



FROM A EUROPEAN TO A COMMON SECURITY AND DEFENCE POLICY

Matthaios Charalampous

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ABSTRACT

The Lisbon Treaty has introduced significant changes in the field of EU security and defence. On the one hand, important institutional reforms, such as the creation of a renewed High Representative, have of course a great impact on this policy field. On the other hand, the Lisbon Treaty has also introduced specific innovations in the security and defence of the European Union. The mutual defence clause and the new mechanisms for flexible cooperation such as the permanent structured cooperation, are only some of the key innovations. Generally, the European Security and Defence Policy receives its own section in the Treaty on European Union and is rebranded as Common Security and Defence Policy. Thus, the Lisbon Treaty sets the objective for a common policy in this field. However, does this reform really provide for the means for the realization of such a common policy? Furthermore, does the Lisbon Treaty increase the importance of CSDP or is the increasing importance of this policy field just reflected in the Treaty text? These are the main questions that the present paper attempts to address through the analysis of the new institutional setting of the post-Lisbon security and defence policy, as well as through the examination of the specific innovations in this area.

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TABLE OF CONTENTS

1	INTRODUCTION AND HISTORICAL BACKGROUND	5
1.1	Introduction	5
1.2	From Nice to Lisbon	6
2	EXPANDED OBJECTIVES, TASKS AND ASPIRATIONS OF CSDP	8
2.1	Capabilities Development	8
2.2	Expansion of the Petersberg Tasks	9
2.3	Prospects for a common defence	9
3	THE INSTITUTIONAL FRAMEWORK	11
3.1	The role of the new actors	11
3.1.1	The High Representative of the Union for Foreign Affairs and Security Policy	11
3.1.2	The President of the European Council	12
3.2	The institutions	12
3.2.1	The parliamentary assemblies	12
3.2.2	The European Council	15
3.2.3	The Council	15
3.2.4	The Commission	16
3.2.5	The Court of Justice of the European Union	17
3.3	Decision-making and legal instruments	17
3.3.1	Decision-making	17
3.3.2	Legal instruments	19
4	OTHER KEY INNOVATIONS	20
4.1	Mutual defence clause and solidarity clause	20
4.1.1	The mutual defence clause	20
4.1.2	The solidarity clause	22
4.2	The new forms of flexible cooperation	23
4.2.1	Enhanced cooperation	23
4.2.2	Permanent structured cooperation	23
4.2.3	Coalitions of the able and willing	25
4.3	Rapid access to the Union budget and start-up fund	26
5	FURTHER INSTITUTIONAL REFORMS	27
5.1	The European Defence Agency	27
5.2	The European External Action Service	27
6	CSDP AND NATO	29
7	CONCLUSIONS	30
7.1	The shortfalls	30
7.2	Has the Lisbon Treaty enhanced the CSDP, and what has the reform offered?	31
7.3	Ambiguities remain	32
7.4	Suggestions for future reforms	33

1 INTRODUCTION AND HISTORICAL BACKGROUND

1.1 Introduction

The present paper deals with the impact of the Treaty of Lisbon¹ in the area of the EU security and defence policy. Thus, the paper focuses mainly on ‘provisions in the Common Security and Defence Policy’² (CSDP). Nonetheless, CSDP is ‘an integral part of the Common Foreign and Security Policy’³ (CFSP). Hence, the examination of the provisions concerning the area of CFSP seems inevitable to the extent that these provisions are also applicable to CSDP, or at least affect it.

A big proportion of the reforms introduced by the Lisbon Treaty concerns the area of CFSP/CSDP. More specifically, almost half (25 out of 62) of the amendments in the Treaty on European Union deal with CFSP/CSDP issues, and most of these amendments concern specifically CSDP, or at least affect it. Apart from the amendments in the TEU, reforms affecting CSDP can also be found in the Treaty on the Functioning of the European Union (TFEU) (e.g. solidarity clause)⁴, as well as in Protocols (e.g. Protocol on permanent structured cooperation).⁵

The reforms that entered into force in the area of CSDP are, with very few exceptions, identical to the ones proposed under the draft Constitutional Treaty. The exceptions concern mainly reforms of political and symbolic significance, and are of no particular interest from a legal point of view. For example, the “Union Minister for Foreign Affairs” of the Constitutional Treaty under the Lisbon Treaty is rebranded as “High Representative of the Union for Foreign Affairs and Security Policy”. Other minor changes are introduced, such as the addition of declarations, *etc.*

The Treaty reforms in CSDP, and more generally in CFSP, aim at producing a more coherent European Union and at the enhancement of its role as a world actor. Apart from important institutional changes concerning generally CFSP (e.g. High Representative, European External Action Service *etc.*), the Reform Treaty has brought key innovations in the field of the EU security and defence policy. Apart from the military aspects of the security and defence policy, the Treaty also institutionalises its civilian aspects. Major changes focus on capabilities development (establishment of the permanent structured cooperation and incorporation of the European Defence Agency into the Treaty). Apart from the permanent structured cooperation, other forms of flexible cooperation are provided for in the Treaty, *i.e.* the enhanced cooperation and the coalitions of the able and willing. Lastly, other important innovations are introduced, such as the mutual defence and solidarity clauses, and mechanisms for rapid financing of CSDP.

¹Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [hereinafter Lisbon Treaty or Treaty of Lisbon or Reform Treaty].

²Section 2 of Chapter 2 of the Treaty on European Union (consolidated version 2010) [hereinafter TEU-L].

³Article 42(1) TEU-L.

⁴Article 222 of the consolidated version of the Treaty on the Functioning of the European Union [hereinafter TFEU].

⁵Protocol (No 10) annexed to the EU Treaties on permanent structured cooperation established by Article 42 of the Treaty on European Union [hereinafter Protocol 10].

The European Security and Defence Policy, which is relabelled as Common Security and Defence Policy, has now its own section in the TEU-L, receiving ‘an extended presence in the new Treaty’.⁶ Indeed, the ESDP, which was not even referred to as such⁷ in the Nice Treaty, is now incorporated into the Treaty on European Union as a separate policy field with its own specific provisions. This policy field is not called “European” security and defence policy, as its founders chose to name it outside the framework of the Treaties, but is rebranded as “Common” Security and Defence Policy. What exactly does this rebranding mean? Does it just signify ‘a new level of ambition’?⁸ Do the changes of the Lisbon Treaty really create the framework for a common policy, or does the EU security and defence policy remain an area of cooperation? And lastly, does the Lisbon Treaty increase the importance of the security and defence policy, or is the increasing importance of this policy field just reflected in the Treaty text? An answer to these questions can be given only after the examination of the new institutional architecture of CSDP and the specific innovations in this area. Through the examination of these reforms it will be possible to compare the ESDP and CSDP, to define the exact character of the new EU security and defence policy, and lastly, to assess the impact of the Lisbon Treaty on this policy field.

1.2 From Nice to Lisbon

The Nice Treaty was until recently the legal basis for the security and defence policy of the European Union. This Treaty had established permanent political and military structures (the Political and Security Committee, the European Union Military Committee, the European Union Military Staff, the Civilian Planning and Conduct Capability), ‘in order to enable the European Union to fully assume its responsibilities for crisis management’.⁹ The European Security and Defence Policy had already been created by the Heads of States and Governments at the Helsinki Summit of 1999, long before the entry into force of the Nice Treaty. However, the European Security and Defence Policy, which has been operational since 2003, had not been incorporated into the Treaty framework by the Nice reform.

The draft Constitutional Treaty (2003),¹⁰ provided for reforms in the field of ESDP. However, the rejections of the Constitutional Treaty, which were anyhow not connected to the amendments in security and defence, delayed the incorporation of these reforms into the Treaties. After the “period for reflection” that followed these rejections, the Brussels European Council agreed to an IGC for the adoption of a new Treaty.

This new Treaty, which was signed in Lisbon on 13 December 2007 and which due to ratification difficulties entered into force two years later (1 December 2009), contained reforms that were almost identical with the Constitutional Treaty as regards CSDP. The “Lisbon Treaty” incorporates into the Treaty framework the European (now Common) Security and Defence Policy and all its developments since the Cologne European Council in 1999.

Despite the deadlock concerning the Treaty reforms lasting from 2003 till the end of 2009, the EU did not stop developing in security and defence matters. Since 1 December 2003 the EU has undertaken approximately 24 military operations and civilian missions, not only on

⁶Mölling 2008, 2.

⁷As “European Security and Defence Policy”.

⁸Mölling 2008, 1.

⁹Council of the European Union 2010.

¹⁰The European Convention 2010.

the European continent but also in Africa and Asia. On 12 December 2003 a European Security Strategy was drawn. The European Defence Agency was established within the framework of the European Union by a joint action of the Council on 12 July 2004. The EU battle-groups were created the same year, on 22 November. These and many other important developments took place within the European Security and Defence Policy after the entry into force of the Nice Treaty and before the ratification of the Lisbon Treaty.

2 EXPANDED OBJECTIVES, TASKS AND ASPIRATIONS OF CSDP

The new provision of Article 42 TEU-L contains more expansively outlined objectives, tasks, and aspirations of CSDP. This provision incorporates into the Treaty framework the objective of capabilities development. Furthermore, Article 43 TEU-L specifies the tasks 'in the course of which the Union may use civilian and military means'. Lastly, paragraph 2 of Article 42 expresses the future vision for the development of a common defence.

2.1 Capabilities Development

Generally, the aim of CSDP is to 'provide the Union with an operational capacity drawing on civilian and military assets', which may be used 'on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter'.¹¹ However, the Union does not have its own army, nor can it provide police officers, judges, or prosecutors for the purposes of the missions and operations. The performance of the tasks under 42(1), and more specifically 43 TEU-L, 'shall be undertaken using capabilities provided by the Member States',¹² and thus the 'Member States shall make civilian and military capabilities available to the Union for the implementation of CSDP'.¹³

Since the inauguration of the ESDP operations and missions the central problem has been the shortfall in capabilities. Thus, the main objective expressed in the Treaty with regard to CSDP is the enhancement of the military capabilities of the Member States. The need to overcome shortfalls in the field of military capabilities (logistics, intelligence, deployability of forces, etc.), which was expressed in the European Security Strategy, as well as in the Headline Goal 2010, and which was already dealt with by the Capability Development Mechanism and the European Defence Agency, is now expressed in the Treaty text. Whereas the wording of the Nice Treaty was limited to cooperation in the field of armaments,¹⁴ the current Treaty framework expands cooperation generally to military capabilities development. Apart from the general obligation of the Member States to progressively improve their military capabilities, two innovations are incorporated into the Treaty for the realization of this goal. First, the already existing European Defence Agency, which now receives a treaty basis, has as its overall task the development of military capabilities. Second, the new mechanism of permanent structured cooperation aims at the coordination of military capabilities development.

However, this commitment for capacity development is restricted to the military components of CSDP. Thus, there is no similar objective expressed in the Treaty concerning the development of the civilian aspects of CSDP (police, strengthening the rule of law, civil administration, civil protection missions), nor are there any mechanisms provided for this purpose, although they are also required in this area.

¹¹42(1) TEU-L.

¹²*Ibid.*

¹³Article 42(3) TEU-L.

¹⁴Article 17 TEU-N.

2.2 Expansion of the Petersberg Tasks

The scope of the so-called “Petersberg Tasks” is extended by the Lisbon Treaty. The Petersberg Tasks, which were set out in the Petersberg Declaration,¹⁵ and later incorporated into the TEU by the Amsterdam Treaty,¹⁶ originally included only ‘humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking’. The Lisbon Treaty has expanded the range of the abovementioned tasks by adding new possibilities for action, *i.e.* ‘joint disarmament operations’, ‘military advice and assistance tasks’, ‘conflict prevention’, ‘post-conflict stabilization’ and ‘the fight against terrorism, including by supporting third countries in combating terrorism in their territories’.¹⁷

Paragraph 2 of Article 43 provides for the conditions under which such tasks are implemented. In particular, the ‘objectives and scope’ as well as ‘the general conditions for their implementation’ are defined by a Council decision. The coordination of civilian and military aspects of such tasks are under the responsibility of the High Representative, who shall act ‘under the authority of the Council and in close and constant contact with the Political and Security Committee’.¹⁸

2.3 Prospects for a common defence

The Lisbon Treaty confirms the commitment on the progressive framing of a common Union defence policy, as expressed already in the Amsterdam Treaty,¹⁹ which will lead to a common defence.²⁰ However, the Amsterdam language is slightly amended. The phrase ‘might lead to a common defence’ used in the Amsterdam Treaty, is replaced by the phrase ‘will lead to a common defence’, making the realization of this future vision seem more certain.

Another change in this provision concerns the procedure by which the decision for a common defence will be adopted. The Treaty implicitly adds the unanimity requirement for the adoption of such a decision by the Council. Nothing was mentioned under the Amsterdam Treaty as regards the decision-making procedure in such a case, and that was justified, since unanimity was in any case the only applicable method for decisions having military and defence implications. However, unanimity remains today the rule in CSDP. This rightfully raises the question, why now the Treaty explicitly requires unanimity in this case. An explanation given is that ‘the additional caveat may be an additional attempt to dissuade the use of enhanced cooperation (now requiring nine Member States) which is applicable in all areas of the Treaty including [CSDP]’.²¹

Furthermore, the remaining reference to the respect of the specific character of the security and defence policy of certain Member States, and of the obligations of Member States under NATO demonstrates that, although the Member States recognise the need for a common defence, they are still not willing to achieve this cause at any cost. The national interest of the Member States remains their first priority. Therefore, only to the extent

¹⁵Petersberg Declaration 1992.

¹⁶Article 17(2) of the Treaty on European Union (consolidated version 1997) [hereinafter TEU-A].

¹⁷Article 43 TEU-L.

¹⁸Article 43(2) TEU-L.

¹⁹Article 2 TEU-A.

²⁰Article 42(2) TEU-L.

²¹Quille 2008, 5.

that these national interests are not at stake, the states shall be bound by this commitment for deeper integration in the field of defence.

Moreover, it is worth noting that two innovations introduced by the Lisbon Treaty could be considered as contributing towards the creation of a common defence. The provision of the mutual defence clause, as it is argued, establishes the 'political legitimacy' of a future common defence.²² However, it should be noted that in the same provision, NATO is characterised as the 'forum for implementation' of the collective defence of certain Member States;²³ something that could be interpreted as excluding the possibility for a future common European defence.²⁴ The second innovation is the permanent structured cooperation, a mechanism originally designed with the prospect of creating a common defence in the future. As Combarieu notes 'the original aim of the proposed permanent structured cooperation was defence within the European Union leading to the formation of a European army, an aspiration often expressed by Germany'.²⁵

In conclusion, the wording of Article 42(2) TEU-L demonstrates the 'embryonic nature of CSDP for a common defence'.²⁶ The prospect for the establishment of a common European defence appears to be more certain with the Lisbon Treaty. However, the realization of a common defence remains a future aspiration. Two innovations introduced by the Lisbon Treaty, the mutual defence clause and the permanent structured cooperation, may be perceived as catalysts for the achievement of this aspiration.

²²Combarieu 2008, 4.

²³Article 42(7) TEU-L.

²⁴Combarieu 2008, 5.

²⁵*Ibid.* 3.

²⁶Dagand 2008, 7.

3 THE INSTITUTIONAL FRAMEWORK

3.1 The role of the new actors

The following subchapters discuss the role of the two new posts within CSDP, *i.e.* the post of the new High Representative of the Union, and the post of the newly created full-time President of the European Council. Although these two posts are considered as ‘central new institutional arrangement[s] [...] within the new Treaty’,²⁷ they are not equally important within CSDP.

3.1.1 The High Representative of the Union for Foreign Affairs and Security Policy

Within CSDP the prominent role is given to the High Representative of Foreign Affairs and Security Policy. Although the post of a High Representative was already introduced by the Treaty of Amsterdam, it is worth analysing the role of the upgraded High Representative within the Common Security and Defence Policy, not only because of his/her increased powers and responsibilities, but also because of the fact that now he/she functions within a completely new institutional setting.

The new double-hatted High Representative, who is the foremost voice of the Union in Foreign Affairs has received new powers and responsibilities within the field of CSDP. The competences and tasks of the former High Representative mentioned in the TEU-N text were limited to assisting the Council in CSDP matters by contributing to the formulation, preparation and implementation of policy decisions, as well as by conducting political dialogue with third parties on behalf of the Council,²⁸ and finally to assisting the Presidency as a Secretary-General of the Council.²⁹

The competences and tasks of the High Representative in the area of CSDP, or his/her powers that at least affect the area of CSDP, are significantly extended by the Lisbon Treaty. It can be generally said that the present High Representative has the same mandate with that provided for the “Union Minister of Foreign Affairs”, of the draft Constitutional Treaty.

The relevant provisions of the Reform Treaty partly confer to the High Representative more power and authority, and partly codify previous practice. New competences and tasks, such as the power to make proposals, are awarded to the High Representative in the area of CSDP. He/she shall exercise these powers in his/her capacity as High Representative/President of the Foreign Affairs Council and not under his/her Commission hat. The Lisbon Treaty formally empowers the High Representative to represent the Union in CSDP. Although the pre-Lisbon High Representative in practice also represented the Union externally, this power was not formally conferred to him. Furthermore, the High Representative as chairman of the Foreign Affairs Council succeeds the prior rotating presidency in CSDP matters and acquires the latter’s responsibilities. Lastly, as the

²⁷Wessels and Bopp 2008, 19.

²⁸Article 26 of the Treaty on European Union (consolidated version 2006) [hereinafter TEU-N].

²⁹Article 18(3) TEU-N.

successor of the High Representative/General Secretary, the new High Representative undertakes his duties with regard to CSDP.

3.1.2 The President of the European Council

It is also worth examining the role of the newly created permanent President of the Union, since from a political perspective he chairs the most powerful institution, the European Council. His tasks and responsibilities specifically in the field of CFSP, and thus in CSDP, are not sufficiently specified in Article 15(6) TEU-L.

According to 15(6) TEU-L, which enlists the general duties of the President, like the High Representative the President has also the task to ensure the external representation of the Union with regard to CSDP. The wording of the Treaty 'without prejudice to the powers of the High Representative' indicates that there is an overlap of tasks, which could possibly lead to a conflict of competences. Furthermore, the President, and not the European Council, is now under the obligation to keep the European Parliament informed by presenting to it a report after each meeting of the European Council.³⁰ And since CSDP issues are also discussed in the European Council meetings, the European Parliament is kept informed by the President regarding developments in this field. Lastly, as President of the European Council he has also other general competences defined in 15(6) TEU-L.

Generally, as Wessels and Bopp comment, the Lisbon Treaty creates a post of a President who is something more than a coordinating chairperson with representative functions, and something less than a strong President seen to represent the Union on the international scene.³¹ Indeed, as regards CSDP, apart from his role as a representative of the Union at his level, his powers are limited to chairing the European Council meetings. Within CSDP it is the High Representative and not the President of the European Council who is given a prominent role by the Lisbon Treaty.

3.2 The institutions

Although the Lisbon Treaty is supposed to have abolished the old pillar structure, it is argued that in practice CFSP, and thus CSDP, remains 'a distinctive pillar in that the roles of the Commission, European Court of Justice and European Parliament are very heavily circumscribed'.³² In this sub-chapter the role of the most important institutions in the area of CSDP will be examined. This shall help to ascertain whether and to which degree the above statement is accurate. The analysis will not be limited to EU institutions, but will extend to national and transnational institutions that also play a role within CSDP.

3.2.1 The parliamentary assemblies

Parliamentary scrutiny in CSDP takes place at three levels. At the supranational level, the European Parliament has oversight over CSDP. At national level, the national parliaments scrutinise the choices of the national governments regarding CSDP. And lastly, at transnational level, the ESDA, the Assembly of the WEU, also exercises democratic control on EU defence and security issues.

³⁰Article 15(6d) TEU-L.

³¹Wessels and Bopp 2008, 18.

³²Whitman and Juncos 2009, 30.

3.2.1.1 The European Parliament

The European Parliament basically retains its supervisory and consultative role, regarding CSDP matters. However, the Lisbon Treaty introduces certain changes which are worth examining.

Since the High Representative is now a member of the Commission and the consent of the European Parliament is required for the appointment of the whole Commission, the European Parliament has acquired democratic control over the High Representative.³³ Similarly, the European Parliament retains the motion of censure on the whole Commission, and thus also on the High Representative/Vice-President of the Commission. Therefore, although the Treaty provides for democratic oversight over the High Representative/Vice President of the Commission, the possibility for the European Parliament to control the High Representative/Chairman of the Foreign Affairs Council to a certain degree through these political mechanisms, is theoretically not excluded.

Furthermore, as was already indicated above, the High Representative shall regularly consult the European Parliament and duly take into consideration its views on CSDP matters.³⁴ Today the duty to consult the European Parliament remains limited to the main aspects and basic choices of CSDP, and does not extend to operational decisions. As mentioned above,³⁵ the European Parliament is also informed by the new President of the European Council about developments in CSDP, *i.e.* CSDP issues which were discussed in the European Council meetings.³⁶ Furthermore, the European Parliament retains the power to ask questions to the Council and make recommendations to it. In addition to that, it may now make recommendations also to the High Representative.³⁷

Moreover, another change with regard to the powers of the European Parliament is that the debates within this body have expanded to CSDP matters. It is now explicitly provided that debates are held specifically on the progress in implementing the Common Security and Defence Policy, and not just generally on the Common Foreign and Security Policy.³⁸ Furthermore, the frequency of these debates has increased from once to twice a year.

As previously the European Parliament does not have any influence via the budgetary procedure in matters having military and defence implications, because expenses concerning such issues are not charged to the Union budget.³⁹ In particular, Article 41(2) excludes from the Union budget only expenses arising from military operations. Thus, *a contrario*, expenditure arising from civilian components of CSDP (police, rule of law, civilian administration, civil protection missions), are financed by the Union budget. Consequently, the European Parliament still does not have any oversight over the financing of military operations, but retains oversight over expenditure deriving from civilian missions.

According to Wessels and Bopp, 'these treaty provisions document the marginal role of the European Parliament which remains restricted to acting as a forum in this policy field'.⁴⁰

³³Article 17(7) TEU-L.

³⁴Article 36(1) TEU-L.

³⁵See above subchapter 3.1.2.

³⁶Article 15(6d) TEU-L.

³⁷Article 36 TEU-L.

³⁸Article 36(2) TEU-L.

³⁹Article 41(2) TEU-L.

⁴⁰Wessels and Bopp 2008, 15.

This statement is to a certain degree accurate. Nevertheless, as the European Parliament is granted the task to exercise democratic control over the High Representative/Vice President of the Commission, to some extent it also acquires powers over the High Representative/Chairman of the Foreign Affairs Council.

3.2.1.2 The national parliaments

As regards the national Parliaments, the Lisbon Treaty has increased their powers. However, the only reform that directly affects the Common Security and Defence Policy concerns the interparliamentary cooperation between national Parliaments, and with the European Parliament. More specifically, the Treaty provides for a conference of Parliamentary Committees for Union Affairs, which, *inter alia*, will be able to organise interparliamentary conferences in order to debate matters of security and defence policy.⁴¹ This innovation is rightly characterised as ‘insufficient’, since it affords the possibility for a conference which would only be the framework for dialogue and not real democratic control.⁴²

The most significant power given to the national parliaments by Reform Treaty, namely the possibility to challenge draft legislative acts for violation of the principle of subsidiarity,⁴³ is not applicable in CSDP, since the adoption of legislative acts is excluded in this area.⁴⁴

In sum, the reforms with regard to the national parliaments reflect the Member States’ desire to give to their national assemblies an ‘enhanced role within the Union and to promote cooperation between them, and with the European Parliament’.⁴⁵ However, as seen above, the powers granted by the Reform Treaty to the national parliaments especially in the field of CSDP are limited. Nonetheless, although the Lisbon Treaty does not really enhance the role of the national assemblies, it is worth mentioning that due to the intergovernmental character of CSDP, debates anyway take place at national level, and thus real scrutiny on defence issues remains within the national parliamentary assemblies.⁴⁶

3.2.1.3 The European Security and Defence Assembly

Lastly, the Common Security and Defence Policy is scrutinised also at transnational level by the Assembly of the WEU, which was recently transformed into the “European Security and Defence Assembly” (ESDA). This assembly is composed of national parliamentarians and has oversight over the government-constituted Council of the WEU, and therefore has democratic control over European security and defence matters. As a consultative institution it has no veto powers on the decisions of the WEU Council.

However, on 31 March 2010 it was announced by the President of the Permanent Council of the WEU that by the end of June 2011 the WEU will be dissolved. As the President of the WEU Parliamentary Assembly said, a new arrangement is to be found to replace ESDA and

⁴¹Title II of Protocol (No 1) annexed to the EU Treaties on the role of the national parliaments in the European Union [hereinafter Protocol 1].

⁴²European Security and Defence Assembly 2010.

⁴³Title I of Protocol 1.

⁴⁴Articles 24(1) and 31(1) TEU-L.

⁴⁵Walter 2009b, 15.

⁴⁶Rosén 2008, 9; Walter 2009b, 15.

‘it is important and very necessary for interparliamentary scrutiny to continue in the Assembly until the new mechanism is up and running’.⁴⁷

Indeed, it seems that interparliamentary scrutiny will continue. However, the exact form that this interparliamentary oversight will take in the future is yet unknown. Several proposals have been already made, e.g. creation of a defence version of COSAC, however no final decision has been taken on this issue.

3.2.2 The European Council

The Lisbon Treaty brings minor changes to the role of the European Council. The European Council, the leading EU institution, retains its minor role in decision-making within CSDP. As Whitman and Juncos have noted, ‘the existing institutional hierarchy of CFSP (and consequently of CSDP) is retained with the European Council setting broad objectives’.⁴⁸

This decision-making body, acting unanimously, continues to define the general guidelines, but now also identifies the Union’s strategic interest and determines the objectives of CSDP⁴⁹ by adopting the necessary decisions.⁵⁰ The Lisbon Treaty also explicitly provides that not only the Council, but also the European Council is involved in the implementation of CSDP.⁵¹ Lastly, the European Council is granted the power to appoint and end the term of office of the High Representative,⁵² a power that previously belonged to the Council.⁵³ Thus, the High Representative is accountable also before the European Council.

Generally speaking, the European Council retains its general strategic role and continues to set the general guidelines in CSDP. Wessels and Bopp maintain that the European Council’s tasks are ‘even reinforced’ in comparison to the Nice Treaty.⁵⁴ However, the European Council continues not to be the most important player in CSDP compared to the Council. Its decisions, which are taken at higher political level, have a general character. Indeed, it is difficult for the European Council, a body that meets a few times a year, to address specific issues. Moreover, due to the fact that its summits are infrequent, it has a very slow decision-making mechanism; and in the area of crisis management speed in decision-making is crucial. Consequently, in practice, the role of the principal decision-maker in CSDP does not belong to the European Council but to the Council of ministers.

3.2.3 The Council

According to Article 16(6) TEU-L, the Foreign Affairs Council is competent for elaborating the Union’s external action, CSDP included. However, the division of the former General Affairs and External Relations Council into two separate Council configurations, *i.e.* the General Affairs Council and the Foreign Affairs Council, does not necessarily mean that the General Affairs Council is excluded from CSDP matters. As a body participating in the

⁴⁷European Security and Defence Assembly 2010.

⁴⁸Whitman and Juncos 2009, 32.

⁴⁹Article 26(1) TEU-L.

⁵⁰Article 22(1) TEU-L.

⁵¹Article 24(1) TEU-L.

⁵²Article 18(1) TEU-L.

⁵³Article 207(2) of the consolidated version of the Treaty establishing the European Community [hereinafter TEC].

⁵⁴Wessels and Bopp 2008, 15.

preparation of the European Council meetings⁵⁵ it is also involved in CSDP whenever CSDP issues are on the agenda of the sessions of the European Council.⁵⁶

The Lisbon Treaty does not bring any substantial changes as regards the tasks of the Foreign Affairs Council. As Wessels and Bopp note, ‘the tasks of the Council are reconfirmed with minor changes of terminology when compared to the current Nice Treaty’.⁵⁷ However, although the competences of the Council remain unaffected, the Lisbon Treaty brings a couple of structural reforms within the institution of the Council. The new Council configuration, which deals with CSDP, the “Foreign Affairs Council”, has a fixed chairperson, *i.e.* the High Representative for a period of five years. Furthermore, the Political and Security Committee, a subordinate to the Council body, shall act not only at the request of the Council but also at the request of the High Representative and shall exercise the political control and strategic direction of crisis management operations under the responsibility of both.⁵⁸ It is also provided that the Political and Security Committee shall assist the Council in the implementation of the Solidarity Clause.⁵⁹

Generally, as already noted above,⁶⁰ the Council retains its role as the major decision-maker in CSDP. Apart from a few structural reforms, the Lisbon Treaty generally does not affect the Council’s functions in the area of CSDP.

3.2.4 The Commission

The competences of the Commission within CSDP are ‘strictly delimited’.⁶¹ The Commission is not anymore ‘fully associated’ with the work carried out in CSDP,⁶² and the High Representative has succeeded it in this role.

More specifically, the Commission does not have anymore the right to refer questions and to submit proposals to the Council with regard to the area of CSDP, but it may only provide support to the High Representative, when he/she refers any question relating to CSDP, and when he/she submits initiatives or proposals to the Council.⁶³ Furthermore, it is outlined that the Commission is not competent to represent the Union in the area of CSDP⁶⁴ and is not anymore ‘fully associated’ with the implementation of decisions taken within CSDP.⁶⁵ Moreover, in its role as contact person for the European Parliament, the Commission has been replaced by the High Representative.

It is posited that nonetheless, the Commission’s voice is somehow “elevated”⁶⁶ in the area of CFSP through the High Representative. The High Representative is, indeed, the foremost person in CFSP. However, the Commission does not seem to have a voice anymore in CFSP that can be “elevated”. The Commission does not actually have any competences in this area, and in any case the High Representative acts within CFSP under his/her Council hat

⁵⁵Article 16(6) TEU-L.

⁵⁶Wessels and Bopp 2008, 17.

⁵⁷*Ibid.*

⁵⁸Article 38 TEU-L.

⁵⁹Article 222 TFEU.

⁶⁰See above subchapter 3.2.2.

⁶¹Dagand 2008, 6.

⁶²Article 27 TEU-N.

⁶³Article 30 TEU-L.

⁶⁴Article 17(1) TEU-L.

⁶⁵Article 18(4) in conj. with 18(2) TEU-N.

⁶⁶Dagand 2008, 6.

and not as a Vice-president of the Commission. It should be nevertheless recognised that the Commission having now control over the High Representative/Vice President of the Commission, is theoretically capable of restricting to a certain degree the freedom of action of the High Representative/Chairman of the Foreign Affairs Council.

In summary, it can be concluded that the Reform Treaty leaves a weakened Commission in favour of a stronger High Representative. The Commission is not anymore a player in CSDP, at least formally, since the limited CFSP powers that it previously possessed are transferred to the High Representative.

3.2.5 The Court of Justice of the European Union

Despite the abolition of the pillar structure, the Court of Justice has, as before, no jurisdiction in CSDP matters. Therefore, the Member States cannot be brought before the CoJ for non-compliance within the area of CSDP. However, Art. 24(1) TEU-L and 275 TFEU provide for two exceptions to this rule.

According to the first exception, the CoJ has jurisdiction to monitor compliance with Article 40 of the TEU, which sets the borderline between the CFSP and other EU areas as regards the extent of powers and the decision-making competences. The second exception, which concerns the possibility of a natural or legal person to challenge a restrictive measure adopted within CSDP, does not seem to affect CSDP, an area which concentrates mainly on the conduct of military operations and civilian missions. Apart from the two aforementioned exceptions, it is maintained⁶⁷ that the CoJ also has jurisdiction to provide its opinion with regard to the compatibility of an international agreement with the Treaties.⁶⁸

To conclude, although the old pillar structure is abandoned, the Court in principle continues to lack jurisdiction in the area of CSDP. Furthermore, the first exception to this rule not only fails to reflect the abolition of the old pillar division, but, on the contrary, aims at safeguarding the strict demarcation between CFSP and other Union fields. With regard to the second exception, it does not have any influence in military operations and civilian mission, with which the CSDP is primarily concerned. And finally, serious doubts have been raised concerning the power of the CoJ to provide opinions on international agreements.

3.3 Decision-making and legal instruments

3.3.1 Decision-making

The Lisbon Treaty makes limited revisions with regard to decision-making in CSDP, where unanimity remains the only possible method, subject to three exceptions.⁶⁹ Generally in CFSP, the use of qualified majority voting is allowed in several cases.⁷⁰ However, it is excluded by virtue of Article 31(4) TEU-L when the decisions have military or defence implications. The possibility of further extension of the qualified majority voting by a unanimous decision of the European Council⁷¹ is also excluded for decisions that have

⁶⁷Keatinge and Tonra 2009, 17.

⁶⁸Article 218(11) TFEU.

⁶⁹Article 24(1) TEU-L, and 31(1) TEU-L.

⁷⁰Article 31(2) TEU-L.

⁷¹Through the “CFSP passerelle clause” of 31(3) TEU-L.

military or defence implications. Paragraph 4 of 31 TEU-L refers to decisions with military and defence implications and not generally to decisions in the area of CSDP. Thus, it could be argued that *a contrario*, the provision of 31(4) TEU-L is not applicable to CSDP decisions that do not have defence and military implications (decisions concerning civilian components of CSDP).⁷² However, in any case qualified majority voting cannot be applied in CSDP due to the specific CSDP provision of Article 42(4) that provides for strict adherence to the unanimity rule in all CSDP decisions.⁷³ Therefore, unanimity is initially presented as the sole decision-making method in CSDP.

Nonetheless, new areas are added, in which the Council takes decisions exceptionally by qualified majority. First of all, the decision adopted by the Council for the purpose of establishing permanent structured cooperation and determining the list of the participating Member States is taken by qualified majority voting.⁷⁴ Moreover, as regards the “start-up fund”, which concerns the financing of defence policy missions, the Treaty allows the Council to adopt decisions establishing the procedures for setting up, financing, administering and controlling the start-up fund by a qualified majority.⁷⁵ Finally, some aspects of the European Defence Agency, *i.e.* the decision of the Council defining the Agency’s statute, seat and operational rules, are also governed by the qualified majority voting procedure.⁷⁶

The reforms concerning the decision-making procedures confirm that in CSDP matters, the Member States, when facing the dilemma between sovereignty (veto rights) on the one hand and efficiency in decision-making on the other, prefer to guard their sovereignty.⁷⁷ Consequently, the nature of decision-making in CSDP remains intergovernmental.⁷⁸ On the other hand, it is maintained that the few provisions that introduce the qualified majority voting in CSDP, reflect the desire of the Member States for more coherency within EU and for an effective decision-making process in an EU of 27 Member States.⁷⁹ In any case, qualified majority voting is, in principle, excluded in CSDP, and thus decision-making in this area remains inflexible.

⁷²Civilian crisis management, *i.e.* police, strengthening of rule of law, strengthening of civilian administration, civil protection missions. The phrase ‘military and defence implications’ can be found also in Article 41 TEU-L, which concerns the financing of CFSP. This Article provides, as the former Article 28 TEU-N did, that expenditure arising from operations with military or defence implications shall not be charged to the Union budget. In Article 41, the term ‘military and defence implications’ refers to military operations and not to civilian missions of CSDP. This can be confirmed by the EU practice, which finances civilian CSDP missions, whereas for military operations, the Athena mechanism is set up (in order “to administer the financing of costs of EU operations having military or defence implications”). It can be concluded that the drafters of the Treaties, when referring to ‘military and defence implications’, do not include civilian aspects of CSDP. Consequently the term ‘military and defence implications’ of 31(4) also does not refer to civilian components of CSDP. Acceptance of a different interpretation would mean that the Treaty is inconsistent as regards the scope of this phrase within two different provisions.

⁷³Article Art. 42(4).

⁷⁴Article 46(2) TEU-L.

⁷⁵Article 41(3) TEU-L.

⁷⁶Article 45(2) TEU-L.

⁷⁷Wessels and Bopp 2008, 24; Report of The Federal Trust 2009, 30.

⁷⁸Dagand 2008, 5; Mölling 2008, 1.

⁷⁹Dagand 2008, 7.

3.3.2 Legal instruments

The 'joint actions' and 'common positions' are replaced by 'decisions defining actions to be undertaken by the Union' and 'decisions defining positions to be taken by the Union' respectively.⁸⁰ The 'common strategies',⁸¹ which were anyway redundant instruments, are omitted from the Treaty text. As before, the 'general guidelines' continue to be defined.⁸²

Although the names of the decisions have been modified by the Lisbon Treaty, their nature remains unchanged. They are still instruments distinct from decisions taken in other fields of Union action. Thus, it is supported that CSDP acts 'should not generally be capable of having independent effects (such as direct effect and/ or primacy) within the domestic legal orders'.⁸³

As regards the conclusion of international agreements, the procedure followed is now provided for in Article 218 TFEU, and not in the Treaty on European Union. The major change introduced concerning the CSDP agreements is that the negotiations shall possibly be held exclusively by the High Representative, and not by the troika, as previously.⁸⁴

Furthermore, the Lisbon Treaty explicitly excludes the adoption of legislative acts within CSDP.⁸⁵ Therefore, the decisions taken in this field, although legally binding, cannot be classified as legislative acts. Apart from the fact that legislative procedures are not applicable in CSDP, the characterization of the acts as non-legislative has certain other legal consequences. One consequence is that, according to Protocol 1,⁸⁶ national parliaments cannot challenge draft non-legislative acts for violation of the principle of subsidiarity. Also, for the adoption of such acts the Council is not anymore under the duty of 16(8) TEU-L, *i.e.* to deliberate and vote in public.

The modifications of the legal instruments are 'modest'.⁸⁷ They are limited to the names and not the essence of the provided acts. Thus, the acts adopted in CSDP remain distinct from legal instruments in other Union areas. This confirms that, despite the abolition of the pillar structure, CFSP (including CSDP) remains a special legal area.⁸⁸

⁸⁰Article 25 TEU-L.

⁸¹Article 12 TEU-N.

⁸²Article 12 TEU-N provided that the 'principles of and general guidelines for' the CFSP shall be defined, whereas now Article 25 TEU-L refers only to the 'general guidelines'.

⁸³Dougan 2008, 625.

⁸⁴Article 24 TEU-N.

⁸⁵Article 24(1) and 31(1) TEU-L.

⁸⁶Protocol 1.

⁸⁷Wessels and Bopp 2008, 11.

⁸⁸Mölling 2008, 1.

4 OTHER KEY INNOVATIONS

4.1 Mutual defence clause and solidarity clause

The Lisbon Treaty provides for a “mutual defence clause”⁸⁹ and a “solidarity clause”.⁹⁰ These two innovations ‘promote the principles of solidarity with, and assistance to other Member States, principles on which the EU is based’.⁹¹

4.1.1 The mutual defence clause

This is a major innovation of the Lisbon Treaty, according to which the Member States are obliged to aid and assist other Member States that are victims of armed aggression on their territory.

The Member States decide at national level the kind of help to be offered, and the help is also provided on a national basis. Thus, the aid and assistance is not afforded by the European Union but by the Member States.⁹² In the Treaty text it is provided that the Member States are under the obligation to aid and assist the states-victims ‘by all the means in their power’. It is presumed that this phrase implies that, if necessary, the states should use even military assistance. Consequently, this clause is quite innovative, because it imposes the obligation to conduct military operations, within the framework of CSDP, in the territory of other Member States. However, Keatinge and Tonra give a different interpretation to the phrase.⁹³ According to them it refers to the legal means of each member state, and thus the Member States are obliged to provide aid and assistance to other states-victims of aggression, only to the extent that their domestic legal order (e.g. national Constitution) allows this.

The new provision, as it was argued before the entry into force of the Lisbon Treaty, “echoes” Art. V of the Brussels Treaty,⁹⁴ and was characterised as ‘a very soft WEU Article V-type guarantee’.⁹⁵ Others went even further and supported that, when compared to the WEU Treaty, one could find ‘striking similarities [...] with [...] the modified Brussels Treaty’ and that ‘the Lisbon Treaty formula matches the guarantee of the Brussels Treaty and goes beyond it with a reference to NATO’.⁹⁶

In any case, the mutual defence clause is the successor of Article V of the WEU Treaty. Already before the entry into force of the Reform Treaty the WEU had transferred most of its competences to the EU, and the essential remaining purpose for this organization was the framing of a mutual defence clause. After the entry into force of the Lisbon Treaty, the Member States of the WEU, which are also EU Member States, decided that there is no reason for continuation of their cooperation within the WEU, since the latter ‘has

⁸⁹Article 42(7) TEU-L.

⁹⁰Article 222 TFEU.

⁹¹Dagand 2008, 8.

⁹²Angelet and Vrailas 2008, 30.

⁹³Keatinge and Tonra 2009, 17.

⁹⁴Report of The Federal Trust 2009, 34; Dagand 2008, 8.

⁹⁵Whitman 2008, 14.

⁹⁶Quille 2008, 8.

accomplished its historical role',⁹⁷ and since a mutual defence clause is now provided for in the EU Treaty.

However, it can be deduced that the substitution of the WEU defence clause for a mutual defence clause in a Treaty reform, and the subsequent dissolution of the WEU, was the original intention of the drafters of the Treaties already since 2003, when the Constitutional Treaty was drafted. This is indicated by the fact that the decision for the dissolution of the WEU Treaty was announced on 31.03.2010, only four months after the entry into force of the Lisbon Treaty, which introduces a mutual defence clause almost identical to the one provided for in the original Convention draft for the Constitutional Treaty, and which omits, like the Constitutional Treaty, any reference to the WEU.⁹⁸

Generally, it is supported that the defence clause of the Lisbon Treaty is *not* of the same nature as Article V of the WEU Treaty.⁹⁹ In comparison to the clause of the original Convention draft for the Constitutional Treaty (2003), which was almost identical to Article V of the Brussels Treaty, and which was the starting point for an EU defence clause, the Lisbon defence clause seems to be less binding.¹⁰⁰ The Lisbon Treaty uses the wording 'the other Member States shall have towards it an obligation of aid and assistance', and not as in the draft Constitution, 'the other Member States assist'. Furthermore, unlike the draft Constitutional Treaty, the Reform Treaty does not mention the phrase 'military' (aid and assistance). Article V of the Brussels Treaty also explicitly refers to 'military assistance'. An analogous phrase ('armed force') is explicitly mentioned in the NATO Treaty as well. Such phraseology, which is related to military alliances, is missing from the Treaty of Lisbon.

The provision is further weakened by the introduction of the duty to respect the specific character of the security and defence policy of certain Member States, as well as the duty for consistency with the commitments under NATO. The reason for this "watering down" of the provision is that certain Member States did not accept that the EU was a military alliance, and did not want to see it become one in the future. As the French Senator Huber Haenel aptly commented, 'the mutual defence clause appears more as a petition of principle and no longer as a substitute for the mutual defence clause of the WEU'.¹⁰¹ Nevertheless, the mutual defence clause is, after all, the successor of the WEU defence clause, and the Presidency of the WEU maintained that with the Lisbon Treaty 'we remain strongly committed to the principle of mutual defence of Article V of the modified Brussels Treaty'.¹⁰²

The final wording of the Lisbon defence clause can only be explained if one takes into account the big controversy during the negotiations concerning this provision. The drafters of the Treaty were confronted with the demands of three groups of Member States:¹⁰³ a) 'those seeking a mutual defence commitment', b) 'those seeking to protect their traditional neutral status', and c) 'those wanting to ensure that the Article would not undermine NATO', and which felt that the provision fell short of the WEU clause, because the phrase 'close cooperation with NATO' (a phrase also present in the draft Constitutional

⁹⁷Statement of the Presidency of the Permanent Council of the WEU 2010.

⁹⁸Article 17(4) TEU-N provided that cooperation within the EU security and defence shall not prevent the cooperation under the WEU.

⁹⁹Walter 2009b, 14.

¹⁰⁰Combarieu 2008, 4.

¹⁰¹*Ibid.*, where Huber Haenel is quoted.

¹⁰²Statement of the Presidency of the Permanent Council of the WEU 2010.

¹⁰³Quille 2008, 8.

Treaty) was missing from the Treaty text.¹⁰⁴ Finally, the clause, as it is expressed in the Reform Treaty, tries to satisfy all three groups. The first group sees a mutual defence obligation introduced in the Treaty text. The Treaty satisfies the second group by ensuring that the specific character of the security and defence policy of certain Member States shall be respected. And finally, the Treaty, as requested by the third group, ensures the consistency of the clause with commitments under NATO.

In conclusion, the wording of the mutual defence clause reflects the conflict of views between, on the one hand the Member States that did not like the fact that it resembled a clause of a military alliance, because either they wanted to ensure their neutrality or because they did not want NATO to be undermined, and on the other hand, those Member States that desired a strong mutual defence commitment. Thus, the wording of the mutual defence clause of the Reform Treaty is a result of a big compromise. The clause resembles the mutual defence clause contained in military alliances, especially in the WEU, but nevertheless falls short of the WEU commitment. As illustrated above, the original intention (2003) seems to have been the creation of a mutual defence clause, which would succeed the one contained in the WEU Treaty. The clause that was finally produced, indeed succeeds the WEU clause, however, it does not seem to be worthy of its predecessor. In any case, the mutual defence clause does not change the nature of the Union by transforming it into a military alliance.

4.1.2 The solidarity clause

This is a new legal mechanism of assistance in the case that ‘a member state is the object of a terrorist attack or the victim of a natural or man-made disaster’.¹⁰⁵

A question which could be raised is whether the term “terrorist attack” falls within the meaning of “armed aggression” of the mutual defence clause. In other words, in case of a terrorist attack, could the mutual defence clause be invoked instead of the solidarity clause? In order to answer this question, it is necessary to consider that the solidarity clause, as it was initially inspired by the European Council¹⁰⁶ after the terrorist attack in Madrid, was the tool destined to achieve solidarity among the EU states in the event of a terrorist attack. If the drafters of the Treaties had considered that the mutual defence clause also covered the fight against terrorism, it is most probable that the solidarity clause would not have been introduced into the Treaty framework. Consequently, the mutual defence clause, like its predecessor, the WEU defence clause, seems to be restricted to “conventional” armed aggression deriving from states.

For the purposes of this provision the Member States are under the duty to coordinate between themselves in the Council, and the arrangements for the implementation of the solidarity clause are defined by a Council decision. Where the decision has defence implications, the Council acts in accordance with Article 31(1), *i.e.* by unanimity. Therefore, the Member States cannot be forced to provide military assistance, if they do not agree with such an action. Finally, the assistance is put into effect only after the request of the political authorities of the victim-Member State.

¹⁰⁴Report of The Federal Trust 2009, 34.

¹⁰⁵Article 222(1) TFEU.

¹⁰⁶Declaration of the European Council on combating terrorism, 18.

Doubts have been raised concerning the legal nature of the solidarity clause.¹⁰⁷ In any case, be it a legal provision or a political principle, the solidarity clause is an important innovation introduced by the Lisbon Treaty, which allows the EU to mobilise its military resources for the purpose of providing assistance to a Member State.

4.2 The new forms of flexible cooperation

The new forms of cooperation offer more flexibility for action in the field of CSDP. Taking into consideration that unanimity is in most of the cases the rule, and the fact that the recent enlargements of the EU have increased the Union's internal heterogeneity, they are very necessary mechanisms for the CSDP.¹⁰⁸

4.2.1 Enhanced cooperation

The enhanced cooperation procedure provides for closer cooperation in fields where not all Member States want to cooperate. The Nice Treaty allowed such cooperation for the implementation of joint actions and common positions in CFSP matters, excluding it, however, from matters with military and defence implications.¹⁰⁹ The Lisbon Treaty omits the provision, which excluded enhanced cooperation in military and defence matters, thus increasing the flexibility in the EU security and defence policy.

For the establishment of enhanced cooperation, participation of a minimum number of nine Member States is required, and therefore this mechanism cannot be used as the framework for multilateral cooperation of less than nine Member States, as previously were the European Corps, Euromarfor, Eurofor, the Air Transport Cell, and the European Gendarmerie Force.¹¹⁰

The extension of the range of the enhanced cooperation mechanism in CSDP reinforces the flexibility in this field. However, serious doubts have been raised concerning whether this possibility will seem useful in this area in the future.¹¹¹ The supporters of this pessimistic view argue that, although enhanced cooperation was already provided for in the Nice Treaty as regards CFSP, it remained just a theoretical possibility. The reason is that the CSDP (and generally CFSP) is traditionally an area where consensus is preferred. Thus, it remains to be seen whether the Member States will make use of this opportunity for flexible cooperation in CSDP.

4.2.2 Permanent structured cooperation

“Permanent structured cooperation”¹¹² is a new flexible cooperation mechanism for military capabilities development and pooling of military assets. More specifically, this mechanism aims at the deepening of co-operation in different defence-related areas such as capability development, operations, training, logistics, joint acquisitions.¹¹³ Therefore, it is related only to the development of military capabilities. The civilian capabilities

¹⁰⁷Angelet and Vrailas 2008, 31.

¹⁰⁸Wessels and Bopp 2008, 26.

¹⁰⁹Article 27B TEU-N.

¹¹⁰Combarieu 2008, 4.

¹¹¹Report of The Federal Trust, 32; Wessels and Bopp 2008, 26; Joint study by CEPS *et al.* 2007, 136.

¹¹²Article 42(6) and 46 TEU-L.

¹¹³Article 42(6) TEU-L.

development is not a concern of this mechanism and there is nothing comparable provided for it in the Treaty. Moreover, Permanent Structured Cooperation is *not* concerned with the conduct of military operations, deployment of groups or mutual defence, but is limited to the enhancement of operational capabilities. Therefore, the group is *not* entitled to launch a military operation on behalf of the Union, something that can be done only within the framework of the coalitions of the able and willing.¹¹⁴ Lastly, it differs from enhanced cooperation, because permanent structured cooperation is ‘predetermined in scope and has specific procedures and requirements’.¹¹⁵

Permanent structured cooperation is a voluntary cooperation mechanism. In particular Member States participate in it on an opt-in basis, and thus no obligation is imposed on them by the Treaty to undertake such a commitment. The special characteristics of this mechanism are as follows:¹¹⁶ a) it is a permanent commitment (a ‘permanent measure’)¹¹⁷, b) it has a structured nature, and c) the eligibility assessment is based on performance.

The original aim of this form of cooperation was ‘defence within the European Union leading to the formation of a European army, an aspiration often expressed by Germany’.¹¹⁸ Thus the initial ambition of the drafters of the Treaties was the creation of a permanent reserve of European forces, which would constitute the basis for the creation of a future common European defence. For the purpose of achieving this aim, Article 2(b) of Protocol 10,¹¹⁹ provides that ‘Member States participating in permanent structured cooperation shall undertake to bring their defence apparatus into line with each other as far as possible, particularly by harmonizing the identification of their military needs, by pooling and, where appropriate, specialising their defence means and capabilities, and by encouraging cooperation in the fields of training and logistics’.

Certain decisions concerning the Permanent Structured Cooperation, i.e. establishment, accession, withdrawal and suspension, are taken by qualified majority voting. These possibilities are some of the few exceptions to the rule of unanimity in CSDP. However, as mentioned above, permanent structured cooperation is limited to capabilities development. Therefore, the decision taken by qualified majority voting is not related to the launch of military operations on behalf of the Union, something which would still require a unanimous decision of the Council. In addition to that, all other decisions concerning PermStrucCoop shall be taken by unanimity.¹²⁰

For the establishment of permanent structured cooperation, no minimum number of Member States is required. However, unclear eligibility criteria are set for the Member States. Article 1 of Protocol 10 attempts to specify the general criteria set out in Article 42(6) (‘fulfil higher criteria’, ‘have made more binding commitments’). Nevertheless, it is not certain whether the wording of the Protocol, which incorporates the Helsinki Headline Goals 2010, and the Battle-group concept, will allow for purely capability criteria or political considerations to prevail.¹²¹

¹¹⁴Article 42(5) TEU-L.

¹¹⁵Missiroli 2008, 16.

¹¹⁶CEPS *et al.* 2007, 137.

¹¹⁷Dagand 2008, 8.

¹¹⁸Combarieu 2008, 3.

¹¹⁹Protocol 10.

¹²⁰Article 42(6) TEU-L.

¹²¹Whitman and Juncos 2009, 43.

The process and the criteria set out are compared with the process and the criteria of the Economic and Monetary Union.¹²² Like the EMU, the permanent structured cooperation also sets out 'functional benchmarks', however the criteria defined in the EMU are much more specific.

Lastly, it is worth mentioning that the European Defence Agency, which is also involved in military capabilities development within the Union, has been assigned the task to evaluate the performance of the Member States' commitment to permanent structured cooperation.¹²³

In sum, permanent structured cooperation is a closer military cooperation mechanism created to overcome 'the traditional political taboo over unanimity' in military and defence matters.¹²⁴ It encourages the enhancement of European military capabilities, and motivates the Member States to meet the Helsinki Headline Goal 2010. The idea behind this mechanism is the launch of a cooperation scheme in the field of capabilities development initially between the strongest military states. Thus, at a first stage only a 'hard core',¹²⁵ of the biggest EU countries will participate in this cooperation. This will become an incentive for the other Member States to enhance their military capabilities in order to join the group of the "strong". Consequently, through this form of cooperation the Union will be provided with more responsive forces, and the ground will be prepared for a future European defence. The criticism against this new mechanism is that it may create 'a two-speed Europe', in which the smaller Member States willing to follow would not be able to achieve the objectives due to shortfalls in financial or human resources.¹²⁶

4.2.3 Coalitions of the able and willing

This is another deep EU military integration mechanism, which institutionalises the development of a previous practice, *i.e.* the Artemis mission in Congo. However, as characterised by Whitman and Juncos, it is much more 'light-touch' than the permanent structured cooperation.¹²⁷ The "coalitions of the able and willing", provided for in Article 42(5), is another flexible cooperation form, by which a group of Member States which are willing and have the necessary capabilities for the execution of a task, are entrusted to execute it. Hence, the mission is led by the members of the coalition, although it is conducted in the name of the EU. This mechanism concerns the conduct of operational tasks by a group of interested Member States, and provides for flexibility at an operational level.

The coalitions of the able and willing have been already used in practice before the entry into force of the Lisbon Treaty. However, it should be noted that the formal recognition of such a practice by the Treaty gives to it more legitimacy and transparency, and avoids controversies.¹²⁸

¹²²Missiroli 2008, 16; Angelet and Vrailas 2008, 44.

¹²³Art. 3 of Protocol 10.

¹²⁴CEPS *et al.* 2007, 137.

¹²⁵As was noted by Pierre Lellouche, quoted in Dagand 2008, 8.

¹²⁶Dagand 2008, 8.

¹²⁷Whitman and Juncos 2009, 44.

¹²⁸Report of The Federal Trust 2009, 33; Joint study by CEPS *et al.* 2007, 136; Dagand 2008, 7.

4.3 Rapid access to the Union budget and start-up fund

The Nice Treaty did not provide for a mechanism ensuring rapid funding of civilian operations and military missions. Thus, the slow financing procedures delayed the launch of these operations, and in cases of urgency, the EU was incapable of reacting rapidly due to the red tape concerning the funding of crisis management.

Today the Lisbon Treaty on the one hand retains the normal procedure for financing of CSDP, and on the other hand guarantees rapid access to the Union budget for preparatory activities for the tasks mentioned in 42(1) and 43 TEU-L, provided that these activities can be charged to the Union expenditure. Therefore, rapid access to the Union budget is ensured for preparatory activities for civilian missions, which are charged to the Union budget.¹²⁹ For the activities that are not charged to the Union expenditure,¹³⁰ the third paragraph of Article 41 provides for the creation of a start-up fund made up of Member States' contributions for the purpose of financing of such operations. This mechanism is similar to the existing ATHENA mechanism used for the administration of common costs of the operations that have military or defence implications. However, in both cases (civilian and military spending) the mechanisms provided for in 41(3) are limited to preparatory activities for the tasks of 42(1) and 43 TEU-L. This means that it is limited to urgent actions concerning possibly only the planning and launching of the operations, and it does not cover further activities.

Generally, Article 41 TEU-L affords rapid access to funds for preparatory activities of CSDP missions and operations, thus ensuring more flexibility of Union action in cases of urgency. The role of the European Parliament is limited as regards this provision. On the one hand, since the start-up fund consists of Member States' contributions and not of Union funds, the European Parliament has no democratic overview over the start-up fund. However, democratic control is exercised at national level, since the national parliaments have the possibility to scrutinise their governments, which contribute to the fund, and thus there is no democratic deficit concerning the start-up fund mechanism. On the other hand, as regards the setting up of the mechanism for rapid access to the Union budget, the European Parliament, which in principle has budgetary control over Union expenditure, shall only be consulted in this case 41(3). This raises a democratic legitimacy issue, since neither the national parliaments nor the European Parliament have the possibility to scrutinise the rapid access to the Union budget for preparatory activities of civilian missions.

¹²⁹According to Article 41 TEU-L operating expenditure arising from operations that do not have military or defence implications shall be charged to the Union budget. Civilian components of CSDP do not have military and defence implications. Thus, the latter are also charged to the Union budget.

¹³⁰According to 41(2) TEU-L, operating expenditure arising from operations having military or defence implications e.g. military operations, swift procurement procedures, shall not be charged to the Union budget but to the Member States.

5 FURTHER INSTITUTIONAL REFORMS

5.1 The European Defence Agency

The Treaty on European Union refers for the first time to a European Defence Agency (EDA). However, the EDA was established in July 2004 and is already fully operational. The Reform Treaty gives a firmer legal basis to the EDA; the legal basis is now the EU Treaty and not just an atypical joint action. Thus, the Lisbon Treaty incorporates the already existing EDA, which coordinates and supports tasks for the Member States in the field of defence capabilities development, research, acquisitions and armament.

Article 42(3) and 45(1) list the tasks of EDA. The mandate of this body remains, in principle, the same. However, Angelet and Vrailas support that Article 45(1e), according to which the EDA shall ‘contribute to identifying and, if necessary, implementing any useful measure [...] improving the effectiveness of military expenditure’, extends the mandate of the EDA, by giving ‘the Agency real leverage in forcing participating Member States to bring about substantial improvements in their budgets’.¹³¹ Another change introduced by the Reform Treaty is that the EDA plays now a role in the implementation of permanent structured cooperation, by assessing participants’ performance as regards capabilities development.¹³²

Participation in the Agency is open to any Member State. Article 45(2) makes clear that Member States can participate in the EDA on an opt-in basis. Thus, the voluntary character of membership within EDA is retained.

A decision taken by the Council by qualified majority voting shall define the statute, seat and operational rules of the Agency. Article 45(2) also provides for the setting of specific groups of Member States (sub-groupings) within the Agency for the realisation of joint projects.

With regard to its nature, the European Defence Agency is intergovernmental. Participants are the Member States, which function under the authority of the Council. The tasks of EDA are carried out in liaison with the Commission, only where this is necessary, e.g. in the areas of industrial policy, public procurement.

To sum up, Articles 42(3) and 45 codify existing practice and provide for a firmer legal basis for this CSDP body. This, according to Dagand, indicates the Member States’ desire to reinforce the Agency’s leading role in operational capabilities development.¹³³

5.2 The European External Action Service

The EEAS shall assist the High Representative in fulfilling his/her mandate. As regards its functions it is considered comparable to national foreign ministries. However, as the

¹³¹Angelet and Vrailas 2008, 43.

¹³²Article 3 of Protocol 10.

¹³³Dagand 2008, 7.

Council decision establishing the organization and functioning of the European External Action Service¹³⁴ indicates, it will also deal with CSDP matters.

The Council decision provides, *inter alia*, that the EEAS shall support the High Representative in fulfilling his/her mandate to conduct the Common Foreign and Security Policy (and thus CSDP). Moreover, the EEAS will incorporate crisis management structures, such as the Crisis Management and Planning Directorate (CMPD), the Civilian Planning and Conduct Capability (CPCC), the EU Military Staff (EUMS) and the EU Situation Centre (SitCen) 'in order to enable the High Representative to conduct the European Security and Defence Policy (ESDP)'.¹³⁵ These structures are placed under the direct authority and responsibility of the High Representative in his/her capacity of High Representative for Foreign Affairs and Security Policy.

The EEAS will be a central body for CSDP, since it will support the High Representative in conducting this policy, and it will incorporate already existing CSDP structures. The EEAS' tasks go beyond CFSP/CSDP issues. Thus, by blending CFSP/CSDP elements with elements of the abolished Community pillar, the EEAS will aim at achieving a more coherent external policy.¹³⁶

¹³⁴Decision 2010/427/EU of the Council of the European Union establishing the organisation and functioning of the European External Action Service.

¹³⁵Report of the EU Presidency on the European External Action Service 2009, 3.

¹³⁶Missiroli 2008, 12.

6 CSDP AND NATO

The issue of the relationship between the EU security and defence policy and NATO has been raised since the inauguration of the European Security and Defence policy. The Lisbon Treaty refers to the North Atlantic Treaty Organization in two cases in the TEU-L.

The obligation to respect the NATO obligations of EU Member States is expressed two times in the same article. The Lisbon Treaty first sets out the general obligation for respect of the commitments under NATO,¹³⁷ and then repeats this obligation in 42(7) TEU-L, specifically with regard to the mutual defence clause. As mentioned above¹³⁸ this reflects the pressure exercised during the negotiations by the Member States, proponents of a collective defence within NATO, which had serious fears that an increasingly growing CSDP could undermine the North Atlantic Alliance.

On the other hand, the provision which safeguarded that closer cooperation between two or more Member States in the framework of NATO would not run counter to or impede the cooperation under CSDP,¹³⁹ is omitted from the Treaty text. A possible explanation for this omission could be that the drafters of the Treaty felt confident that an emerging CSDP is not threatened to be undermined by the cooperation under NATO.

Despite the fact that the Lisbon Treaty refers to NATO, it does not go further to define the kind of relationship the EU should have with it, and does not entertain the issue of cooperation between the two organizations. However, although the former Treaty also did not deal with this issue, EU and NATO managed to remain partners, and to retain a complementary relationship. In particular, NATO has not shown interest in undertaking civilian operations, whereas the majority of EU missions have a civilian character. Furthermore, concerning the military operations, the EU has chosen to deploy in principle only where NATO is absent. In rare cases it appears that there is unnecessary duplication of capabilities. Nevertheless, the latter problem can be dealt with only on a case-by-case basis, since duplication in certain cases may be considered 'necessary'.¹⁴⁰ It seems that these issues can be better determined by politics under the specific political circumstances than by an abstract legal text such as the Lisbon Treaty.

Generally speaking, the Lisbon Treaty continues to ensure that cooperation within CSDP will respect the NATO commitments. In addition to that it provides for a 'stronger reference to NATO'¹⁴¹ as the foundation for collective defence. Nevertheless, the exact relationship between CSDP and NATO as well as the details concerning the cooperation between the two remain undefined by the Treaty.

¹³⁷Article 42(3) TEU-L.

¹³⁸See above subchapter 4.1.1.

¹³⁹Article 17(4) TEU-N.

¹⁴⁰Angelet and Vrailas 2008, 54.

¹⁴¹Whitman and Juncos 2009, 7.

7 CONCLUSIONS

7.1 The shortfalls

The Lisbon Reform introduces a new ambition in the EU security and defence area by labelling it as a “common policy”. Nevertheless, this new ambition of creating a common policy is not accompanied by the necessary reforms which would set the essential institutional framework for the realisation of this objective. And it is due to the unwillingness of the Member States to transfer powers to the Union in this sensitive area that the Reform Treaty falls short of its goal.

In particular, the Common Security and Defence Policy (and generally CFSP) remains a distinct area, which has its own rules and procedures. Although the pillar structure is abolished, CSDP continues to be governed more or less by the same intergovernmental aspects. More specifically, the Lisbon Treaty has adhered to the rule of unanimity, and thus, with regard to CSDP matters, this reform has failed to ensure an efficient decision-making system in a Europe of 27. The influence of the Member States is strong, also because they share with the High Representative the right of proposal. Moreover, the “supranational” institutions (Commission, European Court of Justice, European Parliament) are almost completely excluded from this area.

As regards the available legal instruments, the acts provided for by the Treaty, although renamed, seem to retain their former nature, as instruments of a separate legal area. Furthermore, the adoption of legislative acts is excluded in CSDP, with this having several legal consequences.

Concerning the democratic nature of CSDP, although the European Parliament is generally reinforced by the Lisbon Treaty, its role remains weak, particularly in CSDP. However, this does not raise a democratic legitimacy issue. Since the veto right is retained in EU security and defence matters, the states have a strong voice, and consequently, the national parliaments preserve the real democratic control over CSDP. Besides, in the policy area of security and defence, it is often required that decisions are taken fast and in a discreet manner. Thus, the conferral of more powers to the European Parliament would result in unnecessary complications and delays, since the EP sessions are held in public and are accompanied by lengthy procedures.

Generally, the rebranding of the policy field as “common” does not reflect the reality. It is true that the Lisbon Treaty offers new legal possibilities for enhancement of the EU security and defence policy, but CSDP remains, nevertheless, an area of cooperation between the Member States and is not really a common Union policy. In particular, the EU security and defence policy remains subordinated to the national policies, since the veto right is retained and since CSDP is out of the reach of the supranational institutions. The precedence of the national policies over CSDP is even confirmed in the Treaty text, which repeats in two provisions that CSDP shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of its Member States under NATO.¹⁴² Perhaps the characterization of the policy field as

¹⁴²Article 42(2) and 42(7) TEU-L.

“common” has a symbolic and political significance, however, from a legal point of view it is not accurate.

7.2 Has the Lisbon Treaty enhanced the CSDP, and what has the reform offered?

Pending the eight-year period for the reform of the Nice Treaty, the area of the EU security and defence policy did not stop developing. On the contrary, before the entry into force of the Lisbon Treaty, important developments had already taken place in this field. The creation of the European Defence Agency, the establishment of coalitions of the able and willing, the informal conferral of more powers to the High Representative were some of the major developments which were realised in the living architecture of CSDP already before the Reform Treaty had taken effect. Thus, the Lisbon Treaty in principle codifies, consolidates and institutionalises existing policies, practices, and procedures.

The CSDP has now a separate section in the TEU-L, which illustrates its increased importance. However, the CSDP does not owe this significance to the Lisbon Treaty, but the Reform Treaty seems just to reflect the growing importance of the EU security and defence policy. And from a legal perspective, even if the Lisbon Treaty would not have entered into force, most of the developments within CSDP could have been realised under the former treaty basis.¹⁴³ Nevertheless, it should be recognised that the Reform Treaty has been the motive force for the introduction of important new features and innovations, which will allow the development of CSDP.

In particular, the Lisbon Treaty created a post of a reinforced High Representative supported by a European External Action Service. The new powers given to the High Representative make him/her more effective and efficient not only in the representation of the Union, but also in the implementation and coordination of the Common Security and Defence Policy.

Moreover, the Lisbon Treaty introduces a mutual defence as well as a solidarity clause. Although the mutual defence clause of the Reform Treaty is of a weaker legal nature than the one provided for in the draft Constitutional Treaty, the former constitutes the successor of Article V of the WEU Treaty.

Another contribution of the Lisbon Treaty to CSDP is the introduction of flexible cooperation mechanisms, and especially the permanent structured cooperation. These new forms of cooperation offer more possibilities for Union action in the area of CSDP, where unanimity, which often leads to stalemates, remains the only possible decision-making method. However, it remains to be seen, if, and to which extent, Member States will use these possibilities as alternatives to the unanimity rule.

Furthermore, it should be noted that the mutual defence clause and the permanent structured cooperation set the foundations for a future common European defence. Whereas the mutual defence clause offers the political legitimacy for such a common defence, permanent structured cooperation affords the possibility for establishment of permanent defence structures, which shall form the basis of a future European army.

¹⁴³Whitman and Juncos 2009, 37-39.

The cooperation form of permanent structured cooperation generally promotes the development of military capabilities. This is the main mandate also of the European Defence Agency, a body initially established and inaugurated outside the Treaty framework, but now incorporated into the Lisbon Treaty.

Lastly, the Lisbon Treaty provides for mechanisms that ensure rapid funding of preparatory activities of operations and missions. The possibility for adopting procedures guaranteeing rapid access to the Union budget with regard to civilian missions, and the provision of a start-up fund for military operations, are essential innovations in the field of crisis management, which often requires fast reflexes.

Consequently, the developments of CSDP in the living architecture are incorporated into the Lisbon Treaty and the growing importance of the EU security and defence policy is now reflected in the Treaty text. The introduction of a new legal basis for the CSDP does not seem to offer much to the policy field, since the majority of the reforms could have taken place under the Nice Treaty. Nevertheless, what the Lisbon Reform has offered to CSDP was a good opportunity for significant changes, the introduction of which could have otherwise delayed.

7.3 Ambiguities remain

Several months after the entry into force of the Lisbon Treaty, a number of questions, as regards the legal implementation of CSDP, have not yet been answered. First of all, the division of powers between the High Representative and the President of the European Council, concerning the representation of the Union in defence matters, and the duty to inform the European Parliament about CSDP developments, is not absolutely demarcated.

The Treaty also does not define clearly the division of labour between several bodies and organs, such as between the High Representative and the Political and Security Committee, the Political and Security Committee and COREPER, and at lower level the High Representative's representatives and COREPER, and the working groups, *etc.*

With regard to permanent structured cooperation, the eligibility criteria are not sufficiently specified. Vague and very general criteria are set, which leave a big margin of appreciation as regards the eligibility of Member States to this cooperation form. Fears have been expressed that this will allow political considerations, and not purely capability criteria, to play the decisive role in the assessment of whether Member States fulfil the conditions for accession.

Lastly, in their effort to create a more comprehensive external action, the drafters of the Treaties overloaded the High Representative with responsibilities. The Treaty does not mention anything concerning the sub-delegation of powers to deputies in order to allow the High Representative to fulfil more efficiently his/her essential duties.

Since the Treaty of Lisbon does not clarify how the above issues shall be implemented, it is left to the practice to provide for solutions. Obviously, the interpretation and application of these ambiguous provisions will depend on the personality of the mandate-holders.

7.4 Suggestions for future reforms

Of course, the Treaty reforms as regards CSDP will probably not come to an end with the Lisbon Treaty. If the Member States desire an enhanced CSDP, which will ensure a greater role of the Union on the international scene, it is crucial that shortfalls in CSDP are eliminated, and that future institutional reforms aim at a further integration in this field. Several suggestions are made to this end.

First of all, it is suggested that the existing ambiguities, as regards the division of competences arising from the present Treaty reform, are clarified. The Treaties should be clear when conferring competences and should not rely on the good will of the mandate-holders. Any possibility for future conflicts of competence, which would lead to legal uncertainty, should be eliminated.

What is more, as a legal text, the Treaty should also be precise, when defining the legal conditions for the application of its provisions. Otherwise, it is not legal but political considerations that prevail in the implementation of the Treaty. More specifically, with regard to the eligibility conditions for admission to permanent structured cooperation the Treaty should determine the specific criteria for the assessment of the states by delineating the precise figures that ought to be accomplished. What does the phrase ‘proceed more intensively to develop its defence capacities’¹⁴⁴ exactly mean? This wording does *not* offer a tangible goal to be achieved by the Member States. If the Treaty identified the exact numbers or percentages, the margin of political discretion would be substantially limited, if not completely eliminated.

Moreover, as it is documented in the Civilian Headline Goal 2010,¹⁴⁵ the Union has significant shortfalls in civilian capabilities, which hinder its ability to respond effectively to crisis management tasks. Although the largest portion of Union operations are civilian missions, and despite the considerable deficit in civilian capabilities, the Reform Treaty does not address this problem, whereas it provides only for mechanisms for military capabilities development. Thus, it would be constructive if future Treaty reforms institutionalised the development of civilian capabilities as well.

Furthermore, it is obvious that the intergovernmental model is not very suitable for a deeper integration process in CSDP. The new forms of flexible cooperation, which do not require everybody to be onboard, and the constructive abstention, do not constitute a sufficient solution to the problem. Decision-making in CSDP continues to be ineffective, and thus, progress in this area will remain painfully slow. Consequently, the qualified majority voting procedure, which was exceptionally introduced in CSDP, could be gradually expanded in future reforms. Moreover, it is also obvious that a supranational institution, such as the Commission, which by definition acts under the common interest, would certainly be more willing to accelerate the integration process within CSDP than the Member States, which in practice act within the Council according to their national interests. If the Commission, an organ that since the Treaty reform has no voice in CSDP, would be granted a substantial role in the EU security and defence policy, a deeper integration in this field would be certainly advanced.

More generally, the introduction of the phrase “common policy” into the Treaty text is not an accidental event. It clearly illustrates the initial intention of the inspirers of the reform

¹⁴⁴Article 1a of Protocol 10.

¹⁴⁵Civilian Headline Goal 2010 2007.

to set the objective of a common European defence and security policy. However, although this objective is set by the Lisbon Treaty, the treaty-drafters have failed to provide for the necessary means for the realisation of this ambition. It is therefore left to future reforms to overcome this fundamental shortcoming of the present Treaty.

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