aims and objectives. In the perspective of a “ratchet fusion process” (Wessels, 2005: 94; Wessels, 2001; see also Miles, 2003, 2006) this would mean that the CFSP provisions of the Lisbon Treaty have provided for a major step upward towards the “next plateau” of an “integration ladder”, representing a gradual move towards a sys-

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<sup>10</sup> European Parliament/Council of the European Union, European Commission (2006).

tem with clear supranational elements. This would also mean that the often-claimed coherence of the Union's external action and its capability to act have been enhanced towards a stronger and more coherent international actor with a strengthened identity in the international system and more capabilities to act while internal efficiency and transparency have been enhanced. In Figure 1 this would mean a step towards the highest end of Plateau II, but not yet towards Plateau III. In this view the Lisbon Treaty would be the last treaty revision of CFSP issues for the time being.

Figure 1. The integration 'cascade': A micro view of "ratchet fusion"



Source: Based on Wessels & Regelsberger (2005: 113).

On the other hand, the treaty provisions can be interpreted as demonstrating an ever-refined type of "rationalised intergovernmentalism" (Wessels, 2001: 204) whereby the heads of state and government grant limited roles to the EP and the Commission but stick to unanimity in the Council and the central role of the European Council. In the line of this argument, transfers of competences go along with increased complexity and differentiation in decision-making procedures. In this reading, the Lisbon Treaty does not constitute a major step upwards in the integration process but just some minor adoptions on the former plateau without a real 'upgrading'. The member states have retained control of all important issues and are merely "using" CFSP provisions to pursue their own, national goals. This would imply that internal as well as external coherence have not been strengthened due to a growing complexity and inter-institutional tensions and national reservations about 'real' transfers of competence.

Following the argumentation of the second reading we would assume that the Lisbon Treaty does not constitute a constitutional breakthrough but that the heads of state and government have even more moved into the intergovernmental trap (Klein & Wessels, 2006). At the same time the capability-expectations gap (Hill, 1993, 1998) has been widened by ambitious formulations regarding the role of the EU as an international actor while the institutional and procedural provisions have not been altered correspondingly. From this intergovernmentalist reading the CFSP is seen as a mere "agent" (Kassim & Menon, 2003, Pollack, 2006) of the member states as "principals" and "masters" of national governments which seek to pursue their national interests and strengthen their position in the international system via the Union's institutional set-up.

In the case of a “high-politics” (Hoffmann, 1966) crisis, the Treaty provisions will then not provide the Union with optimal tools for action. Thus, when faced with such an output failure, the heads of state and government might try to upgrade the relevant provisions, but they will not be able and willing to pass the threshold of the defence of national sovereignty which in the end prevents the establishment of a more effective, efficient and coherent Union. In this sense the Lisbon Treaty would signify another step towards ever-refined modes of intergovernmental governance in the sovereignty-loaded policy fields of CFSP. The Lisbon provisions will then not have moved the CFSP to a higher level of the integration ladder, remaining in the middle of Plateau II as indicated in Figure 1.

As indicators we will analyse the CFSP provisions of the Lisbon Treaty taking into account the ideas and objectives inherent in the treaty which express the self-perception of the Union’s international role, the provisions for the different institutions, the procedures governing the involvement of the institutions in decision-making and the instruments and resources. This will help us to assess if the CFSP provisions of the Lisbon Treaty provide the Union with the necessary tools and procedures for effective action and thus can be regarded as last treaty revision – at least for the time being – or if the new legal framework poses new challenges to the Union which might soon lead to a further treaty reform.

Where possible, we will add some preliminary expectations about the impact of these written treaty letters – the architecture of the “legal constitution” (Olsen, 2000: 7) – on the daily practice, i.e. the architecture of the “living constitution”. Against the background of the experiences gained so far and regarding the enlargement to 27 members at the beginning of 2007, it should be considered if and how the actors of the CFSP will be able to use and/or eventually avoid or extrapolate the new legal prescriptions. The governments, diplomats and holders of the new positions are moving within a field of rules containing possible incentives, but also constraints for their action (Olsen, 2002; Scharpf & Treib, 2000; Scharpf, 1997). Can we expect the institutions of the European Union to strengthen norms for the ‘normal’ behaviour in the daily practice (Wessels, 2003a)? Will they develop a more sustainable ‘common’ foreign and security policy? These questions not only depend on the form of the institutional architecture – the ‘opportunity structures’ – but also on the mind and style with which the relevant individuals (the leading chiefs of governments) use the offered rules and especially on the kind of external or internal challenges they might face. This will be of special relevance in sudden, unforeseen cases of crisis. As we have no practical experiences of the implementation of this recently signed treaty, this part of the analysis is only based on preliminary theses and on previous experiences.

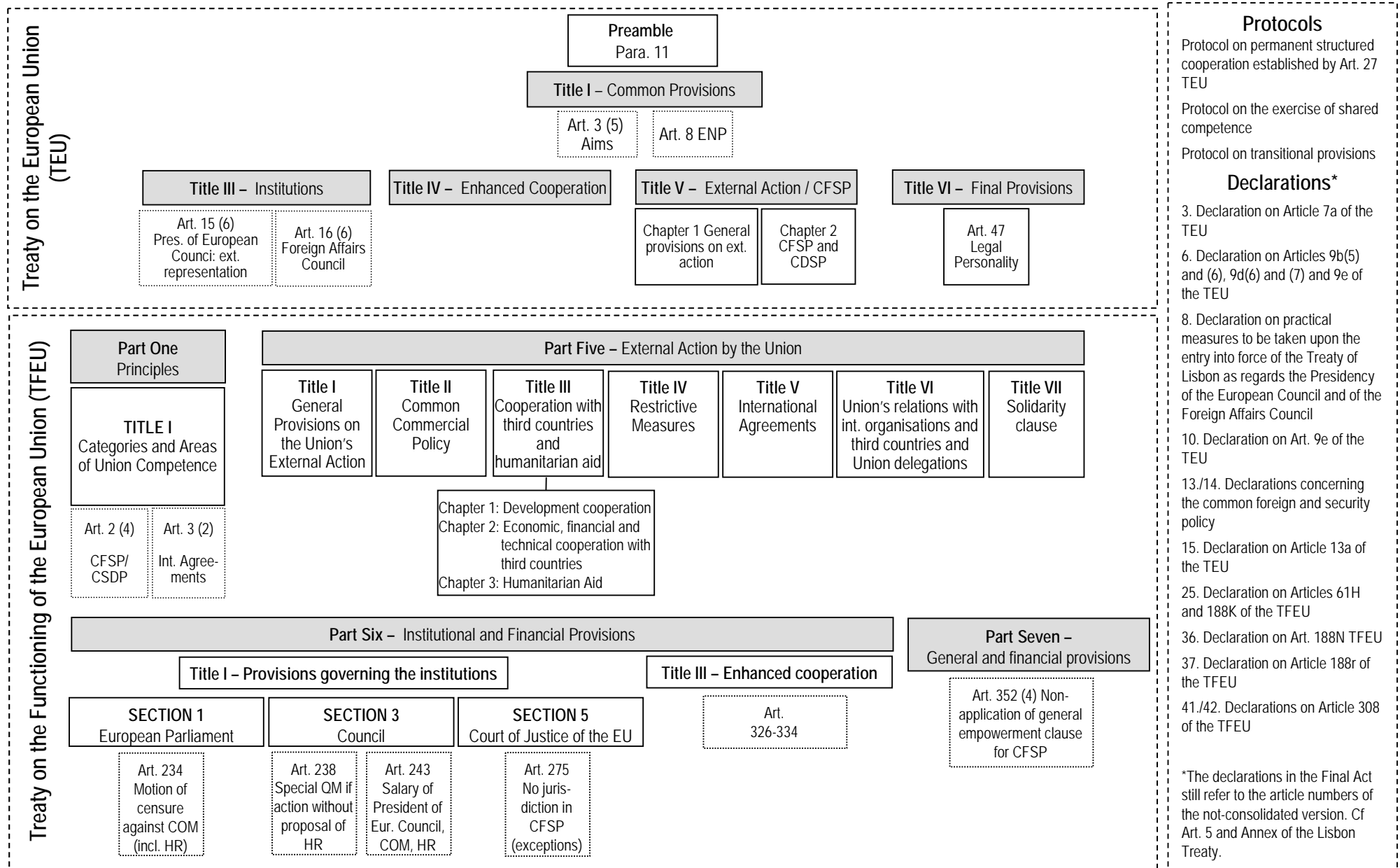
## 2. The ‘new CFSP’: New options and old conflicts

The CFSP provisions of the Lisbon Treaty, which are – with some exceptions – the same as in the Constitutional Treaty (for the debate on the Constitutional Treaty see Klein & Wessels, 2006), foresee a range of changes in comparison to the current legal basis, the Nice Treaty. For a detailed analysis of the treaty provisions it is necessary to find and analyse the relevant articles containing the ideas on objectives, relevant institutions and procedures as well as legal instruments and operative and financial resources for the external action of the EU (for an overview, see Figure 2). After analysing the relevant articles, the new legal framework should be tested regarding its capability to overcome crises and its adequacy for the Union’s daily work. Thus it has to be discussed if the new regulations – when compared to the current Nice Treaty – allow for more efficiency in decision-taking and more coherence in the external representation as the mandate for the IGC 2007 required.<sup>11</sup>

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<sup>11</sup> European Council, 2007b: 15.

Figure 2. CFSP/CSDP and other areas of external action in the Lisbon Treaty



Source: Own graph based on Wessels, 2003b. Abbreviations: Art: Article; HR: High Representative; COM: European Commission, QM: qualified majority.



## 2.1 *An ambitious and ambiguous actor: Visions and missions of the EU*

The list of aims and objectives of the Union's external action is quite extensive and covers all areas of traditional (national) foreign policy. In this context, the Union presents itself as both an ambitious and an ambiguous actor.

In the preamble of the Treaty on European Union, the Lisbon Treaty stresses the reference to the “cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law” and declares as the aim of the CFSP and the CSDP that they should be “reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world.”

The almost missionary statement of the preamble of the Constitutional Treaty, which had stated that “Europe offers them [the peoples] the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope”, has not been reproduced in the preamble of the reformed TEU. Instead, the preamble in the Lisbon TEU is the same as in the present TEU except for one new paragraph about the “cultural, religious and humanist inheritance of Europe”.

### *Box 1. Visions and missions of the Union's external action*

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. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

*Source:* Art. 3 (5) TEU.

The Lisbon Treaty contains an extended catalogue of common values and ambitious normative aims which characterise the EU internally and which it seeks to promote externally. This catalogue stresses the impression of a self-perception as a ‘civilian’ (Blauberger, 2005; Whitman, 1998; Bull, 1982; Duchêne, 1972) or ‘normative’ power (Scheipers & Sicurelli, 2007; Manners, 2006, 2002), while at the same time Art. 42 (1) TEU claims that the Common Security and Defence Policy shall “provide the Union with an operational capacity drawing on civilian and military assets.”

### *Box 2. General provisions on the ‘Union's external action’*

(1) The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

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

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

- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters; and
- (h) promote an international system based on stronger multilateral cooperation and good global governance.

*Source:* Art. 21 TEU.

The aims and objectives of Art. 21 TEU draw from different articles of the Nice Treaty (11 (1), 131, 177 and 181a TEU), combining them in one single article right at the beginning of the TEU and the chapter about the Union's external action. A new aim of the Union's 'relations with the wider world' is the 'protection of its citizens' (Art. 3 (5) TEU), a term that was introduced at the request of the French President Sarkozy. In the context of the Union's external relations, this could refer to consular protection in third countries, protection from natural/man-made disasters or from terrorist threats, but the French position referred mainly to (social-economic) threats of globalisation (cf. European Policy Centre, 2007a: 39).

The emphasis of the norms and values inherent in the European construction are thus presented as possible 'exports' which shall be promoted internationally. The EU identifies itself not only as an economic community but also as a 'civilian power', which could contribute to the normative 'Europeanisation' (cf. Olsen, 2002) of the rest of the world.

A similar self-perception can be found in the formulation of the aims and objectives of the Union's external action (see Box 1). The tasks with which the Union seeks to promote these aims (the 'Petersberg Tasks'<sup>12</sup>) are amended by the Lisbon Treaty, and include now a wide range of measures such as "(...) civilian and military means, (...) joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation" (Art. 43 (1) TEU). The fight against terrorism is also included (Art. 43 (1) TEU, 222 TFEU). The Petersberg Tasks originally only included humanitarian and rescue tasks, peacekeeping and tasks of combat forces in crisis management (Art. 17 (2) TEU (Nice)); cf. Diedrichs, 2008; Jopp & Sandawi, 2007; Bretherton & Vogler, 2006). This amendment exemplifies the hybrid nature of the Union's identity: while typical civilian aims are pursued, the military capabilities for the implementation/enforcement of these are increased.

The fight against terrorism concerns not only CFSP but also the Justice and Home Affairs section where it is mentioned several times (Arts. 75, 83, 88 TFEU). It is not quite clear how this pillar-overarching topic will be coordinated and pursued.

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<sup>12</sup> The Petersberg Tasks were first set out in the "Petersberg Declaration" adopted at the Ministerial Council of the Western European Union (WEU) in June 1992 and were afterwards included in the Treaty of Amsterdam (former Art. 17 TEU).

Regarding the defence policy the Lisbon Treaty keeps the formulations that were introduced by the Maastricht Treaty and which set as an aim the “progressive framing of a common defence policy, which might lead to a common defence” (Preamble and similar Art. 24 (1) TEU; Art. 2 (4) TFEU). Article 42 (2) TEU has a similar wording, but is more precise: “The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council (...) so decides.”

In a newly added ‘Solidarity Clause’ (Art. 222 TFEU), member states commit themselves to mutual solidarity in cases of terrorist attacks or natural or man-made disasters. A similar commitment to mutual assistance even in the case of an armed aggression on the territory of one of the member states can be found in Art. 42 (7) TEU in the framework of the CSDP articles.

*Box 3. Solidarity clause*

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

- (a) — prevent the terrorist threat in the territory of the Member States;
  - protect democratic institutions and the civilian population from any terrorist attack;
  - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

(2) Should a Member State be the object of a terrorist attack or the victim of a natural or manmade disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

(...)

*Source:* Art. 222 TFEU.

This clause and especially Art. 42 (7) TEU are very similar to the collective security article (Art. 5) of the NATO Treaty which provides for mutual cooperation in the case of an armed attack on one of the member states:

*Box 4. Art. 42 (7) TEU vs. Art. 5 NATO Treaty*

Article 42 (7) TEU

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

Article 5 NATO Treaty

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. (...)

*Source:* NATO Treaty and TEU.

The major difference in these two articles is that in the case of an armed aggression, the NATO article foresees action “including the use of armed force”, which is not specified in the EU Solidarity Clause. But the fact that the use of armed force is also not excluded leads inevitably to the question if the EU in fact is becoming a defence organisation. In its resolution on the revision of the European Security Strategy (ESS) the EP writes that the EU “is on the way to developing into a Security and Defence Union”.<sup>13</sup> In the ESS, which is about to be revised in 2008, the Union also stresses the mutual solidarity of the Member States and repeats the aims of the EU to contribute to global security and building a better world (cf. Pullinger, 2007; Valasek, 2007).<sup>14</sup> Nevertheless, the second paragraph of Art. 42 (7) TEU limits the mutual obligations of EU Member States by stressing that “Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation”. Thus, despite the rapid developments in the “living architecture” of CSDP since 1999 it is generally assumed that “the EU as a security actor is still in its early infancy” (Howorth, 2007: 3).

These formulations of norms and objectives of a ‘civilian’ power (Blauberger, 2005; Whitman, 1998; Bull, 1982; Duchêne, 1972) are thus accompanied by an incremental cooperation in the military area and a step-by-step strengthening of the military (defence) capabilities of the EU (cf. Treacher, 2004). Whether and to what extent the Union will be able to use its military capacities to defend and promote its civilian objectives need to be discussed in the light of the provision for the respective instruments and institutions.

## **2.2 Legal instruments and operative resources: Limited changes**

### **2.2.1 Overview: CFSP/CSDP as special category of competences**

In the articles regulating the division of competences between the Union and its member states, the Union’s competence in the area of CFSP and CSDP is mentioned in Art. 2 (4) TFEU – thus, neither within the area of exclusive competences (Art. 3 TEU) nor within the ‘shared’ (Art. 4 TEU) nor ‘supporting’ competences (Art. 6 TFEU). In the respective provisions of the Constitutional Treaty, CFSP was placed between the shared and supporting category of competences.

This placement within the division of competences documents the special and unique role of this policy field. Other policy areas with clear foreign implications belong to the Union’s exclusive competences (customs union, common commercial policy and the right to conclude certain international agreements) or shared competences (development cooperation and humanitarian aid). The categorisation of different areas of competences in general can be interpreted as a continuing ‘pillarisation’ within the treaties. The impression of continuing ‘pillars’ is also reinforced by an explicit statement that CFSP “is subject to specific rules and procedures” (Art. 24 (1) TEU). In view of the allocation of competences, a new element has been inserted in the treaty stating that national security remains a national competence (Art. 4 (2) TEU), a phrase that was also not foreseen in the Constitutional Treaty.

An additional declaration stresses that “competences not conferred upon the Union in the Treaties will remain with the Member States” (Declaration No. 18). Further treaty revisions may not only increase but also reduce the Union’s competences.<sup>15</sup> A further point of reference for the member state’s anxiety not to lose too much power can be found in Declaration No. 24, which

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<sup>13</sup> European Parliament, 2006.

<sup>14</sup> European Council, 2003b; 2007a: 24.

<sup>15</sup> Declaration No. 18 in relation to the delimitation of competences.

offers reassurances that Union's "legal personality" will not authorise it to act beyond its competences.

Thus, despite the official granting of "legal personality" (Art. 47 TEU) to the Union, which basically allows the Union to conclude international agreements in all its areas of competence (cf. Art. 216 TFEU) and is generally seen as a very positive asset regarding the Union's external capability to act, the special provisions for CFSP seem to draw a different picture.

### 2.2.2 Instruments for implementation: Modest changes

Compared with the ambitious claim of the aims and objectives (cf. section 2.1), the underlying legal instruments have been modified only modestly. Whereas the Constitutional Treaty had foreseen "European decisions" in CFSP/CSDP (as part of the general 're-naming' of the Union's instruments, cf. Art. I-33 and III-294 TCE), the Lisbon Treaty again refers only to "decisions". In any case, as before, the "adoption of legislative acts shall be excluded" (Art. 24 TEU). The instruments at hand for the Union in CFSP/CDSP refer to the adoption of general guidelines, decisions on positions, actions and their implementation and the strengthening of cooperation between the Member States (cf. Box 5<sup>Box 5</sup>).

#### *Box 5. Legal instruments of CFSP*

The Union shall conduct the common foreign and security policy by:

- (a) defining the general guidelines;
- (b) adopting decisions defining:
  - (i) actions to be undertaken by the Union;
  - (ii) positions to be taken by the Union;
  - (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii); and by
- (c) strengthening systematic cooperation between Member States in the conduct of policy.

*Source:* Art. 25 TEU.

The instrument of a "common strategy" (Art. 12 TEU (Nice)) has been deleted but a similar term remains in the formulation of the tasks of the European Council who shall "identify the Union's strategic interests" and "define the strategic lines of the Union's policy" (Art. 26 TEU).<sup>16</sup> The Nice Treaty had foreseen "*joint actions*" and "*common positions*", a term deleted in the Lisbon Treaty.

Decisions on "operational action" shall contain "objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation" (Art. 28 TEU). Decisions on positions of the Union can refer "to a particular matter of geographical or thematic nature" (Art. 29 TEU). For the implementation of the CFSP, national as well as Union resources may be used (Art. 26 (3) TEU).

To reach the aims of the Common Security and Defence Policy, the Union furthermore has the option of "missions" for which "civilian and military assets" may be used (Art. 42 (1)). The execution of such special tasks may also be entrusted to a certain group of member states "to protect the Union's values and serve its interests" (Art. 42 (5) TEU). But the resources for these

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<sup>16</sup> As elaborated elsewhere, this instrument has only been used three times between 1999 and 2005, and has proved to be quite ineffective. It had been elaborated as a possible introduction to qualified majority decisions in the Council (cf. Regelsberger, 2007b: 76, 2001: 158-159; Wessels, 2003b).

operations “having military or defence implications” remain at national level: “The performance of these tasks shall be undertaken using capabilities provided by the Member States” (Art. 41 (2); similar Art. 42 (1) TEU).

As far as budgetary means are concerned, administrative and operating expenditure shall – as is already the case – be charged to the Union budget except for operations with military and defence implications (Art. 41 (1) and (2) TEU). In cases where the expenditures are not charged to the Union budget, they have to be paid by the member states, taking into account their gross national product. The Council also has the option to decide otherwise. In this formulation, the Lisbon Treaty has added the requirement for an unanimous decision which had already been in the formulation of the Nice Treaty but which was not specified in the Constitutional Treaty (Art. 41 (2) TEU and III-313 TCE/ 28 TEU (Nice)). The Lisbon Treaty also introduces a new element regarding the “rapid access to appropriations in the Union budget for urgent financing of initiatives” which refers especially to the civil and/or military operations and missions (Art. 41 (3) TEU). This “start-up fund” shall consist of member states’ contributions, the Council deciding (with qualified majority voting) on its set-up, administration and control and authorising the High Representative to use the fund if necessary. This shall be the case when the task that is planned cannot be charged to the Union budget (i.e. when it is an operation with military and defence implications). The European Parliament, which is normally fully participating in the budgetary procedure, shall only be consulted (Art. 41 (3) TEU).

In contrast to this rather limited set of instruments for CFSP, other areas of external action are implemented via the whole range of instruments that is offered by the application of the ordinary legislative procedure, i.e. regulations, directives and decisions (cf. Art. 289 TFEU). This refers for example to the common commercial policy, development cooperation or humanitarian aid.

As in the previous treaties, the Lisbon Treaty stresses the mutual commitment of member states to support the Union’s external and security policy “actively and unreservedly in a spirit of loyalty and mutual solidarity” and to “refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness” (Art. 24 (3) TEU), thus specifying the general assurance of mutual cooperation and fulfilment of treaty obligations (Art. 4 (3) TEU). Both the Constitutional Treaty and the Lisbon Treaty added a subordinate clause with an obligation of the member states to “comply with the Union’s action in this area” (Art. 24 (3) TEU). They have also extended the regulations for mutual information and consultation (former Art. 16 TEU (Nice)) of the member states in matters of general interest (now Art. 32 TEU). Furthermore, the article stresses: “Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene.” Further regulations of mutual information mechanisms have not been changed in substance (cf. Art. 28 TEU).

The Lisbon Treaty also repeats the formulations of the current Art. 19 TEU (Nice) regulating that the member states shall “coordinate their action in international organisations and at international conferences” (Art. 34 (1) TEU). A new phrase regarding the responsibility of the High Representative for the organisation of this coordination has been added, as well as a provision stating that the member states that are members of the UN Security Council “will concert and keep the other Member States as well as the High Representative fully informed” (Art. 34 (2) TEU) – in the Nice Treaty only the other member states had to be informed. This task of the High Representative strengthens his/her role for the external representation and coherence of the Union.

To control this mutual loyalty, the Lisbon Treaty addresses the Council and the High Representative to “ensure compliance with these principles [of mutual political solidarity]” (Art. 24 (3) TEU), a task that was formerly assigned only to the Council (Art. 11 (2) TEU (Nice)). In any case, the compliance with this demand for mutual solidarity and loyalty has to be tested in the

future. During the Iraq war in 2003, similar provisions in the Treaty of Nice (Art. 11 EUV (Nice)) turned out to be rather ‘dead treaty letters’.

In this regard the High Representative will play a role that is not yet clearly defined. S/he could behave as an actor representing the overall interests of the Union and controlling national foreign policies without any ties to national institutions – similar to the task of the Commission to “promote the general interest of the Union” [and] “ensure the application of the Treaties” (Art. 17 (1) TEU). That s/he “shall ensure the implementation of the decisions adopted by the European Council and the Council” (Art. 27 (1) TEU) is another indicator for the ‘watchdog’ function of the High Representative. But contrary to the competence of the Commission in other policy fields (cf. Art. 258 TFEU), the High Representative may not bring a matter of non-compliance of treaty obligations by a member state before the Court of Justice. In the terms of a “principal-agent” (cf. Pollack, 2006; Kassim & Menon, 2003) relationship, the High Representative could thus also function as an agent of the European Council and its president, controlling both the Commission and the EP. The reading of the legal text suggests that the High Representative could also play the role of a ‘moral conscience’ in trying to maintain discipline among the member states through ‘naming, shaming and blaming’ of rule-breaching governments (for the terms used in context with the Open Method of Coordination, see Linsenmann et al., 2007; Meyer, 2004) and to make the mutual commitments ‘credible’ (Moravcsik, 1998). But the analysis of the living diplomatic practice so far does not seem to confirm this expectation.

It remains open which actor or interest constellation could guarantee that the member states comply with the norms of behaviour that they set for themselves. As could be seen in various cases in the history of the EPC/CFSP (see case studies in Regelsberger et al., 1997; Pijpers et al., 1989), governments tend to bypass these soft commitments if it seems conducive to their own national interests (at least in the short run). In such a dilemma the cost-benefit calculations of rational acting states tends towards non-compliance. Even if these declarations have clearly defined formulations, the states can avoid the inherent obligations without facing any sanctions. Member states could also become free-riders who take advantage of the solidarity behaviour of others without having to comply with the rules that might be against their own short-term interests (see in general Hasenclever et al., 1997; Keohane, 1984; Krasner, 1983: 2; Wessels, 2000). Therefore it cannot be expected that the new and old regulations will establish a regime of co-operation within which the member states – orchestrated by the High Representative – will transform the treaty principles into common norms of behaviour in the living architecture.

On the other hand, authors have identified growing trends of ‘Brusselisation’ (see Regelsberger, 2007a; Wessels & Regelsberger, 2005: 105f.), especially at the administrative level of CFSP-related bodies such as working and expert groups. The increasing number of bodies working within CFSP and especially CSDP in Brussels might contribute to bringing life into these letters by establishing and living a common group discipline. Based on these treaty formulations, actors in Brussels – though without ‘teeth’ – might construct appropriate norms (see for the term March & Olsen, 1989; for an overview, see Risse, 2004; Hall & Taylor, 1996) for the work within the legal architecture (Wessels & Regelsberger, 2005: 106). This goes along with a growing ‘socialisation’ of CFSP actors, leading to specific patterns of behaviour (Juncos & Pomorska, 2006).

Based on previous experiences, it can be expected that especially crises in issues that are regarded as ‘high politics’ (Hoffmann, 1966) will lead to a behaviour that is focused on a country’s own national interest. The formula “The Member States shall show mutual solidarity” (Art. 32 TEU) will probably not lead to a realignment of national foreign policy in constellations of divergent preferences.

In this respect the Lisbon Treaty thus basically repeats the formulations of the Constitutional Treaty. Amendments to the existing Treaty of Nice are of minor relevance and do not seem to

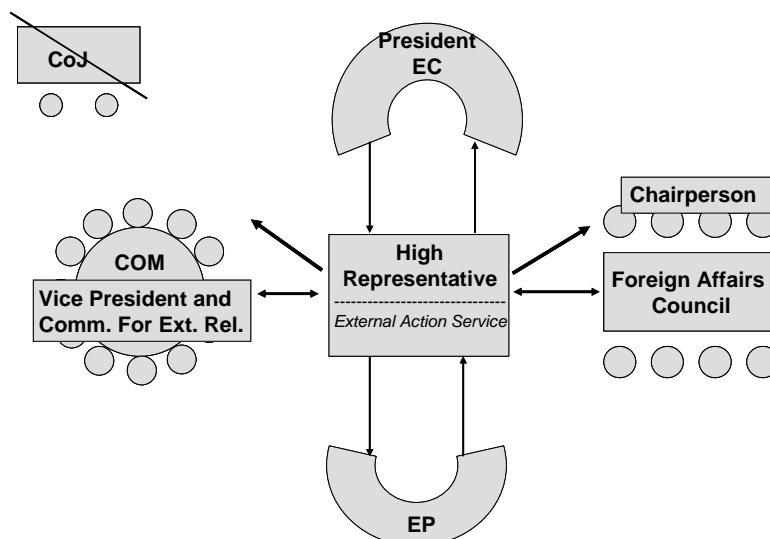
provoke a stimulus for major changes in the behavioural pattern of member states. Thus the risk remains that this formula about the “appropriate behaviour” of the Lisbon Treaty will remain ‘treaty prose’ without any significant impact on the day-to-day practice.

## 2.3 Institutions and procedures – major innovations with unforeseeable roles

### 2.3.1 A survey on the institutional balance

The institutional architecture of CFSP has been subject to major innovations and amendments, although some basic underlying features remain. This new architecture deserves to be paid special attention by the new full-time president of the European Council (Art. 15 TEU) and the office of the High Representative of the Union for Foreign Affairs and Security Policy (Art. 18 TEU).

Figure 3. The institutional architecture of CFSP



Source: Wessels, 2008: 412.

If we take a closer look at the modifications to the institutional balance (see Figure 4), we see that the role of the European Parliament in CFSP matters has not been substantially modified. The Lisbon Treaty inserted the High Representative as the new contact partner of the EP (instead of the Commission or the Council Chairman) who shall regularly inform it and to whom it can address questions and recommendations (Art. 36 TEU). Furthermore, the frequency of debates within the EP on CFSP and CSDP matters has been upgraded to twice instead of once per year. As a minor amendment the Lisbon Treaty added that the EP should also be regularly consulted on aspects of the CFSP (Art. 36 TEU) and not only in CFSP issues. But as administrative and operating expenditures of CFSP are charged to the Union budget – except for matters having military or defence implications (Art. 41 TEU) – the EP has at least some kind of influence via the budgetary procedure.

The “Protocol on the role of national parliaments in the European Union” furthermore foresees that a “conference of Parliamentary Committees for Union Affairs” may organise interparliamentary conferences “in particular to debate matters of common foreign and security policy, including common security and defence policy” (Art. 10 of the Protocol).



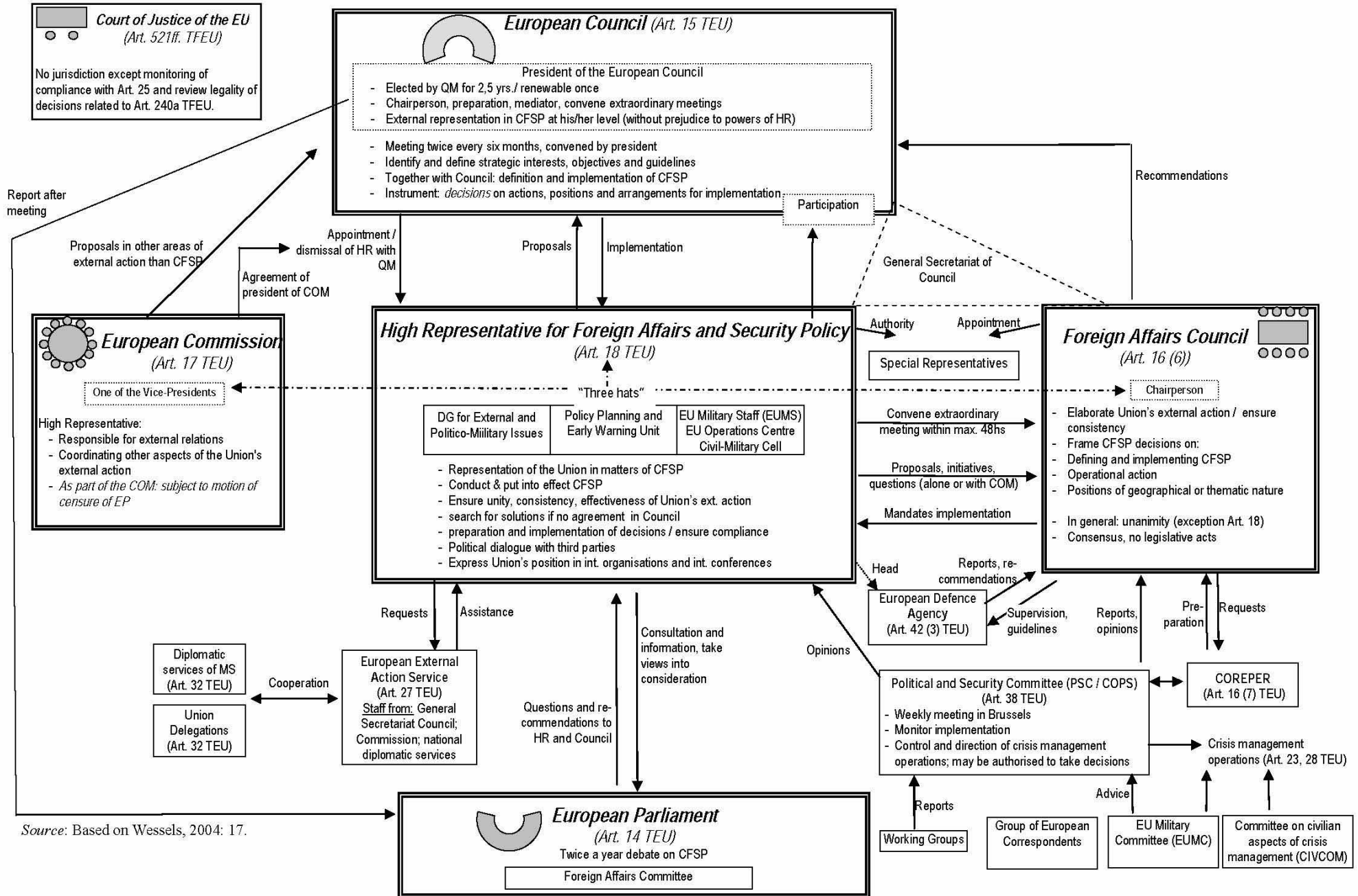
These treaty provisions document the marginal role of the EP which remains restricted to acting as a forum in this policy field. It also fosters the special characteristics of this policy field which generally requires fast, discreet and discretionary decisions. Similarly restricted is often the role of national parliaments in national foreign policy (Diedrichs, 2004; Mittag, 2003: 153). At the same time the preference for an ‘intergovernmental’ character of the CFSP has again been stressed: The Lisbon Treaty does not see the EP as a source of legitimacy for this central part of coordinating national action. Governments and diplomats remain the only legitimised actors who have to resort to their national basis for acceptance of their activities.

It is especially important that the overall dominance of the European Council in this policy field has not been modified. This body shall “identify the Union’s strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including matters with defence implications” (Art. 26 TEU). Its task description is even reinforced if compared to the Nice Treaty (Art. 13 TEU (Nice)).

In political practice, several tasks can be attributed to the European Council. These are the provision of guidelines and overall guidance, to give orientation and to ‘steer’ the EU, to act itself as an international actor and to act as a decision-taking body. Furthermore, its meetings attract in general more attention in the media than the meetings of other EU institutions which provides it with a special impact on publicity and questions of legitimacy (Wessels, 2008). Especially the function as an institutional actor on its own in the international system is of relevance as it even increases the number of actors representing the Union externally. Since its beginnings, the European Council and its rotating presidency have interpreted their role as representation and ‘voice’ of the Union and have regularly adopted declarations on all major international developments. Even if these declarations often refer to merely compromising statements that can be interpreted in various different ways, the European Council remains a central institution for orientation and reference.

As the previous paragraphs might have shown already, the institutional architecture of CFSP is quite complicated and very much simplified by the graphical presentation above. Thus, the following Figure 4 aims at demonstrating the complexity of the institutional architecture – this time at the cost of clarity.

Figure 4. The detailed institutional architecture of CFSP/CSDP in the Lisbon Treaty



Source: Based on Wessels, 2004: 17.

The Lisbon Treaty divides the former General Affairs and External Relations Council into two separate bodies: the General Affairs Council and the Foreign Affairs Council (Art. 16 (6) TEU). This overdue division reflects the growing number and complexity of CFSP issues the Council has to deal with. But this division of labour also holds some open risks: as the General Affairs Council shall prepare the meetings of the European Council together with its president and with the Commission (Art. 16 (6) TEU), it is also involved in foreign affairs insofar as they are on the agenda of the sessions of this major decision-maker. Also, the continuity represented by the full-time President of the European Council contrasts with the rotating presidency in the General Affairs Council. The Foreign Affairs Council will be the only Council formation with a fixed chairperson (the High Representative) for five years besides the European Council with its full-time President for 2.5 years.

The tasks of the Council are reconfirmed with minor changes of terminology when compared to the current Nice Treaty. The Council shall “frame” the CFSP and “take the decisions necessary for defining and implementing it” (Art. 26 (2) TEU).<sup>17</sup> Furthermore, the Council takes decisions on operational action by the Union “where the international situation requires” (Art. 28 (1) TEU), thus binding the member states who “shall commit” to these decisions “in the positions they adopt and in the conduct of their activity” (Art. 28 (2) TEU).

The work description of the Political and Security Committee (PSC) as part of the institutional structure of the Council (Art. 38 TEU) has basically remained unchanged except that it shall act not only at the request of the Council but also of the High Representative and that it shall work under the responsibility of both institutions. The PSC shall also assist the Council in the implementation of the Solidarity Clause (Art. 222 TFEU) and here, if necessary, cooperate with the new Standing Committee for Justice and Home Affairs (Art. 71 TFEU). The tasks designed to it overlap partially with the tasks of the High Representative – an ambiguity in the text that leaves much room for interpretation (see below). Similarly, the division of competences between the PSC and Committee of Permanent Representatives (COREPER, Art. 16 (7) TEU) is not clearly defined, which might lead to concurring tensions between these two institutions preparing sessions of the Council.

The Commission in its role as contact person for the EP and as a player within the CFSP has been replaced by the High Representative who establishes a not yet clearly defined connection to the Commission due to its role as its Vice President. The basic division of action is manifested in Art. 22 (2) TEU which states that “The High Representative (...), for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council” (see also Art. 17 (1) TEU). The role of the Commission has thus been weakened in CFSP in favour of the High Representative although it remains to be seen what role the latter will fulfil as a Vice President of the Commission and which environment – the group of Commissioners or the colleagues of the Foreign Ministries – will socialise him/her more severely (see below).

As before, the Court of Justice of the European Union (ECJ) has no jurisdiction in CFSP and CSDP matters (Art. 24 (1) TEU and 275 TFEU). However, there are some exceptions. This refers to the monitoring of compliance with Art. 40 TEU, which assures that implementation of CFSP shall not affect the procedures and powers of the institution as laid down in the TEU and the TFEU, mainly in the articles containing the division of competences (Art. 3-6 TFEU). Furthermore, the Court may rule on proceedings initiated by natural or legal persons against acts of

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<sup>17</sup> Here as elsewhere the Reform Treaty merges regulations into one article, which were separated in the Constitutional Treaty between part I and part III (in this case, being Art. I-40 (2) and III-295 (2) TCE) and thus contributes to a more coherent legal framework of the Union.

the Union reviewing the legality of decisions providing for restrictive measures adopted on the basis of the CFSP/CSDP provisions.

Notably, the exclusion of the Court from this policy field has been slightly extended when compared to the Constitutional Treaty. In the TCE, the jurisdiction of the Court was *not* excluded from the provisions having general applications (Title V Chapter I, Art. III-292 and III-293 TCE, cf. Art. III-376 TCE), whereas in the Lisbon Treaty the jurisdiction of the ECJ relates to all provisions of the whole title except for the above-mentioned exclusions, which were also excluded in the TCE. In the next subsections, we will analyse the two major institutional innovations in more detail.

### 2.3.2 *The President of the European Council: More than chairperson and spokesperson*

Of major importance is the potential role of the full time President of the European Council as a major decision-making body – not only in the legal but especially in the living architecture.

The ‘full-time’ President of the European Council is elected by qualified majority for 2½ years (renewable once). As this election is foreseen without proposal of the Commission or the High Representative, the requirements for qualified majority are slightly higher than usual (from November 2014 on, requiring 72% of the members in the European Council, representing at least 65% of the population (Art. 238 TFEU), making an agreement quite difficult. The main tasks of this institution are set out in Box 6.

#### *Box 6. Tasks of the President of the European Council*

The President of the European Council:

- (a) shall chair it and drive forward its work;
- (b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;
- (c) shall endeavour to facilitate cohesion and consensus within the European Council;
- (d) shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his 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.

The President of the European Council shall not hold a national office.

*Source:* Art. 15 (6) TEU.

His tasks and functions are not very clear especially when compared to the catalogue of tasks assigned to the High Representative. On the one side, s/he has to be able to promote consensus among the heads of state and government and on the other side s/he has to be influential enough to ‘steer’ the Union and ensure member states’ implementation of their political promises. This position thus moves between two extreme positions: one the one hand, a merely coordinating chairperson with representative functions, and on the other, a kind of strong ‘President of Europe’ or ‘Mr/Ms Europe’, seen to represent the Union in its role in the international system (cf. CEPS et al., 2007; Wessels & Hofmann, 2008).

The potential role conflicts between the President of the European Council and the High Representative, which are indicated by this article, are obvious. The formulation “without prejudice to” indicates that potential role conflicts are being recognised by the masters of the treaties but

their resolution shifted to daily practice. It is not clear to what extent the Union's external representation will be 'shared' between these two institutions in everyday practice – it seems that in the future the EU might then have at least 'two telephone numbers'. Should the President of the European Council combine his/her internal management tasks with his task of "external representation of the Union" (e.g. dialogues with presidents and heads of government of third countries), s/he will become an important actor within the CFSP. In the light of the above-mentioned self-perception of the European Council as actor on its own and representative of the EU, the full-time President could be regarded as the main 'spokesperson' of the EU in all matters of international interest.

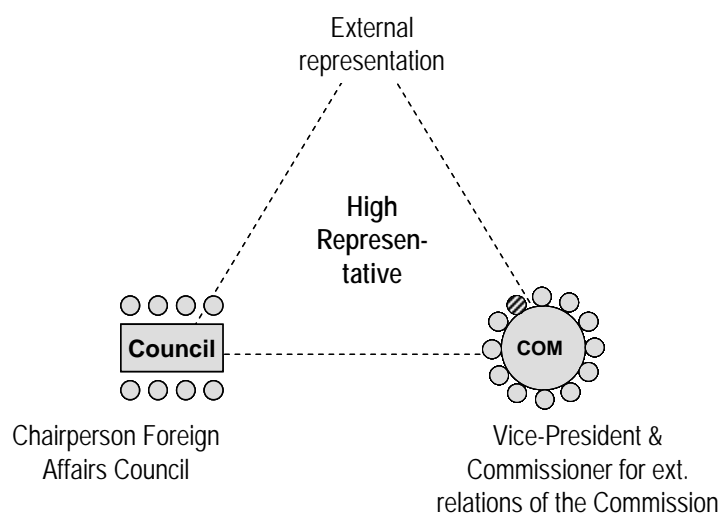
Furthermore, even if the presidency of the European Council brings more coherence to the Union's external action, the President still has to cope with the rotating Council presidency in the other-than-Foreign Affairs Councils and in the committees and working groups that are subordinated to the Foreign Affairs Council (see above). In this function the office might also compete with the reinforced President of the Commission, who is well disposed to "ensure the preparation and continuity of the work of the European Council" (Art. 15 (6) TEU) together with the President of the European Council.

Finally, the President has to prepare a report for the European Parliament after each European Council meeting, although in general it is the task of the High Representative to keep the EP informed about developments in CFSP (Art. 36 TEU).

### 2.3.3 *The High Representative of the Union for Foreign Affairs and Security Policy*

The High Representative of the Union for Foreign Affairs and Security Policy (Art. 18 TEU) is – together with the full-time presidency of the European Council – the central new institutional arrangement in the area of CFSP within the new treaty. The office is the latest of a range of suggestions and efforts to enhance the efficiency of the cooperation between the member states and to "ensure the consistency of the Union's external action" (Art. 18 (4) TEU) in giving it a 'single voice' and 'face'. To fulfil these tasks the person will be provided with a 'double hat' or even three functions, respectively. The office combines the current two posts of the High Representative Javier Solana and the Commissioner for external action (currently Benita Ferrero-Waldner). Furthermore, as a 'third hat' he or she will chair the Foreign Affairs Council.

Figure 4. *The functions of the High Representative: A magic triangle or a tragic melange?*



Source: Wessels, 2003b.

Due to the extensive concentration of tasks, the election and competences deserve a more detailed analysis. The dual assignment of the High Representative is also visible in the way of his/her selection and/or dismissal: “The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy” (Art. 18 (1) TEU). The same applies for the end of the term of office. Keeping in mind the requirements for qualified majority voting, some possible member state coalitions can be detected for the appointment of the High Representative.<sup>18</sup>

Examples for meeting the criteria required until 2014 would be the 23 ‘smaller’<sup>19</sup> member states and Germany, all ‘pro-integration’<sup>20</sup> states or all NATO members. Coalitions meeting the criteria from 1 November 2017 onwards would be the 23 ‘smaller’ member states and two of the big states<sup>21</sup> or the above-mentioned ‘pro-integration’ coalition or the NATO members. A blocking minority must be comprised of at least four member states. The voting requirements for his/her election are thus quite high. What might become relevant is the option of a NATO members’ coalition, depending on the profile of a controversial candidate. This could lead to the situation in which the EU member states that are also NATO members could agree on a candidate for the High Representative and thus outvote the neutral EU member states. An additional declaration reminds us that in the choice of the persons for the offices of the High Representative, the President of the European Council and the President of the Commission “due account is to be taken of the need to respect the geographical and demographic diversity of the Union and its Member States”.<sup>22</sup>

Apart from his appointment, the High Representative is – as part of the Commission – also responsible to the European Parliament insofar as the EP has to give a vote of consent to the entire Commission (Art. 17 (7) TEU). In a similar way, the High Representative has to pay attention to the role of the President of the Commission who can request his withdrawal – in contrast to the current treaty the President of the Commission no longer even needs the “approval of the College [of Commissioners]” for this step (new Art. 17 (6) TEU and former Art. 217 (4) TEC (Nice)). Thus the High Representative is responsible to three bodies at the same time – the Commission, the Council and (to a lesser extent) to the EP – which will represent a difficult balancing act, leading analysts to the conclusion that the High Representative wears not only “two resp. three hats” but also has “to carry a raincoat and umbrella” (CEPS et al., 2007). and that the person fulfilling these tasks needs the characteristics of a “superhuman gymnast” (European Policy Centre, 2007a). A fourth institutional involvement relates to the participation of the High Representative in the meetings of the European Council. His success in granting more coherency and effectiveness in the Union’s external action will rely heavily on his ability to combine his (at least) two faces, a reminder of the Roman god Janus having two faces, but each looking in a different direction.

The job profile of the High Representative covers many central and differentiated functions which will probably absorb all of his/her attention. These are set out in detail below.

First of all, s/he “conduct[s] the Union’s common foreign and security policy” (Art. 18 (2) TEU). That means that this person has a major influence to shape the agenda and its priorities, as well as to structure the debate and broker a consensus. Thus this office raises high expectations relating to his/her ability to drive forward the CFSP and CSDP via proposals, suggestions

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<sup>18</sup> See Art. 238 TFEU and the Protocol on transitional provisions.

<sup>19</sup> All 27 except G, UK, F, ES.

<sup>20</sup> All 27 except UK, S, DK, CZ, SK, M. (see Wessels, 2001: 208).

<sup>21</sup> Germany, France, United Kingdom and Italy.

<sup>22</sup> Declaration No. 6.

and activities. At the same time the High Representative as chairperson of the Foreign Affairs Council has to promote consensus among its members while including different political interests of the member states as well as different resorts of the Commission and the respective networks behind.

He shares the right to make proposals with the member states (Art. 30 (1) and 42 (4) TEU), a task he can also fulfil “with the Commission’s support” in matters of CFSP (Art. 30 (1) TEU). Different to the Commission in major policy fields of the TFEU, he has no monopoly of initiative.

The High Representative shall ensure the implementation of the decisions taken in the field of CFSP (Art. 27 (1) TEU). In this regard another overlapping of competences exists, this time with the Political and Security Committee, which shall “monitor the implementation of agreed policies, without prejudice to the powers of the High Representative” (Art. 38 TEU). This unclear division of competences could be partly outweighed due to the fact that it is planned to appoint a representative of the High Representative as chairperson of the PSC.<sup>23</sup>

Within the CFSP the High Representative furthermore “represents the Union” and he “shall conduct political dialogue with third parties on the Union’s behalf and shall express the Union’s position in international organisations and at international conferences” (Art. 27 (2) TEU), including the right to represent the Union’s position on a specific topic in the UN Security Council (see above and Art. 34 TEU).

Finally, s/he shall contribute to the improvement of the coherence of the external representation. In this regard an important innovation which was introduced in the Constitutional Treaty and has remained in the Lisbon Treaty is the aspect that the High Representative may represent the Union’s position in the Security Council given that the Union has defined a position on one of the topics on the agenda and that he is requested to do so by the member states represented in the Security Council (Art. 34 (2) TEU). Furthermore, if a common approach of the Union has been defined by the Council or the European Council, the “High Representative of the Union for Foreign Affairs and Security Policy and the Ministers for Foreign Affairs of the Member States shall coordinate their activities within the Council” (Art. 32 TEU). The former is also responsible for the organisation of the coordination of the action of the member states in international organisations and at international conferences (Art. 34 (1) TEU, see above). These tasks stress his importance for the coherence of the Union’s external action and presence.

In CSDP the High Representative shares the right of proposal with the member states, as in CFSP (Art. 42 (4) and 30 (1) TEU). He shall furthermore “ensure coordination of the civilian and military aspects” of the tasks foreseen within CSDP, meanwhile “acting under the authority of the Council and in close and constant contact with the Political and Security Committee” (Art. 43 TEU). Nonetheless, the latter keeps its overall responsibility to “exercise, under the responsibility of the Council and the High Representative, the political control and strategic direction of the crisis management operations” (Art. 38 TEU). This Committee may even be authorised to take decisions “for the purpose and for the duration of a crisis management operation” (Art. 38 TEU).

Further general coordination tasks of the High Representative are linked to forms of flexible cooperation such as the establishment of a group of member states which can be entrusted by the Council with the fulfilment of a special task (Art. 42 TEU, see below) – here, the High Representative shall “ensure coordination of the civilian and military aspects of such tasks” (Art. 43

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<sup>23</sup> Declaration No. 9 on Article 9 C (9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council.

(2) TEU) – and the “permanent structured cooperation” (Art. 46 TEU, see below), where s/he is closely involved.

Additionally, the High Representative can convene an extraordinary Council meeting in “cases requiring a rapid decision” (Art. 30 (2) TEU). Following a “specific request (...) from the European Council”, the High Representative may also propose decision-taking with QMV in the Council (Art. 31 (2) TEU, see also the following chapter on decision-making procedures). The High Representative may finally propose to the Council the appointment of so-called “special representatives” who then “shall carry out his or her mandate under the authority of the High Representative” (Art. 18 TEU). These special representatives are appointed by the Council with qualified majority. For the EP the High Representative has become the main contact person in CFSP issues (see above and Art. 36 TEU).

The High Representative is also involved in the other (EC-) areas of external action where he has together with the Commission the right to make a joint proposal on the interruption of economic/financial relations with third countries (Art. 215 TFEU) and can make recommendations to the Council on the conclusion of international agreements “where the agreement envisaged relates exclusively or principally to the common foreign and security policy” (Art. 218 TFEU). In reality, this might not always be easy to define. Furthermore, s/he will be responsible for the implementation of cooperation with other international organisations such as the UN and the Council of Europe (Art. 220 TFEU) and for the implementation of the solidarity clause (Art. 222 TFEU).

In addition to these tasks the High Representative also fulfils a special role within the Commission as one of its Vice-Presidents. The High Representative is “responsible (...) for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action.” While fulfilling these tasks, he is “bound by the Commission procedures” (Art. 18 (4) TEU). A new particularity which will not make his/her job easier is the fact that as Vice President s/he will be responsible for the coordination of external policies within the Commission and thus have a kind of ‘authority’ over the his colleagues dealing with policy fields with external implications. This might create tensions towards the president and within the consortium of colleagues of Commissioners (Cf. European Policy Centre, 2007a: 19).

Facing this job profile the High Representative has only limited own resources compared to his/her colleagues in the Council and in the Commission and is basically dependent on his power of persuasion within both institutions. For the fulfilment of his tasks he will be supported by a new body, the “European External Action Service” (EEAS), in the broadest sense a kind of ‘foreign policy ministry’ (see also Chapter 2.5 below). Due to its mixed composition this institution will not have the same hierarchical relation to the High Representative as would be expected from national officials to their Foreign Minister. Substantial operative resources such as financial aid remain within the Commission – a political weight the High Representative could or should use for his position within the Council. Furthermore s/he cannot expect to be supported by his national “colleagues” in his/her aim at promoting the capacity of the Union to act in the international system (see above). Thus the fulfilment of his/her tasks within the institutional architecture will very much depend on his/her capability to move and act within and in between the different ‘hats’.

A possible advantage lies within the multiple roles of the High Representative which could contribute to giving him advanced information from the one or the other forum. On the other hand his multiple roles could cause dependency on the goodwill of other actors who will probably ‘test’ him/her in a first experimental phase if and how s/he considers their interests and rights.

In order to be able to establish general acceptance and consensus in spite of this institutional and procedural pressure, the High Representative will probably have to pursue a “low profile” pol-



icy especially in times of crisis or conflict when the involved actors and institutions have diverging interests. His balancing between double or even triple ‘hats’ (see graph above) always holds the risk of falling between two or more chairs. This seems to indicate that his position can only marginally enhance efficiency within and external effectiveness in situations of global crisis such as the Iraq war.

### 2.3.4 Decision-Making Procedures

The re-designed institutional (im-)balance is further influenced by the rules governing the involvement of the different institutions in the daily decision-making procedures (cf. Figure 6).

Neither the Constitutional Treaty nor the Lisbon Treaty reached a breakthrough in the question of decision-making procedures in CFSP: unanimity remains the standard for decision-making in this policy field (Art. 24 (1), 31 (1) TEU). Box 7 lists the exceptions and thus decisions to be taken with qualified majority.

#### *Box 7. Qualified Majority Voting in CFSP*

(2) By derogation from the provisions of paragraph 1, the Council shall act by qualified majority:

- when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union’s strategic interests and objectives, as referred to in Article 22(1),
- when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative,
- when adopting any decision implementing a decision defining a Union action or position,
- when appointing a special representative in accordance with Article 33.

If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. 3 If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.

*Source:* Art. 31 (2) TEU.

The second point is especially new and it could lead to rather perverse practice: if the High Representative wants to start an initiative for more qualified majority voting in the Council, s/he has to refer first to the European Council and cannot bring the issue to the Council of Ministers directly.

Furthermore subject to qualified majority voting and a new provision in the Treaty is a decision of the Council on the procedures for the setting-up of a ‘start-up fund’ which shall allow for rapid access to the Union budget in cases of “urgent financing of initiatives” (Art. 41 (3) TEU). Furthermore, the Council decides with QM the establishment of “permanent structured cooperation” (Art. 46 (2) TEU, see below). A simple majority is needed for procedural questions (Art. 31 (5) TEU), as it is formulated in the Nice Treaty.

The Lisbon Treaty also maintains the possibility of constructive abstention: member states can abstain from a vote and qualify this with a formal declaration. This member state is then not obliged to application of the relevant decision which has to be respected by the other member states. Should the relevant decision have financial implications the member state is also exempted from financial contributions. In case the number of member states abstaining rises to at least one third of the member states which represent at least one third of the population, the en-

ture decision is not adopted (Art. 31 (1)). In the Nice Treaty the threshold is one third of the weighted votes in the Council (Art. 23 TEU (Nice)).

As a last option for protection of national interests, member states may – in cases where qualified majority is applied – use an ‘emergency brake’ if the issue touches “vital and stated reasons of national policy” (Art. 31 (2) TEU, which follows the idea of the “Luxembourg Compromise”. While this latter agreement still required “very important interests” to be concerned, in the Nice Treaty it was changed to “important” (Art. 23 (2) TEU (Nice)) and in the Lisbon Treaty to “vital”). In these cases, the vote will be suspended and – another Treaty innovation – the High Representative has the task to act as a kind of “mediator” in order to find a solution. He shall “in close consultation with the Member State involved, search for a solution acceptable to it” (Art. 31 (2) TEU). If s/he fails the Council can by a qualified majority decision bring the issue to the European Council as arbitrator or “final instance” (cf. de Schoutheete, 2006). The European Council has (in)voluntarily more and more assumed this role as final decision-making body.

The described ambiguities between consensus, qualified majority and national ‘emergency brakes’ document more than other provisions that the member states – when faced with the dilemma between efficiency of their body and the right to veto – have decided to guard their sovereignty. For the High Representative this clearly limits his/her scope of action.

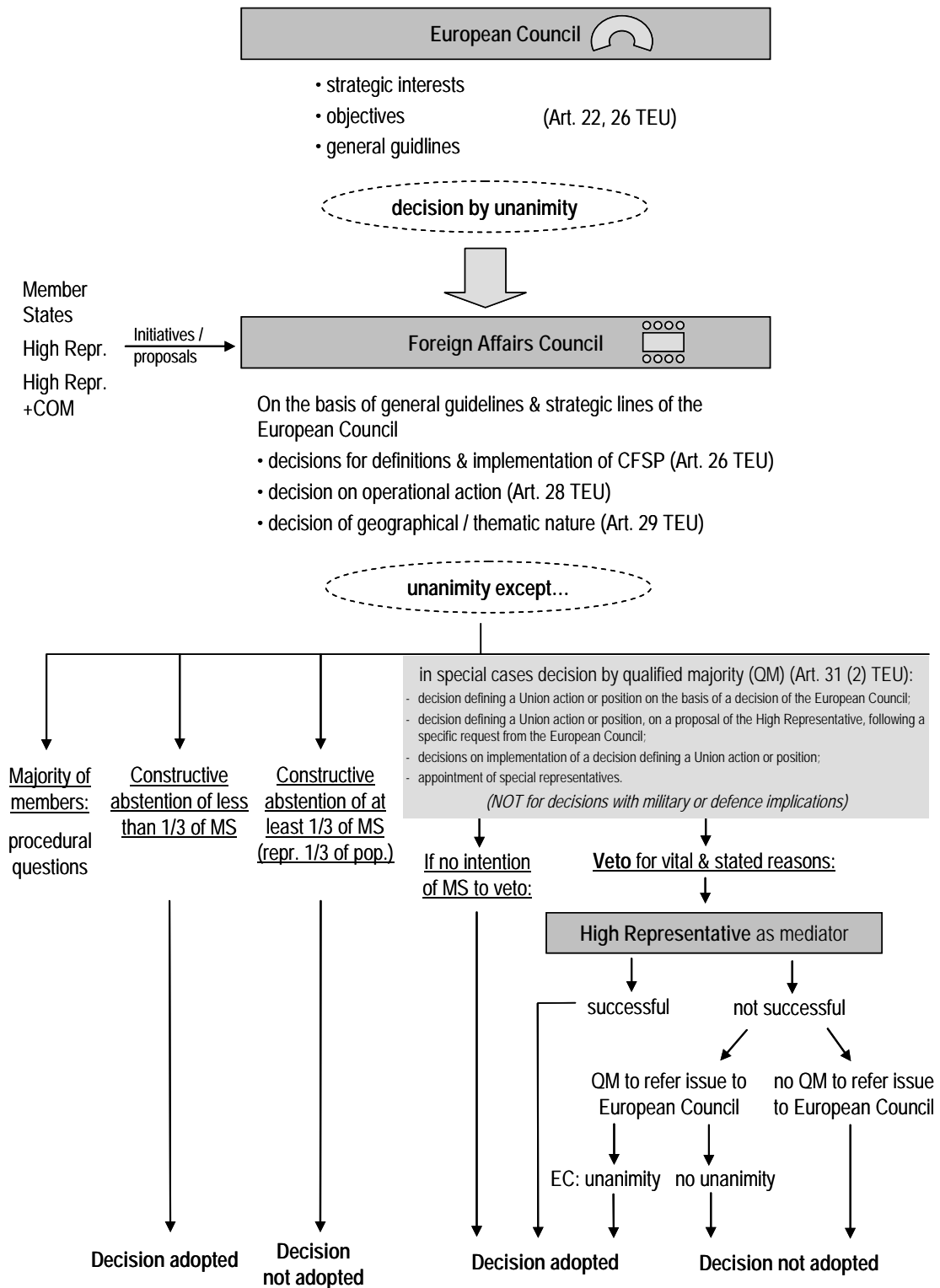
A new aspect is that this list of exceptions from the unanimity rule can be extended by an unanimous decision of the European Council (passarelle clause, Art. 31 (3)). It is interesting to note that this provision is not subject to control by national parliaments – in contrast to the provisions of the “general” passarelle clause of Art. 48 (7) TEU. In any case, this option for extension of QMV “shall not apply to decisions having military or defence implications” (Art. 31 (4) TEU).

Within CFSP and CSDP, special procedures will be applied concerning the question of data protection. Whereas Article 16 TFEU grants the general right to the protection of personal data and defines that the respective rules shall be adopted following the ordinary legislative procedure, this does not count for the area of CFSP where decisions of this kind are adopted by the Council only (Art. 39 TEU). The issue is further subject of a declaration in which requires that “whenever rules on protection of personal data (...) could have direct implications for national security, due account will have to be taken on the specific characteristics of the matter.”<sup>24</sup>

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<sup>24</sup> Declaration No. 20 on Article 16B of the Treaty on the Functioning of the European Union.

Figure 5. Decision-making in CFSP according to the Lisbon Treaty



Source: Own graph on the basis of Wessels/Regelsberger (2005: 102).

## 2.4 Flexibility options: real progress or wishful thinking?

Debates about possible mechanisms of flexibilisation inside and outside the EU framework are recurrent in European integration history and date back to the 1970s. In the framework of CFSP they are of special relevance in light of the requirement for unanimity and the latest enlargements of the EU in May 2004 and January 2007 which increased the Union's internal heterogeneity (for the discussion on flexibility within CFSP see also Tekin 2008). Key terms in this debate are concepts of “avant-garde” (Chirac, 2000), “core Europe” (cf. Schäuble & Lamers, 1994) or “centre of gravity” (Fischer, 2001).

After the first introduction of flexibility options in the primary law with the Maastricht Treaty (for EMU and the Social Charter), the Amsterdam Treaty introduced the concept of “enhanced cooperation” (then still called “closer cooperation”), which was subsequently extended to the policy field of CFSP in the Nice Treaty (Art. 27a TEU (Nice)). However, this option has not been used in the “living architecture” so far neither in the EC nor in the CFSP pillar. The Lisbon Treaty now reconfirms the option of “enhanced cooperation” and extends its range of application even to matters having military or defence implications, thus extending this flexibility option to CSDP (Diedrichs & Jopp, 2005, 2003; Jopp & Regelsberger, 2003). At the same time the requirements for such a flexible cooperation were reduced: the minimum number of member states which have to participate was changed from eight in the Nice Treaty to nine in the Lisbon Treaty (Art. 20 (2) TEU), meaning a reduction from half of the member states to one third in an enlarged Union of 27. But in light of the experiences so far the use of this flexibility option remains doubtful.

The relevant procedures are slightly different for CFSP than for other policy areas, especially in the fact that the request to establish enhanced cooperation has to be made to the Council instead of to the Commission and that the High Representative is responsible for assessing the consistency with the other CFSP regulations while the Commission shall ensure consistency with the other policy areas of the Union. As the High Representative *is* part of the Commission and within it responsible for the coordination of all external relations aspects, the treaty provisions are not quite clear regarding the division of tasks between the High Representative and the rest of the Commission.

Authorisation to proceed with the enhanced cooperation within CFSP is granted by an unanimous decision of the Council whereas in policy areas of the TFEU the Commission makes a proposal and the European Parliament has to give its consent and the Council decides with qualified majority (Art. 329 TFEU).

The Lisbon Treaty furthermore establishes another, interesting new form of flexible cooperation for CSDP called “permanent structured cooperation” (Art. 42 (6), 46 TEU and the Protocol on permanent structured cooperation). It refers to member states “whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area” (Art. 42 (6)). These member states would notify their intention to establish such a cooperation to the Council and the High Representative. Within three months, the Council has to decide with qualified majority on the establishment of the permanent structured cooperation. Within this form of cooperation, decisions are taken with unanimity within the Council. Participating member states may also withdraw from the permanent structured cooperation and their participation may be suspended if they do not longer fulfil the necessary criteria (Art. 46 TEU).

As a further option for flexibility the Council may entrust a group of member states with the “execution of a task (...) in order to protect the Union's values and serve its interests” (Art. 42 (5), 44 TEU, see also above). These “tasks” represent an existing political practice and are further specified in Art. 43 TEU: they shall include “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” as well as combat of terrorism. The High Representative and the PSC have coordination tasks and the Council decides on objectives, scope and general conditions of implementation (Art. 43 (2) TEU). Member states can also establish multinational forces and make these available to the CFSP (Art. 42 (3) TEU). Finally, as mentioned above, participation in the European Defence Agency is also voluntary but so far, all member states except Denmark, are participating. The option of constructive abstention has already been analysed in Chapter 2.3.4 but should also be mentioned here due to the fact that this option also allows for flexible cooperation for special groups of member states.

Apart from these treaty-based options for flexibility it should be kept in mind that other forms of cooperation between some member states are already existent even without the explicit use of the relevant clauses in the Nice Treaty. In this sense the EU battle group concept (cf. Mölling, 2007; Biscop, 2005; Quille, 2004) is a remarkable innovation. In the long run, these battle-groups could lead to the establishment of a military CSDP-avantgarde of certain member states. Already at this stage many smaller member states declared their wish to participate in order not to close the door for possible future permanent structured cooperation (Mölling, 2007).

In general, these flexibility provisions for the area of CFSP foreseen in the Lisbon Treaty are more transparent both for participating and non-participating members so that the creation of a “directoire” of the big three (Hill, 2006) might be avoided. On the other hand the provisions for flexibility do not contain further incentives for these kinds of cooperation so that it remains to be seen if the member states will take the opportunity to use those forms of flexible cooperation within the Treaties or if they prefer to cooperate outside the Treaty. Whether these flexibility options are mere expression of a wishful thinking or could also function as a potential threat to not-willing member states cannot be assessed yet.

## **2.5 Further institutional innovations: The European External Action Service and the European Defence Agency**

A new institutional arrangement is the “European External Action Service” (EEAS) which shall assist the High Representative in “fulfilling his mandate” (Art. 27 (3) TEU) and thus function as a kind of “ministry” to the re-named “Foreign Minister”. The EEAS works in cooperation with the national diplomatic services and “shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States” (Art. 27 (3) TEU) and thus combine supranational and intergovernmental elements (cf. Maurer/Reichel 2004). Its detailed organisation and functioning is still to be defined by a decision of the Council. An additional declaration regulates that the Secretary-General of the Council, the High Representative, the Commission and the member states shall begin preparatory work on the EEAS after the signature of the Reform Treaty.<sup>25</sup> In fact, preparatory work had already begun in 2004 after the signature of the Constitutional Treaty (Maurer/Reichel 2004) and the chapter was then re-opened during the 2007 treaty negotiations (European Policy Centre, 2007b).<sup>26</sup>

Nevertheless, the detailed set-up and tasks as well as the precise setting within the institutional architecture still remain unclear. So it remains to be seen if the Service will be placed within the Council or the Commission or none of them. Both institutions have differing concepts on how to structure this new body (Lieb & Maurer, 2007). Its legal status is also not defined yet: neither an agency such as the European Defence Agency nor a committee but rather a “hybrid new

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<sup>25</sup> Declaration No. 15 on Article 13a of the Treaty on European Union.

<sup>26</sup> European Council 2005: 23.

agency, indeed *sui generis*” (CEPS et al., 2007). Apart from the institutional question other aspects such as financing and professional support have to be answered, as well as the relations of the Service to the PSC, COREPER or the Special Representatives (Duke, 2004).

Apart from these amendments in the institutional architecture, a new agency has been set up in the field of CSDP. The European Defence Agency was established by a Joint Action of the Council of Ministers in 2004 and has now been included in the articles of CSDP in the Lisbon Treaty. Following the treaty, it shall improve the military action capability of the Union (Art. 42 (3) TEU). Irrespective of the ratification process of the Constitutional Treaty the Agency was already established in 2004 by a Joint Action of the Council, acting on a request of the European Council of Thessaloniki in June 2003 who demanded the creation of “an intergovernmental agency in the field of defence capabilities development, research, acquisition and armaments”.<sup>27</sup> It was thus established even before the Constitutional Treaty was even signed. This demonstrates that institutional changes within the CFSP are also pursued without the official procedure of treaty revisions and ratifications. Participation in the European Defence Agency is open to any member state. Furthermore “specific groups” can be set up within the Agency in order to pursue “joint projects” (Art. 45 TEU).

At the end of 2007, all member states of the European Union except Denmark were participating in the Defence Agency.<sup>28</sup> Javier Solana, the current High Representative, is Head of the Agency and Chairman of the Steering Board, the latter being the decision-making board composed of the 26 Ministers of Defence of the participating member states and a representative of the Commission. In the Joint Action of the Council, which established the EDA, it is said that the High Representative should have a “leading role in the Agency’s structure and provide the essential link between the Agency and the Council”.<sup>29</sup> The Agency operates under the “authority and the political supervision” of the Council.<sup>30</sup>

### 3. Assessments

The previous chapters provided an overview over the distinctive provisions the Lisbon Treaty offers for EU-member state cooperation in the area of CFSP and CSDP. Our analysis reveals a rather mixed and “hybrid” character.

Whereas we found many traces for norms and visions of a “civilian power” (Blauberger, 2005; Whitman, 1998; Bull, 1982; Duchêne, 1972), member states have made remarkable progress in giving the Union military and defence capabilities. Thus, the growing emphasis of the norms and values of a civilian power is accompanied by strengthened military capabilities and an increased reference to defence issues. This is on the other hand only marginally represented in the constituting ideas (cf. Art. 42 (1) TEU), which leads to an ambiguous and far from coherent external picture of the EU’s international identity.

Institutionally, the external coherence is somewhat strengthened. The Lisbon Treaty indeed made some efforts in order to enhance efficiency and effectiveness of single institutions, especially by the establishment of the High Representative and the full-time presidency of the European Council. But if this strengthening of single institutions will lead to more overall efficiency and coherence or, contrary, to mutual blocks, overlapping competences and inter-institutional tensions (cf. Wessels & Hofmann, 2008), cannot be answered at this stage. Thus, while the new

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<sup>27</sup> Council of the European Union 2004; European Council 2003a

<sup>28</sup> See Website of the Agency at <http://www.eda.europa.eu> (last visit: 29 November 2007).

<sup>29</sup> Council of the European Union 2004:17.

<sup>30</sup> Council of the European Union 2004: Art. 4 and 8.

office of the High Representative could lead to a more coherent external action of the EU, the overlapping competences with the President of the European Council could also demote him/her to mere coordinative/administrative tasks. The treaty provisions for the institutional architecture remain quite vague and leave substantial room for interpretation in the “living architecture”. The High Representative has a position which is clearly placed in an area of conflict *between* and *within* the institutions. In the daily practice this person will probably be under tight scrutiny both of the national governments in the Council and the colleagues in the Commission as well as of the diplomats in the Political and Security Committee. He could also be ‘controlled’ by the president of the European Council as representative of the member states as the principals, if the latter interprets his own role in such a sense (cf. Art. 15 (6) and 27 (1) TEU). The “intrinsic dualism” (CEPS et al., 2007) which characterizes the external action of the European Union has not been dissolved but will be now continued and settled in one person.

The Union’s capability to act might be increased by extended flexibility options and operative resources. But in the main intergovernmental pattern – the decision-making procedures – no breakthrough could be reached. The adoption of legal acts is still not possible for CFSP/CSDP and decisions have to be taken by unanimity. However, it is not clear if forms of flexible cooperation will be used in the living architecture or if they will serve mainly as a wishful thinking of member states. Overall, the modifications of the available instruments do not correspond to the enhanced list of objectives and aims, which indicates that the capabilities-expectations-gap (Hill, 1993, 1998) has rather been widened than closed. When analysed in light of the ambitious objectives of the Union to promote its internal norms and values in the international system the operative resources seem limited. The same applies for the legal instruments available for situations of crisis which per se would require rapid reaction. Thus the term *Common Security and Defence Policy* can still be regarded as somewhat misleading.

The CFSP provisions of the Lisbon Treaty can thus not be qualified as a “saut constitutionnel” (Klein & Wessels, 2006) in a ‘supranational’ direction (cf. Wessels, 2005). Compared to other fields such as Justice and Home Affairs the Treaty of Lisbon does not offer substantial supranational leaps in the field of CFSP. Similarly, in the area of Security and Defence Policy the Treaty of Lisbon has not altered the dominance of the unanimity rule and the right to initiate proposals is shared between the High Representative and the member states. The Commission is only very marginally involved.

In any case, in the living constitution and apart from the “official” treaty revisions cooperation in CSDP has already been strengthened – due to the establishment of the European Defence Agency, which is now (apart from the Space Agency) the only agency which is mentioned in the Lisbon Treaty, and the launch of the EU-battlegroups. Both issues had been realised in the “living architecture” and then been incorporated in the legal base of the Lisbon Treaty (Art. 42 TEU and Protocol No. 10 on Permanent Structured Cooperation) and thus point at a very dynamic evolution and a kind of “hidden constitutionalisation” (Wessels & Regelsberger, 2005: 93) and include forms of flexibility arrangements which lets us doubt about the feasibility of the new ‘official’ flexibility option for “permanent structured cooperation”.

To sum up, we conclude that although major efforts have been made to strengthen efficiency and coherence – such as the establishment of the High Representative with its central inter-institutional and mediating role – basic features of cooperation in this field remain not only intergovernmental but even seem to indicate towards a further complication and confusion of responsibilities within the Union especially through unclear divisions of power not only between the High Representative and the ‘full-time’ President of the European Council but also between the PSC and the High Representative. Thus the hesitating pooling of national and supranational resources is on the one hand accompanied by ambitious aims and objectives stressing the Union’s claim to be a civilian power and an ever increasing refinement of intergovernmental

strategies. At the same time, the increasing importance of defence issues has definitely changed the Union's international identity, causing some authors to claim "an opportunity lost" (Treacher, 2004: 66) for the Union to become a distinct, non-military international actor.

Thus, while we could find indicators for both of our contrasting assumptions, none of them has proven to be able to explain the whole range of developments. As a third possible explanation we find several traces for a 'ratchet fusion' (cf. Figure 1). In this perspective, national and European actors come together for joint activities and policy-making (labelled as 'Europeanisation' (Olsen, 2002) and 'Brusselisation' (Regelsberger, 2007a), respectively) in a process of de facto increasing involvement. In several evolutionary steps, political attention and personal resources are shifted to the Brussels arena (Maurer et al., 2002) but this does not mean a 'communitarisation' in the strict sense, meaning that procedures are used which are known from the community method. Central to this view is the assumption that this development is irreversible – while remaining in the status quo is possible for some time, 'spill-backs' are excluded. In each treaty revision, member states give competences to the Union for more efficient problem-solving, but at the same time they retain influence via the participation in several administrative and political bodies. The office of the High Representative in between the institutional triangle is the most visible example for such a "schizophrenia" (Klein & Wessels, 2006) and exemplifies *par excellence* an institutional fusion (Wessels, 2004). While the CFSP provisions of the Lisbon Treaty were not raised onto the next plateau (cf. Figure 1) institutional complexity and interconnectedness have been enhanced.

We would expect that some weaknesses of CFSP such as the external visibility and coherence and internal efficiency will be reduced by the Lisbon Treaty while other, new problems such as internal rivalry due to unspecific division of powers might increase (Klein & Wessels, 2006). The efficiency and general performance of the Union's crisis management operations will have to be tested in actual moments of crisis providing the 'right' kind of challenges to the Union's action capability. Even the role and political acceptability of the new office of the High Representative and thus the capability of the Union to act as a global actor in the international system remain open.

Of the three possible scenarios 1) a real step forward on the integration cascade; 2) refinement of the intergovernmental status quo and 3) an ongoing fusion (cf. above and Wessels, 2005: 95f.), the masters of the treaty have chosen a combination of the second and third scenario. The 'imperfect outcome' of the CFSP provisions in regard to internal efficiency and external representation might thus lead to future adaptations even if treaty texts will not be changed. This could be the case in 2013 when the financial perspective has to be renegotiated and when the size of the Commission is to be reduced by 2014. It can be expected that these rules will be subject to further adaptations after a first test phase and/or crisis situations. Too many antagonisms can be detected between the pretension to be a 'super power' and the avoidance of a 'super state' (Blair, 2000). The Intergovernmental Conference did not give the Union the necessary instruments and institutions to fulfil the self-postulated aim to be a missionary community of norms. The options for efficient and effective action are still very limited. The 2007 reform would then document (just) another step on the same plateau of a ratchet fusion process (Wessels, 2001) and queue in a line with the other treaty reforms in which the heads of state and government each time revised the constitutional architecture in an 'upward' (i.e. supranational) direction while at the same time refining the intergovernmental structures and modes of governance. Thus, the Lisbon Treaty cannot be qualified as a 'constitutional break-through' but introduces some remarkable innovations whose impact has to be measured after ratification. The ambiguity of the legal text might rather create new challenges in the future especially for the first holders of the new offices as President of the European Council and High Representative.



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## About CHALLENGE

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The familiar world of secure communities living within well-defined territories and enjoying all the celebrated liberties of civil societies is now seriously in conflict with a profound restructuring of political identities and transnational practices of securitisation. **CHALLENGE** (Changing Landscape of European Liberty and Security) is a European Commission-funded project that seeks to facilitate a more responsive and responsible assessment of the rules and practices of security. It examines the implications of these practices for civil liberties, human rights and social cohesion in an enlarged EU. The project analyses the illiberal practices of liberal regimes and challenges their justification on the grounds of emergency and necessity.

The objectives of the **CHALLENGE** project are to:

- understand the convergence of internal and external security and evaluate the changing character of the relationship between liberty and security in Europe;
- analyse the role of different institutions in charge of security and their current transformations;
- facilitate and enhance a new interdisciplinary network of scholars who have been influential in the re-conceptualising and analysis of many of the theoretical, political, sociological, legal and policy implications of new forms of violence and political identity; and
- bring together a new interdisciplinary network of scholars in an integrated project, focusing on the state of exception as enacted through illiberal practices and forms of resistance to it.

The **CHALLENGE** network is composed of 21 universities and research institutes selected from across the EU. Their collective efforts are organised under four work headings:

- *Conceptual* – investigating the ways in which the contemporary re-articulation and disaggregation of borders imply a dispersal of practices of exceptionalism; analysing the changing relationship between new forms of war and defence, new procedures for policing and governance, and new threats to civil liberties and social cohesion.
- *Empirical* – mapping the convergence of internal and external security and transnational relations in these areas with regard to national life; assessing new vulnerabilities (e.g. the ‘others’ targeted and critical infrastructures) and lack of social cohesion (e.g. the perception of other religious groups).
- *Governance/polity/legality* – examining the dangers to liberty in conditions of violence, when the state no longer has the last word on the monopoly of the legitimate use of force.
- *Policy* – studying the implications of the dispersal of exceptionalism for the changing relationship among government departments concerned with security, justice and home affairs, along with the securing of state borders and the policing of foreign interventions.

### The CHALLENGE Observatory

The purpose of the **CHALLENGE** Observatory is to track changes in the concept of security and monitor the tension between danger and freedom. Its authoritative website maps the different missions and activities of the main institutions charged with the role of protection. By following developments in the relations between these institutions, it explores the convergence of internal and external security as well as policing and military functions. The resulting database is fully accessible to all actors involved in the area of freedom, security and justice. For further information or an update on the network’s activities, please visit the **CHALLENGE** website ([www.libertysecurity.org](http://www.libertysecurity.org)).

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