

External Action under the Lisbon Treaty

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Unlike the Treaty establishing a Constitution for Europe, the Lisbon Treaty is a modifying treaty, which takes up the classic method for revision of the founding Treaties on the European Union and of the European Communities. Even if it does not anymore refer to the term "constitution" and to the most significant elements which led to the comparison of the European Union with a state and notably the reference to the Union minister for foreign affairs, the Lisbon Treaty reiterates the main changes already provided for in the Constitutional Treaty and which respond to the needs of the European construction.

External action is certainly one of the fields that have the most changed. The aim of this contribution is to assess the evolution and to ascertain whether the expectations for improvement have been met in respect of this area of the Lisbon Treaty.

At the outset of the work of the European Convention on the Future of Europe, three primary needs were clearly expressed in relation to foreign policy: first, the need for greater coherence between different European Union and Community external policies, second the need for greater co-ordination between the Union and Member States' external policies and finally, the need for a stronger projection of unity abroad.¹ After an analysis of the consequences of the express legal personality to the Union (I) we will then examine the competences in the external relations (II), the definition of common principles and objectives (III), the major changes in the common foreign and security policy (IV), the progressive definition of common security and defence policy (V), the clarifications in the common commercial policy and in other Union policies (VI) before giving a general appraisal of the amendments made by the Lisbon Treaty to the existing framework (VII).

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1 These needs may be translated into different questions which have to be considered such as: how to ensure the coherence of Union's action and coordinate all the measures taken in foreign policy (including common foreign and security policy, trade policy, development aid, humanitarian action, financial assistance, etc.)? What can be done to ensure that the decision-making process allows the Union to act rapidly and effectively on the international scene? How far could the Community method be extended to other fields of action and how could it be made more effective? What role for the High representative in external action? How could the coordination between the Union and the Member States be better achieved in foreign policy?

I. Legal Personality of the Union and Abolition of the Pillar Structure

Under the existing Treaties, the European Community has legal personality explicitly conferred by Article 281 TEC, while the Union has *de facto* legal personality, resulting from the practice that has developed in relation to Articles 24 and 38 TEU.

According to the new Article 1 TEU, the Union shall replace and succeed the European Community.² It shall have legal personality. The express conferral of the legal personality to the Union in Article 47 TEU is a logical consequence of the decision of merging the Union and the Community into one single entity. This is a major innovation in favour of a better identification of the Union on the international scene.³ The external representation of the Union increases in legibility and in clarity in the relations with third states and international organisations, which will have as partner one single valid representative: the European Union. The Court of Justice already stressed in 1993 and 1994 the requirement of unity in the international representation of the European Community in *Opinions 2/91*⁴ and *1/94*⁵ within the framework of the duty of cooperation between the Member States and the institutions.⁶

This simplification, which constitutes a major progress, puts an end to the confusion concerning the coexistence of the Union and the European Community and the respective competences of each in the external relations field, known most of the time only by the specialists.

However the express grant of the legal personality is the reflection of the existing legal situation. Whereas the existing Treaty on the European Union does not include an express provision on the Union's personality, it does confer to it powers to conclude international agreements according to Articles 24 and 38. The practice developed on the basis of these provisions has largely confirmed the Union's capacity to conclude agreements in its own name and not in the name of the Member States. This practice did not raise any objection from the Member States as it is attested notably by the signature in 2003 of two important agreements with the United States

2 The Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union are published in OJ C 115, 9.5.2008, 1.

3 The legal personality of the European Union was also provided for expressly in the Treaty establishing a Constitution for Europe in Article I-7. See notably the contribution of Jean-Claude Gauthron, in: Burgogue-Larsen/Levade/Picod, *Traité établissant une Constitution pour l'Europe. Commentaire article par article*, Tome 1, Bruylant, 2007, 117; Wichard, in: Calliess/Ruffert, *Verfassung der Europäischen Union*, 2006, 141.

4 ECJ, *Opinion 2/91 Convention N° 170 of the International Labour Organisation concerning safety in the use of chemicals at work*, [1993] ECR I-1061, para 36.

5 ECJ, *Opinion 1/94, Competence of the Community to conclude the WTO agreements*, [1994] ECR I-5267, para 108.

6 This principle is provided for in Article 4 TFEU.

on extradition and legal assistance⁷, in 2004 of an agreement on the association of Switzerland to the Schengen area⁸ or in 2008 of the agreement with Cameroon on the status of the European Union-led forces in transit on the territory of the Republic of Cameroon⁹.

The new architecture of the European Union's external action is based on the unique legal personality of the Union, which allows it to conclude agreements in all the fields, which fall in its competences. In the same way, there is one single provision for the negotiation and conclusion of international agreements, including the area of common foreign and security policy.¹⁰ There are however specific rules applicable in the monetary field¹¹ and in the field of common commercial policy.¹²

The abolition of the pillar structure, which was introduced by the Maastricht Treaty, is certainly a simplification element brought by the Lisbon Treaty. However the Union is still described in Article 1 TEU and in Article 1 TFEU as being “founded” on both treaties, which are to “have the same value”.¹³

The reform brings a reorganisation of the provisions on the European Union external action in two different places in the Treaties. Title V of the TEU comprises the general provisions on the Union's external action as well as the specific provisions on common foreign and security policy, including common security and defence policy. Part Five of the TFEU includes the other fields of the external action: common commercial policy,¹⁴ development cooperation,¹⁵ economic, financial and technical cooperation with third states,¹⁶ humanitarian aid,¹⁷ restrictive measures,¹⁸ international agreements,¹⁹ Union's relations with international organisations and third states and Union delegations,²⁰ as well as the solidarity clause.²¹

7 Agreement on extradition between the European Union and the United States of America, OJ L 181, 19.7.2003, 27; Agreement on mutual legal assistance between the European Union and the United States of America, OJ L 181, 19.7.2003, 34.

8 Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ L 53, 27.2.2008, 52

9 Agreement between the European Union and the Republic of Cameroon on the status of the European Union-led Forces in transit within the territory of the Republic of Cameroon, OJ L 57, 1.3.2008, 31.

10 Article 218 TFEU.

11 Article 219 TFEU.

12 Article 207 TFEU.

13 The Treaty establishing the European Atomic Energy Community is maintained with the Lisbon Treaty.

14 Articles 206 and 207 TFEU.

15 Articles 208 to 211 TFEU.

16 Articles 212 and 213 TFEU.

17 Article 214 TFEU.

18 Article 215 TFEU.

19 Articles 216 to 219 TFEU.

20 Articles 220 and 221 TFEU.

With the Lisbon Treaty, this grouping together of the provisions concerning the external action is carried out for the first time in the Treaties and contributes obviously to a better visibility of that field in relation to the other policies of the European Union.

The replacement of the dual personality by a single legal personality improves the identification of the Union internationally but will have no implications for the internal division of competences between the Union and the Member States which is essentially maintained as one will observe it from the section below.

II. Attribution of Treaty-Making Powers to the Union

The Lisbon Treaty defines in detail the categories and areas of Union's competences. The system is as before based on the principle of conferral of powers.²² This means that when the Union wants to act internationally, it needs to be determined whether a competence has been conferred to it explicitly or on the basis of the case law of the Court of Justice, which has been largely codified with the Lisbon Treaty. Therefore, one may distinguish the explicit treaty-making power from the implied one as well as from the possibility to apply Article 352 TFEU.²³

According to Article 216 TFEU, the Union may conclude an agreement with one or more third countries or international organisations where the treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding act of the Union or is likely to affect common rules or alter their scope.

The Treaty expressly empowers the Union to act externally in a limited number of fields: common foreign and security policy,²⁴ neighbourhood policy,²⁵ asylum matters,²⁶ readmission field,²⁷ environmental matters,²⁸ research and technological development,²⁹ common commercial policy,³⁰ development cooperation,³¹ economic,

21 Article 222 TFEU.

22 Article 5 (2) TEU and Article 7 TFEU.

23 This is the corresponding provision to Article 308 EC Treaty. See also declarations 41 and 42 on Article 352 of the Treaty on the Functioning of the European Union.

24 Article 37 TEU.

25 Article 8 TEU. The Treaty introduces a new policy of the Union in relation with its neighbouring countries aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation. The agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly.

26 Article 78 (2), litt. g, TFEU.

27 Article 79 (3) TFEU.

28 Article 191 (4) TFEU.

29 Article 186 TFEU.

financial and technical cooperation with third countries,³² humanitarian aid,³³ association agreements,³⁴ monetary policy,³⁵ Union's relations with international organisations and third countries.³⁶ At the same time, Article 216 clearly attempts to codify the case law of the Court on external competence.³⁷

After having determined if the Union has an external competence, one should determine whether this competence is exclusive, shared or complementary to the ones of the Member States. The nature of the competence may be specified in the provision of the treaty. Development cooperation and humanitarian aid for example fall within the category of shared competences but for which the pre-emption principle is not applicable³⁸. The common commercial policy, the external aspects of competition policy or the conservation of marine biological resources under the common fisheries policy are defined as exclusive competences.³⁹ Article 3, paragraph 2, also states that the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope. This provision refers to the case law of the Court. The part of paragraph 2, which mentions the conclusion of an agreement to enable the Union to exercise its internal competence, refers to Opinion 1/76. However, in this Opinion the Court stated that the conclusion of the international agreement was necessary for the attainment of one of the objectives of the Community.⁴⁰ Or in the Treaty of Lisbon no link is made between exclusivity and Union's objectives. The difference in the wording should not in our view lead to a difference of meaning. Anyhow the key question with regard to the provisions in Article 3, paragraph 2, remains whether the text may be interpreted more

30 Article 207 TFEU.

31 Article 209 TFEU.

32 Article 212 TFEU.

33 Article 214 TFEU.

34 Article 217 TFEU.

35 Article 219 TFEU.

36 Article 220 TFEU.

37 See notably ECJ, Case 22/70, *Commission v. Council (ERTA)*, [1971] ECR 263; ECJ, Opinion 1/76, *Draft Agreement establishing a European Laying-up fund for inland waterway vessels*, [1977] ECR 741; ECJ, Opinion 2/91, *Convention N° 170 of the International Labour Organisation concerning safety in the use of chemicals at work*, [1993] ECR I-1061; ECJ, Opinion 1/94, *Competence of the Community to conclude the WTO agreements*, [1994] ECR I-5267; ECJ, Opinion 1/03, *Competence of the Community to conclude the new Lugano Convention on jurisdiction, recognition and enforcement of judgements in civil and commercial matters*, [2006] ECR I-1145.

38 Article 4 (4) TFEU. See our comments below under Section VI.

39 Article 3 (1) TFEU. See ECJ, Case 804/79, *Commission v. UK*, [1981] ECR 1045.

40 ECJ, Opinion 1/76, *Draft Agreement establishing a European Laying-up fund for inland waterway vessels*, [1977] ECR 741, para. 4. See also the reference to Opinion 1/76 in Opinion 1/94 with regard to the question of conclusion of the GATS and TRIPS agreements.

extensively than the case law of the Court, which inspired the provision. Our answer would be that whereas the Treaty translates the existing case law, it may be interpreted and applied in a dynamic and independent way and should not prevent the development of the implied powers theory in the external dimension of Union's policies.

III. Definition of principles and objectives

The Lisbon Treaty establishes a general framework of principles, values and objectives on the basis of which the European Union is founded. This definition of these values and objectives at the internal as well as at the external level may be understood as a way of asserting an identity for the Union.

At the international level, the Union's objectives are enhanced. In its relations with the wider world, it shall assert and promote its values and interests and contributes to the protection of its citizens. It shall contribute to peace, security, sustainable development of the planet, solidarity and mutual respect between the peoples, free and fair trade, eradication of poverty and protection of human rights, in particular those of the children as well as respect and development of international law and notably respect for the principles of the United Nations Charter.⁴¹

According to Article 21, paragraph 1, TEU, 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, rule of law, universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law are part of them.

The European Union shall define and pursue common policies with regard to external action in order to ensure a high degree of cooperation in the international relations. It shall aim to achieve different objectives enumerated in the Treaty: safeguard the values of the Union, its fundamental interests, its security, its independence and integrity; consolidate and support democracy, the rule of law, human rights and the principles of international law; preserve peace, prevent conflicts and strengthen international security; foster the sustainable economic, social and environmental development of developing countries, with the aim of eradicating poverty; encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; 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 sustain-

41 Article 3 (5) TEU. The corresponding provision in Treaty establishing a Constitution for Europe is Article 3 (5).

able development; assist populations, countries and regions confronting natural or man-made disasters; and promote an international system based on stronger multilateral cooperation and good global governance.⁴²

For the first time with the Lisbon Treaty, the Union endows itself with a set of principles, values and objectives, which shall guide the whole range of its external action. Some of them are new such as the references to the promotion of an international system based on an enhanced multilateral cooperation and a good worldwide governance, others resume partially the objectives mentioned in common foreign and security policy, development cooperation, common commercial policy or environment matters. Whereas most of the objectives appear familiar, the fact of putting them together in one single provision, at the heading of the title devoted to the general provisions on the external action constitutes a major innovation. These principles and objectives have to be respected and carried on in the process of elaboration and implementation of this external action in the fields covered by the TEU and the fifth part of the TFEU as well as in the other policies in their external dimensions.⁴³

In the common commercial policy field the application of this rule could for example mean that the specific objective of progressive abolition of barriers to trade, mentioned in Article 206 TFEU is to be taken equally into consideration with the more general interests listed in Article 21 TEU, such as sustainable development or human rights.

It appears that this set of principles, values and objectives shall constitute the basis to operate the choices of the main lines for the development of the external action. They may be considered in a certain way as the "spinal column" of Union action on the international scene. The global coherence of the action is clearly strengthened: the coherence between the different fields of this action as well as the consistency between the internal and external policies of the Union. However difficulties may arise in practice when it comes to the question of determining the priorities in every field of the external action. A balancing of interests has to be operated between the different objectives, which may potentially be contradictory. Therefore the common list of principles and objectives is very useful to a better consistency of the external action but it seems to be not sufficient alone to guarantee it.⁴⁴

IV. Major changes in Common Foreign and Security Policy

Common foreign and security policy (CFSP) is not part of the different categories of competences defined by the Lisbon Treaty. It does not constitute an exclusive com-

42 Article 21 (2) TEU.

43 Article 21 (9) TEU.

44 *Cremona*, The Draft constitutional Treaty: External Relations and External Action, CMLR 2003, 1347, 1349.

petence of the Union. According to Article 24, paragraph 3, TEU, CFSP is defined as a Union policy, which the Member States shall support actively and unreservedly in a spirit of loyalty and mutual solidarity. A solidarity obligation is clearly expressed in this provision. Therefore it is not easy to identify the nature of this Union's competence. Is it to be considered as a shared competence in the meaning of Article 4 TFEU or rather as a "sui generis" Union's competence? No answer is to be found in the Lisbon Treaty and one has the impression that despite the abolition of the pillar structure, there is a strong will to reintroduce in a certain way a kind of a second pillar, removed from the application of the general provisions of the Treaty and to which special rules and procedures are applied.

However the Lisbon Treaty comprises notable changes, which were largely taken up from the Treaty establishing a Constitution for Europe. CFSP benefits from the creation of the High Representative for Foreign Affairs and Security Policy⁴⁵ and of the European External Action Service.

1. High Representative Functions

The High Representative shall conduct the Union's common foreign and security policy under the Council's mandate⁴⁶ and preside over the Foreign Affairs Council.⁴⁷ He or she shall contribute by the making of proposals to develop the policy areas, which he or she shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.⁴⁸ The High Representative will then combine powers of initiative, management and implementation in CFSP matters.

At the same time, he or she will be one of the Vice-presidents of the Commission.⁴⁹ In this capacity, he or she will ensure the consistency of the Union's external

45 The title of "Minister" obtained in the Treaty establishing a Constitution for Europe disappeared, but the person maintains the same competences. For a comment on the corresponding provision in Treaty establishing a Constitution for Europe (Article I-28), see eg. *Sobrino*, in: L. Burgorgue-Larsen/Levade/Picod, *Traité établissant une Constitution pour l'Europe*. Commentaire article par article, Tome 1, 2007, 365; *Cremer*, in: Calliess/Ruffert, *Verfassung der Europäischen Union*, 2006, 342; Philippe Maddalon, *L'action extérieure de l'Union européenne*, RTDE 2005, 493; *Delcourt/Remacle/Smits/Dusepulchre/Govaere/Munoz*, *L'action extérieure de l'Union*, in Marianne Dony et E. Bribosia (éd.), *Commentaire de la Constitution de l'Union européenne*, 2005, 355; *Ponzano*, *Le traité de Lisbonne: l'Europe sort de sa crise institutionnelle*, RDUE 3/2007, 569.

46 Article 18 (2) TEU. On the Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty, see *Kaddous*, in: *Griller/Ziller* (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, 2008.

47 Article 18 (3) TEU.

48 Article 18 (2) TEU.

49 Article 18 (4) TEU.

action and be responsible for handling external relations and for co-ordinating other aspects of external action.

According to the formula of 'double hat', the High Representative will combine the responsibilities currently falling to the High representative '*Javier Solana's* current role' and to the Commissioner for External Relations (*Benita Ferrero-Waldner's* current role). However, his or her actions shall be coherent and "coordinated". He or she shall be responsible for the co-ordination of the entirety of the Union's external action. He or she shall represent the Union in matters relating to the common foreign and security policy, without prejudice to the powers of the President of the European Council and to those attributed to the Commission in other fields of external action. In fulfilling his or her mandate, the High Representative shall be assisted by a European External Action Service.⁵⁰ This service shall work in co-operation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States.

Due to the double hat and to the multiple functions of the High Representative, some conflicts may occur as the distribution of powers in the external representation of the Union is not clearly determined in the Treaty. The President of the European Council and the High Representative are both competent to represent the Union in CFSP matters but at different levels. The Commission also shares this power of representation, but in matters other than CFSP.

Furthermore there are some risks with regard to the competences of the Commission. The High Representative combines powers of initiative, proper to the Commission and powers as President of the Council for Foreign Affairs. This plurality of functions may give rise to problems considering that the initiative function tends to favour Union's general interest whereas the function of President of the Council for Foreign Affairs tends more often to seek the common denominator between the Member States in order to reach an agreement in a field still governed by unanimity vote.

Multiple actors in the framework of the external action of the European Union may impinge the consistency if there is no tight coordination. Much will depend on the personality of the High Representative as well as on the personalities of the President of the European Council and of the President of the Commission and on the 'chemistry' between them. This will determine whether or not they work well together.

50 Article 27 (3) TEU.

2. Limited Role of the Court of Justice⁵¹

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

As far as Article 40 TEU is concerned, the Court shall ensure that the implementation of CFSP does not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 TFEU.⁵²

According to Article 263, the Court shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. At the same time, any natural or legal person will be entitled to institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures. This last mentioned possibility is important in relation to the cases of restrictive measures that may be adopted against natural or legal persons on the basis of Article 215, paragraph 2, TFEU.⁵³

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

51 On the role of the other institutions, see *Kaddous*, Role and position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty, in: *Griller/Ziller*, note 46 supra.

52 The Court held that “[i]t is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community” and it also referred to its previous case-law. See Case 176/03 *Commission v Council* [2005] ECR I-7879, para 39 as well as Case C-170/96 *Commission v Council* [1998] ECR I-2763. This case law may be applicable by analogy in the field of CFSP and in relation to the new Article 40.

53 See, eg, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Conseil* [2006] ECR II-4665 ; Case T-306/01 *Yusuf* [2005] ECR II-3533 ; Case T-315/01 *Kadi* [2005] ECR II-3649. An appeal is pending in the last mentioned case in which the opinion of the Advocate General was rendered on 18 January 2008.

3. Simplification in the CFSP instruments

The Lisbon Treaty brings a simplification in the CFSP instruments. The European Council and the Council shall adopt decisions. The common strategies, common positions and joint actions disappear. Decisions shall be taken unanimously, except where it is otherwise provided for in the Treaty.⁵⁴ This means that unanimity is maintained as a principle, but qualified majority votes are extended in comparison with the present legal situation.

The European Council and the Council shall adopt acts on proposal of a Member State, the High Representative or the High Representative with the Commission's support.⁵⁵ The European Commission loses herewith its initiative power whereas it did not really make use of it. Furthermore, the adoption of legislative acts shall be excluded⁵⁶, which underlines the specific character of CFSP.

The assessment is not very satisfactory with regard to the willingness of changing from unanimity to qualified majority in the CFSP field. However the Treaty provides for a bridging clause, according to which the European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in Article 31, paragraph 2. This possible extension of qualified majority vote does not however apply to decisions having military or defence implications.

V. Definition of a Common Security and Defence Policy

The common security and defence policy (CSDP) shall substitute for the common European defence policy. The change in the name does not affect its relation with CFSP and with the fact that it constitutes an integral part of it. The progressive definition of a common defence policy is provided for in Articles 24 and 42 TEU. CSDP is presented as a European Union's policy, which rests on civilian and military capabilities made available by the Member States. The European Defence Agency, which was already created in 2004⁵⁷, has different missions, among them the task to identify the objectives of Member States military capabilities, to enhance European defence research and technology, to coordinate the programs implemented by the

54 The cases where the Council shall act by qualified majority are listed in Article 31 (2) EU Treaty. For a comment of Article I-40 of the Treaty establishing a Constitution for Europe, see notably *Auvret-Finck*, in Burgorgue-Larsen/Levade/Picod, *Traité établissant une Constitution pour l'Europe. Commentaire article par article*, Tome 1, 2007, 517; *Cremer*, in: Callies/Ruffert, *Verfassung der Europäischen Union*, 2006, 464.

55 Article 30 (1) TEU.

56 Article 31 (1) TEU.

57 2004/551/CFSP Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L 245, 17.7.2004, 17

Member States, to strengthen the industrial and technological base of the defence sector and to improve the effectiveness of military expenses.⁵⁸

The Lisbon Treaty brings major amendments in the assertion of military solidarity between Union Member States. Article 42, paragraph 7, TEU provides for a clause of "mutual defence" if a Member State is 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. However this clause does not prejudice the specific character of certain Member States security and defence policy.⁵⁹ This last provision refers to the neutral States (Austria, Finland, Ireland and Sweden). Furthermore for NATO Members their commitments and cooperation in this area shall be consistent with those taken within the North Atlantic organisation.⁶⁰ Their primary responsibility in military assistance remains within NATO, even if the text refers to the complementary nature between CSDP and the mutual defence system implemented in NATO.

In case of threats other than military, such as terrorist attacks or natural or man-made disasters the TFEU includes a "solidarity clause" which requires the Union and the Member States to assist a Member State hit by such a situation.⁶¹ The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States.

The Lisbon Treaty introduces flexibility in the implementation of CSDP. It allows a kind of enhanced cooperation in the field of defence. The permanent structured cooperation shall be opened to any Member State which undertakes to participate in the main European equipment programmes and to supply targeted combat units for the Union capable of carrying out the most demanding military missions on behalf of the Union, in response for example to requests from the United Nations Organisation. According to Article 46 TEU, the launching of a permanent structured cooperation is subject to a Council decision taken by qualified majority vote after consulting the High Representative, including the determination of the list of participating Member States. Implementing provisions are foreseen in the protocol on permanent structured cooperation.⁶²

This flexibility appears also in the possibility to entrust to a group of Member States within the framework of the Union the implementation of a task in order to

58 Article 42 (3), subp. 2, TEU.

59 Article 42 (7), subp. 1, TEU. The corresponding provision in the Treaty establishing a Constitution for Europe was Article I-41. For a comment, see eg. *Finck*, in L. Burgogues-Larsen/Levade/Picod, *Traité établissant une Constitution pour l'Europe. Commentaire article par article*, Tome 1, 2007, 529; *Cremer*, in : Calliess/Ruffert, *Verfassung der Europäischen Union*, 2006, 483.

60 Article 42 (7), subp. 2, TEU.

61 Article 31 (1) TEU and Article 222 TFEU.

62 Protocol on Permanent Structured Cooperation established by Article 42 of the Treaty on European Union.

preserve and serve the Union's values and interests. Member States participating in the task are volunteers and should have the necessary capabilities to do it.⁶³

The progressive definition of CSDP contains some contradictions. The Union is willing to develop a common defence policy but at the same time allows some Member States to consider that their common defence may take place within another regional organisation: NATO. Even if this observation may be shaded by the fact that cooperation has been largely developed between the Union and NATO in order to bring them closer,⁶⁴ the inconsistency remains.

In defence matters, the amendments brought by the Lisbon Treaty are important, but the traditions and the heterogeneity of the Member States (notably the neutral States) as well as the very different capabilities in military matters had to be taken into consideration in order to obtain a result which underlines more the differentiations than the common applicable rules. Pragmatism was the only method which allowed to coming against the resistance of national sovereignties.

VI. Clarifications in Common Commercial Policy and other Union Policies

Common commercial policy (CCP) occupies a central position in the economical sphere of European Union external action. According to Article 3 TFEU, this policy is designated as an exclusive competence. Article 207 reproduces Article 133 provisions with simplifications and rationalisations. It also explicitly extends the concept of CCP which shall include the conclusion of international agreements relating to trade in services, commercial aspects of intellectual property, as well as foreign direct investment. The last mentioned field is not covered by Article 133 TEC.

All these areas fall within the Union's exclusive competence. Therefore, the Member States shall not anymore be entitled to participate in the negotiation and conclusion of such trade agreements, including those envisaged in the cultural and audiovisual services as well as in the social and health services. However the voting mode within the Council varies depending on the content of the envisaged agreement.

In principle the Council shall act by qualified majority for the negotiation and conclusion of international agreements.⁶⁵ However it acts by unanimity in the case of agreements in the fields of trade in services, commercial aspects of intellectual property and foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules.⁶⁶ It acts according

63 Articles 42 (5) and 44 TEU.

64 See for example the Agreement between the European Union and NATO on the security of information, OJ L 80, 27.3.2003, 36.

65 Article 207 (4) TFEU.

66 Article 207 (4), subp. 2, TFEU.

to the same decision making process for the negotiation and conclusion of agreements in the cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity, as well as in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

The Lisbon Treaty increases the role of the European Parliament in CCP in order to respond to the old concerns with regard to the legitimation of the decision-making process in the external relations. The new ordinary legislative procedure,⁶⁷ which corresponds to the codecision, applies for the adoption of unilateral measures in commercial policy. By a combined lecture of Articles 207 and 218 TFEU, the application of the new ordinary legislative procedure in commercial matters leads to the requirement of the European Parliament consent for the conclusion of commercial agreements. This European Parliament's participation method is also provided for the conclusion of association agreements, the agreement on Union accession to the European Convention on Human Rights, the agreements establishing a specific institutional framework by organising cooperation procedures, the agreements with important budgetary implications for the Union and the agreements covering fields to which either the ordinary legislative procedure applies or the special legislative procedure where consent by the European Parliament is required.⁶⁸

Among the other innovations in the external policies of the fifth part of the TFEU, one may mention the introduction of a humanitarian aid provision,⁶⁹ which allows the Union to conduct operations intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. With the development cooperation,⁷⁰ humanitarian aid constitute shared competences of the Union and the Member States of a specific nature,⁷¹ as the exercise of the competence by the Union shall not result in Member States being prevented from exercising theirs. The Union and the Member States may then exercise their competences in parallel and the pre-emption principle which normally applies to shared competences will not operate in these areas.

Furthermore external action may concern many other fields because all internal policies of the Union do have an external dimension. The area of freedom, security and justice for example which is an important policy of the Union, is classified according to Article 4, paragraph 4, TFEU as a shared competence. Its external dimen-

67 Article 294 TFEU.

68 Article 218 (6), subp. 2, litt. A, TFEU.

69 Article 214 TFEU.

70 Articles 208 to 211 TFEU.

71 Article 4 (4) TFEU.

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sion should then be subject to the same division of powers between the Union and the Member States as the internal dimension.

Finally, the Lisbon Treaty allows a clarification of the competences having regard to the fact that it delineates in a more transparent and systematic way the competences of the Union on the one hand and the ones of the Member States on the other hand. It also provides for a rationalisation and a better clarity of the procedural and substantial provisions in Article 207 in CCP or in Article 218 for the negotiation and conclusion of international agreements. However the simplification could have been greater because the practitioner still need to have large knowledge of the Treaty rules as well as of the case law of the Court of justice in order to make sure to understand correctly the new provisions. This is regrettable as it does not correspond to the meaning of the Laeken Declaration of 2001 which put as priority objectives transparency and simplification of the treaties.

VII. Final remarks

The grant of an express legal personality to the Union which will succeed to the European Community as well as the abolition of the pillar structure are clearly simplification's elements brought by the Lisbon Treaty. However it is in my view a simplification in "trompe l'oeil" because it will have no implications for the internal division of competences between the Union and the Member States, which remains complex. In addition CFSP will still be governed by specific rules and procedures and therefore retain its exceptional nature.

The definition of a common set of principles and objectives applicable to the whole range of Union's external action should indeed lead to a most consistent action of the Union. However, problems may be raised in practice because of potential conflict of interests, for example between CCP and CFSP matters.

The double hat and the multiple functions of the High Representative have been introduced in order to gain coherence in the definition of the Union external action. The plurality of actors: the President of the European Council, the High Representative and the Commission and its President may affect this researched coherence if there is no close cooperation between all these personalities.

The Lisbon Treaty brings simplifications and clarifications in the external policies other than CFSP. However the practitioner still needs to have good knowledge of the existing Treaty provisions as well as of the case law of the Court of Justice to ensure a good understanding of the new texts.

In conclusion, the Lisbon Treaty shall not and cannot resolve all the problems which are involved in the development and the implementation of the external action of the Union, which is a complex polity largely subordinated to the political consent of all its Member States. It brings some clarifications which are to be considered as progresses even if they do not always simplify enough foreign affairs policies and if

they often result in differentiated status for the Member States in the European Union.

