

THE EU's TREATY OF LISBON: ORIGIN, INSTITUTIONAL CHOICE AND SIGNIFICANCE

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[Preliminary draft. Comments invited]

Paper prepared for presentation at 50th Annual Convention of the International Studies Association (ISA), New York, NY, USA, 15-18 February, 2009.

INTRODUCTION

The European Union is currently based on the treaty framework which emerged as the Treaty of Nice entered into force in 2003 (European Union, 2003). The Constitutional Treaty elaborated during the Convention on the Future of Europe, 2002-2003, and finally negotiated during the Intergovernmental Conference (IGC), 2003-2004, proposed a number of changes in that framework, but the treaty was rejected in referenda in France and the Netherlands in May and June 2005 (Laursen, 2008). After a reflection period it was decided to negotiate a so-called Reform Treaty. The German Presidency played an important role in securing agreement on a mandate for a new IGC in June 2007. During the Portuguese Presidency in the autumn of 2007 that IGC then produced a new treaty, the Lisbon Treaty (European Union 2007).

In this paper we shall explore the process of producing this latest EU treaty, outline the most important institutional changes of the treaty, and discuss its significance. Will the Lisbon Treaty improve the efficiency, democratic legitimacy “as well as the coherence of its external action,” as the mandate from June 2007 claimed it should? (Council of the European Union, 2007a).

The Constitutional Treaty would have replaced all existing treaties of the EU by one new treaty. The Lisbon Treaty reverts to the classical method of treaty reform, amending the existing treaties. For that reason the treaty that was signed in Lisbon on 13 December 2007 is much more difficult to read than the Constitutional Treaty (Council of the European Union, 2004). Luckily the consolidated version of the treaties incorporating the Lisbon Treaty, which was published in early 2008, is easier to read than the Lisbon Treaty itself (European Union, 2008). So when we look at the institutional choice we shall compare the 2003 and 2008 versions of the Union’s Consolidated Treaties, although we shall also be looking at the differences between the Constitutional Treaty and the Lisbon Treaty, which in many ways are minor, but some of them nonetheless controversial.

We should of course add that at the moment we do not know whether the Lisbon Treaty will enter into force. It was rejected by the Irish voters in a referendum in June 2008. It now looks rather certain that there will be a second referendum in Ireland in

the autumn of 2009, based on some opt-outs for Ireland. Given the fact that a large majority of the Member States has ratified the treaty there is a chance that the Irish may accept it in a second referendum and it will enter into force. The latest opinion polls in Ireland suggest that there is currently a majority in favour of the treaty. But nothing can be taken for granted when it comes to the use of referenda. Indeed, behind the strategy of the Reform/Lisbon treaty was a deliberate effort to avoid referenda in France, the Netherlands and the UK, and Denmark that has many referenda in the past avoided such referendum on the Lisbon Treaty.

THE PROCESS: A RESCUING MISSION WITH GERMAN LEADERSHIP

Strictly speaking, to explain the institutional choice of the Lisbon Treaty, we should study the institutional choice of the Constitutional Treaty. And if we were to fully explore the origin of the Lisbon Treaty we would have to go back to the post-Nice agenda established at the Nice meeting of the European Council in December 2000. This agenda included yet another reform, which first produced the ill-fated Constitutional Treaty. In this paper, however, we will focus on the decision by the European Council in June 2007 to abandon the Constitutional Treaty and go for a new treaty, initially referred to as a Reform Treaty. It was in the run-up to this decision, which included a detailed mandate for a new Intergovernmental Conference (IGC) that we saw the German Presidency, Chancellor Angela Merkel in particular, playing a role of leadership. The coming to power of Nicolas Sarkozy in France in May 2007 was also an important factor in the process.

The June 2006 meeting of the European Council decided that “the Presidency will present a report to the European Council during the first semester of 2007, based on extensive consultations with the Member States. This report shall contain an assessment of the state of discussion with regard to the Constitutional Treaty and explore possible future developments.” This was a mandate to the future German Presidency to start consultations. It was also specified that the reform process should be completed “during the second semester of 2008 at the latest.” It wasn’t mentioned explicitly at the time, but the idea was to finish the process before the elections to the European Parliament in June 2009. The Presidency Conclusions from the June 2006 meeting also mentioned that a political

declaration should be adopted in Berlin on 25 March 2007, commemorating 50 years of the Treaties of Rome (Council of the European Union, 2006).

Finding a solution to the constitutional impasse produced by the negative referenda in France and the Netherlands was the most important point on the agenda of the German Presidency in the first half of 2007. 17 of the now 27 member states had ratified the Constitutional Treaty and in Germany the parliamentary part of the ratification had been completed. The treaty had been rejected by referenda in France and the Netherlands. The remaining states had put the ratification process on hold.

Those who had ratified the Constitutional Treaty wanted something as close as possible to that treaty. Presidential hopeful Sarkozy in France had suggested a mini-treaty which would only include the essential elements of the Constitutional Treaty. The Netherlands and the UK also wanted some kind of minimal reform that would allow them to avoid a referendum. Sweden and Denmark had sympathy for such an approach. Poland had big problems with the new double majority, 55% of the member states representing 65% of the population, which was included in the Constitutional Treaty (Kurpas and Riecke, 2007). The Poles were happy with the voting rules adopted in Nice in 2000. They now suggested a square-root-of-population approach as the best solution to the weighting of votes.

The drafting of the Berlin Declaration commemorating the 50th birthday of the Treaties of Rome showed the divergence of views and interests among the 27 member states. In the end the Declaration was only signed by representatives of the three main institutions, Chancellor Angela Merkel for the Presidency, EP President Hans-Gert Pöttering and Commission President José Manuel Barroso. Afterwards critical comments followed from the Czech President Vaclav Klaus and the Polish President Lech Kaczynsky, even if the Declaration was rather weak in commitments (Ibid., p. 11). It was also pointed out by press comments that there were some differences in the various translations (Spongenberg, 2007). In the German text we read “Wir Bürgerinnen und Bürger der Europäischen Union sind zu unserem Glück vereint.“ In the English version it was: “We, the citizens of the European Union, have united for the better.“ And the version French

said: “Notre chance pour nous, citoyennes et citoyens de l’Union européenne, c’est d’être unis.”¹

In April Chancellor Merkel sent a letter to the member governments with 12 questions which indicated a pragmatic approach. While wanting only to do what was absolutely necessary to satisfy the sceptical governments, especially the UK, Poland and the Czech Republic, but also France and the Netherlands, the questions suggested the possibility of reverting to the classical method of amending the existing treaties, doing away with the Foreign Minister title and various symbols of a constitution (flag, hymn and logo) (Mahony, 2007a).

Just prior to the June summit UK Prime Minister Tony Blair made a statement outlining four British ‘red-lines’:

First, we will not accept a treaty that allows the charter of fundamental rights to change UK law in any way.

Second, we will not agree to something that replaces the role of British foreign policy and our foreign minister.

Thirdly, we will not agree to give up our ability to control our common law and judicial and police system.

And fourthly, we will not agree to anything that moves to qualified majority voting something that can have a big say in our own tax and benefit system. We must have the right in those circumstances to determine it by unanimity (BBC News, 18 June 2007)

He added: “If we achieve those four objectives I defy people to say what it is supposed to be so fundamental that could require a referendum.”

At the June 2007 summit the UK government was therefore once again a difficult partner. And so was Poland. Poland opposed the new double majority rule from the Constitutional Treaty which would reduce its influence in the Council. The Nice Treaty

¹ The Danish version is similar to the English: ”Vi, borgere i Den Europæiske Union, er forenet til det bedre.” Professor of law at Copenhagen University, Henning Kock, called it a political translation (Spongenberg, 2007).

negotiations had given 27 votes to Spain, compared with 29 for Germany, France, UK and Italy. Spain has about 40 million people (Laursen, 2006). When Poland, with about 38 million people, joined the EU in 2004, it got the same number of votes as Spain (Wilga, 2008). Since Germany has about 82 million people the double majority formula from the Constitutional Treaty would give Poland only about half of that influence. With the square-root-of-the-population formula Poland would retain about two-thirds the influence of Germany (Kurpas and Riecke, 2007, p. 13). Spain would of course also lose influence, but the Spanish Socialist Prime Minister Zapatero, who had won a referendum on the Constitutional Treaty, had reconciled himself with that reduction.

As the summit started the Polish position was deemed unpredictable. Just prior to the meeting the Polish Prime Minister Jaroslaw Kaczynski said to the Polish national radio: “We are only demanding one thing, that we get back what was taken from us.” And he explained: “If Poland had not had to live through the years of 1939 to 1945, Poland would be today looking at the demographics of a country of 66 million” (quoted from Mahony 2007b, and Parker, Cienski and Benoit, 2007).

The actual meeting of the European Council went into the morning of June 23. The Polish demand was the most difficult issue. As the participants thought that an agreement was near late in the evening the Polish Prime Minister Jaroslaw Kaczynski gave a press conference back in Warsaw saying that the compromise proposed to his brother, President Lech Kaczynski, who was in Brussels, was not acceptable. We learn from informed sources that Angela Merkel at this point threatened the Poles to seek an agreement among the remaining 26 member states, thus leaving Poland on the sidelines (Kurpas and Riecke, 2007, p. 13, Rettman, 2007a). Two countries, Lithuania and the Czech Republic indicated that they would not favour such an approach. Through further negotiations where the German Presidency was assisted by Blair, Sarkozy and Luxembourg’s Prime Minister Jean-Claude Juncker a compromise was found which was accepted by Poland (Ibid.).

What Poland got included a delay in the application of the double majority until 2014 and the so-called Ioannina compromise afterwards, which basically says that if 75% of a blocking minority is reached talks in the Council shall continue. The UK got an opt-out from the Charter of Fundamental Rights, as did Poland, and on police and judicial

cooperation on criminal matters. The Netherlands succeeded in inserting a reference to the Union's values as a condition of membership and a strengthening of the national parliaments in their control of the application of the principle of subsidiarity, the so-called 'orange-card procedure' (Ibid.). Sweden's Prime Minister Fredrik Reinfeldt tried to resist the strengthening of membership conditions and Belgium's federalist Prime Minister Guy Verhofstadt was against a further strengthening of national parliaments (Björklund, 2007, and *Financial Times*, June 24, 2007a). To the dismay of many France succeeded in eliminating the reference to "free and distorted competition" from the Union's objectives. Some French voters in the 2005 referendum had voted 'no' because they saw the Union as too "Anglo-Saxon" (Parker, Buck and Benoit, 2007, and Buck et al., 2007).

In the end the summit adopted a 16-page mandate for an IGC which started early in the Portuguese Presidency on 23 July 2007. Final agreement on the Reform Treaty was reached at a meeting of the European Council in Lisbon, 18-19 October 2007. It was signed in Lisbon on 13 December 2007. During the IGC Poland secured a stronger wording of the Ioannina compromise and a permanent Polish advocate general in the European Court of Justice (ECJ) by increasing the number of Advocates General from 8 to 11. And Italy secured an additional seat in the European Parliament (Hans, 2007).

The mandate for the IGC was rather detailed. This made it possible to conclude the IGC rather quickly during the Portuguese Presidency. The German Presidency deserves credit for its handling of the negotiations that reached the agreement on the mandate. After the June summit the *Financial Times* (June 24, 2007b) wrote:

Angela Merkel, the German chancellor, emerged with her reputation enhanced, as a clear-sighted leader and a persuasive negotiator. She looked after the interests of big and small alike, essential in an enlarged EU. Against the odds, she produced a detailed road map for a "reform treaty" that manages to preserve most of the substance, but water it down enough to satisfy the "minimalists" in France, the Netherlands and the UK. Those governments were desperate to have a deal that would not require them to call

referendums, and risk another No vote. Ms Merkel persuaded the “maximalists” to shelve their ambitions and accept a second best deal.

THE INSTITUTIONAL CHOICE

The Lisbon Treaty has retained most of the institutional changes of the Constitutional Treaty (de Poncins, 2008; Griller and Ziller, 2008; Sauron, 2008; and Weidenfeld, 2008). It amends the Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC), the latter being renamed The Treaty on the Functioning of the European Union (TFEU). All references to symbols of constitutionalism, including flag, anthem and motto, have been removed. Legislative acts will not be called laws and framework laws, but retain the old names of regulations and directives. The new post in the Constitutional Treaty of Union Minister for Foreign Affairs has been renamed High Representative of the Union for Foreign Affairs and Security Policy (HR). Nor does the new treaty explicitly say that Union law has primacy, although it will have such primacy based on case law of the European Court of Justice (ECJ) going back to the early years of European integration. The IGC confirmed this in Declaration No. 17 attached to the treaty: “The Conference recalls that in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law” (European Union, 2008, p. 344, see also Wouters et al., 2008, p. 190).

The text of the Charter of Individual Rights is no longer a part of the treaty as such, but the Lisbon Treaty says that it “shall have the same legal value as the Treaties” (art. 6(1) TEU).

Institutional Changes

The Treaty of Nice limited the number of Members of the European Parliament (MEPs) to 732. The Treaty of Lisbon increases the number to 751 (Art. 14 TEU). The exact

distribution will be decided by the European Council. The number of seats will vary between six and 96. At the moment the EP has 785 members because of transitional measures in connection with the 2004 and 2007 enlargements (Sauron, 2008, p. 43, de Poncins, 2008, p. 145). If the Treaty of Lisbon does not enter into force before the next election to the European Parliament (EP) in June 2009 732 MEPs will be elected instead of 751.

The Lisbon Treaty retains the provision proposed by the Constitutional Treaty for electing the President of the European Council “by a qualified majority, for a term of two and a half years, renewable once” (Art. 15(5) TEU). At the same time the European Council officially becomes an institution.

The European Council will among other things determine “the strategic interests and objectives of the Union” for all its external action (Art. 22(1) TEU) thus bringing external relations and CFSP together. The President of the European Council will also be involved with external representation of the Union. The job description of the new post is not very detailed. The location and size of the staff is still to be determined.

The use of qualified majority voting (QMV) in the Council of Ministers becomes the norm: “The Council shall act by a qualified majority except where the Treaties provide otherwise” (Art. 16(3) TEU). This should increase the efficiency of decision-making. According to one account 33 new articles will be based on QMV. With 63 articles already stipulating QMV that brings the total to 96 articles where decisions can be made by QMV (de Poncins, 2008, p. 201).

From 2014 the QMV will be defined as “at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union” (Art. 16(3) TEU). It is also stipulated that a blocking minority must include at least four members. This was the provision that Poland found it difficult to accept.

The so-called co-decision procedure, whereby the Council and EP act on par in the legislative process, each having a veto, becomes “the ordinary legislative procedure” (Art. 294 TFEU). This empowers the EP further and should increase the democratic legitimacy of the Union. Co-decision will be extended to more than 40 new decision areas.

It has been suggested that co-decision will apply to 95% of decisions against 75% at the moment (de Poncins, 2008, p. 148).

The procedure for designating the President of the Commission changes slightly. According to the Treaty of Nice the European Council nominates the President who is then approved by the European Parliament. According to the Treaty of Lisbon the European Council shall propose a candidate, “taking into account the elections to the European Parliament.” This candidate shall then be elected by the European Parliament (EP) (Art. 17(7) TEU). This is a slight step towards a more parliamentary system. But even if the treaty uses the term ‘election’, the choice will be determined by the European Council, i.e. the governments of the Member States.

Further, from 2014, “the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.” In this future Commission reduced in size there will be strict equal rotation between the Member States (Art. 17(5) TEU). But notice that the possibility of retaining a Commissioner per Member States is there. It will require a unanimous vote in the European Council. It may become part of a solution to the Irish problem, since the Irish did not want to lose an Irish Commissioner.

The jurisdiction of the ECJ will be enlarged because of the abolition of the pillar structure, with some limitations remaining especially for CFSP. The Court of First Instance becomes the General Court and there will also be specialised courts (Art. 19 TEU).

The national parliaments will have an increased role in the future. According to article 12 TEU and Protocol no. 1 on the Role of National Parliaments and Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality they will supervise the application of the principle of subsidiarity. If a third of them so requests a draft legislative act must be reviewed. In case of proposed legislation concerning the Area of Freedom, Security and Justice a quarter of the national Parliaments will be sufficient. In countries having bicameral parliaments each chamber will have one vote. Unicameral parliaments will have two votes.

Division of Competences

The call for a catalogue of competences from especially the German *Länder* at the time of the Treaty of Nice negotiations led to the inclusion of the issue in the post-Nice agenda and the European Convention produced a list of different kinds of competences. The Lisbon Treaty includes such listing of different kinds of competences. Some competences are exclusive, including the customs union and common commercial policy (art 3 TFEU). But most common policies, including the internal market, the Common Agricultural Policy, social policy and environment policy are shared competences (art. 4 TFEU). Coordination of economic policies constitutes a separate category (art. 5 TFEU), and so do supporting actions for some policies which basically remain national, such as health, industry, culture and education (Art. 6 TFEU). All this may constitute a clarification, but it does not really change matters.

Area of Freedom, Security and Justice

The Maastricht Treaty included a third pillar that dealt with Justice and Home Affairs (JHA) cooperation. Like the second pillar, Common Foreign and Security Policy (CFSP), it was intergovernmental cooperation. Decisions normally required unanimity. The role of the Commission was very limited and the European Court of Justice (ECJ) was largely excluded. The Amsterdam Treaty started moving some of JHA matters to the first pillar, thus introducing the Community method, with majority voting and increased roles for the Commission and the ECJ. The treaty introduced the concept of an Area of Freedom, Security and Justice (AFSJ). The Treaty of Nice reinforced this trend towards using the Community method for JHA, but Criminal Justice and Police cooperation stayed in the third pillar. The Lisbon Treaty formally abolishes the pillar structure and the Community method will to a large extent also be used for Criminal Justice and Police cooperation in the future. The Lisbon Treaty includes the following under AFSJ: border checks, asylum and migration (Art. 77-88 TFEU), judicial cooperation in civil matters (art. 81 TFEU), judicial cooperation in criminal matters (Art. 82-86 TFEU) and police cooperation (Art. 87-89 TFEU).

External Action

As mentioned earlier the Lisbon Treaty formally abolishes the pillar structure. CFSP, the old second pillar, however will largely remain intergovernmental even after the formal abolishment of the pillar structure.

The existing pillar structure creates problems of coherence between external relations of the Community (1st pillar) and CFSP (2nd pillar). In the past only the Community had legal personality. The Lisbon Treaty attributes legal personality to the Union as a whole (Art. 47 TEU). So in the future the Union will also be able to enter into international agreements under CFSP. The new High Representative will deal with both external economic relations of the Union, in his capacity of Vice-President of the Commission, as well as CFSP, in his capacity of High Representative and as Chairman of the Foreign Affairs Council (Art. 27(1) TEU). This should be seen as an effort to increase coherence in external action in general.

The new TEU has a longer list of external action objectives than the existing treaties. They are listed in the section on external action so they include both external economic relations, including trade, development and humanitarian aid, as well as CFSP. Including this list in the new external action section of the treaty for instance means that the EU will have to work to consolidate human rights in its commercial policy.

Common Commercial Policy

Common Commercial Policy remains a central part of the Union's external action. It has been an exclusive competence since the Treaty of Rome (Art. 113). The Commission negotiates trade deals multilaterally within the GATT – and now WTO - as well as bilaterally with third countries. Decisions can be made in the Council by a QMV. The ECJ has jurisdiction. In other words, the Community method is applied for commercial policy. Interestingly enough, the original article 113 did not mention the European Parliament.

The original treaty basically covered trade in goods. But some international treaties included matters where the Member States remained competent. They were so-

called mixed agreements. For such agreements procedural rules are more complicated. Such agreements, for instance, also require national ratification.

The Uruguay Round extended the international trade agenda to include services and trade related aspects of intellectual property (TRIPS). The ECJ in 1994 decided that these new areas were partly national competence.

In the treaty reforms that followed there was an effort to extend the definition of trade to include services and intellectual property. They were included by the Treaty of Amsterdam, but decisions had to be by unanimity. The Treaty of Nice introduced QMV for services and intellectual property. But “cultural and audiovisual services, educational services, and social and human health services” would still require unanimity (Art. 133 TEC).

The Treaty of Lisbon retains QMV for services and intellectual property, and extends it to the new category of foreign direct investment. However, it retains unanimity for cultural and audiovisual services (“where these agreements risk prejudicing the Union’s cultural and linguistic diversity”) as well as 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”). Finally the Lisbon Treaty introduces the ordinary legislative procedure for commercial policy, thus giving the EP a much stronger role in commercial policy (Art. 207 TFEU). Making the EP a co-legislator in commercial policy is one of the more important innovations of the Lisbon Treaty.

Common Foreign and Security Policy (CFSP)

The Union’s CFSP competence remains limited in various ways in the Treaty of Lisbon. According to Article 24 TEU there are ‘specific rules and procedures’ for CFSP. Unanimity will remain the normal decision rule. Adoption of legislative acts is excluded. And the ECJ normally has no jurisdiction. There are two exceptions: The reference to Article 40 means that the ECJ will “be empowered to referee disputes over the interface of the Union’s general authority and its specific authority relating to the CFSP” (Sieberson, 2008, p. 180). The other exception concerns restrictive measures involving individuals. The Maastricht

Treaty had introduced procedures for adopting sanctions involving both CFSP (the political decision) and the Community (the actual sanctions, often involving trade measures). These sanctions were aimed against states. This created a problem for sanctions against individuals, so-called ‘smart sanctions’ that the EU may want to use against terrorists (see Wouters et al., 2008, p. 193). The Lisbon Treaty has a new article that allows restrictive measures “against natural or legal persons and groups or non-State entities” (Art. 215(2) TFEU). Article 275 TFEU gives the ECJ jurisdiction to review the legality of such restrictive measures against natural or legal persons.

CFSP is not listed in the treaty’s lists of either exclusive or shared competences, which for instance mention common commercial policy as an exclusive competence of the Union (Art. 3(1) TFEU). Development cooperation and humanitarian aid are mentioned among shared competences (Art. 4(4) TFEU). CFSP is mentioned separately as a competence without giving this competence a specific name (Art. 2(4) TFEU).

These various provisions of the new treaty show that despite the formal abolishment of the pillar structure there is still an important difference between external (economic) relations, falling under the old 1st pillar, and CFSP, the old 2nd pillar. The Member States were not ready to extend the ‘Community method’ to the latter. So a *de facto* special CFSP pillar will remain.

Although the basic decision rule for CFSP is unanimity, there is the possibility of some decisions being made by a QMV. Of the four possibilities for QMV mentioned three already exist. The new one is the third possibility mentioned, namely the one where the HR proposes a decision following a ‘specific request’ from the European Council (see Art 31 TEU).

The treaty also includes so-called ‘constructive abstention’, which goes back to the Amsterdam Treaty. Only those voting in favour of a decision are committed. Those abstaining, and explaining why, in a declaration, are not committed but accept that the decision commits the Union (Art. 31(1) TEU).

The idea that the Council can make implementing decisions by QMV is not new, but the Member States have so far hesitated to use the possibility. In Article 31 TEU the possibility is linked with a so-called ‘emergency brake’. A state that has ‘vital’ reasons for opposing a decision can request that the decision be moved from the Council to the

European Council for decision by unanimity. There is a tightening here since it used to be ‘important’ reasons under the current treaty (UK, House of Commons, 2008, p. 42). On the other hand, the article in question also includes a bridging clause – or *passerelle* - whereby it can be decided by unanimity in the European Council to move some area of decision making, beyond the four listed, from unanimity to QMV. This does not include defence matters, though. So all in all, a complex set of rules. Most likely unanimity will remain the norm.

Let’s add that the UK secured two Declarations during the IGC 2007, nos. 13 and 14, which stress the intergovernmental nature of CFSP. Declaration 13 says that the creation of the office of the HR and the establishment of an External Action Service “do not affect the responsibilities of the Member States as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.” Declaration 14 specifically mentions the Security Council of the United Nations and says that the CFSP provisions of the treaty “do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.”

The new High Representative for Foreign Affairs and Security Policy (HR) shall conduct CFSP and be a Vice-President of the Commission. This has been referred to as double-hatting. Since he or she will also chair the Foreign Affairs Council (Art. 18(3) TEU) the HR will actually have three hats. The position is a major innovation. The new HR should become a central figure in the external (economic) relations as well as foreign and security policy of the Union. Some turf battles with the new permanent President of the European Council as well as the President of the Commission can be expected. Further, there will also be a General Affairs Council to be chaired by the rotating Presidency. Much will depend on the personalities of those appointed, and whether some memorandum of understanding about the roles is worked out prior to the appointments being made.

The HR will be assisted by a new European External Action Service (EEAS) composed of officials from the Council Secretariat, the Commission and seconded from Member State Foreign Ministries. This is another important innovation. Details of the arrangement still have to be worked out, but some preparatory work has taken place in cooperation between the current HR and the Commission. The EEAS is expected to reduce

duplication and facilitate the development of a more effective external policy of the EU (UK, House of Parliament, 2008, pp. 63-66).

It is worth mentioning that the existing Commission Delegations in third countries and at international organisations will become EU Delegations. Many assume that they will become part of the EEAS. Diplomatic missions of Member States are required to cooperate with Union Delegations (Art. 32 and 35 TEU).

The current instruments of CFSP are joint actions and common positions, introduced by the Maastricht Treaty, and common strategies, introduced by the Amsterdam Treaty. The distinction between the three can sometimes be difficult in practice. The Lisbon Treaty instead talks about general guidelines and decisions. This at least is a simplification.

The basic budget provisions of the Lisbon Treaty for CFSP remain the same as the current ones, where administrative expenses are charged to the Union budget, while operating expenses normally are charged to the Union budget, “except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise” (art. 41(3) TEU). Financing military and defence operations can thus potentially be a problem. The Lisbon Treaty tries to help by adding provisions for urgent financing, including the setting up of a start-up fund.

Common Defence and Security Policy (CDSP)

Common Defence and Security Policy (CDSP), which used to be called European Security and Defence Policy (ESDP), gets a more prominent place in the new treaty. The basic definition does not change much, but there is now a new emphasis on operational capacity including both civilian and military assets.

The so-called Petersberg tasks, defined at a meeting of the Western European Union (WEU) in 1992, and included in the EU treaties by the Amsterdam Treaty, are extended to include joint disarmament operations, post-conflict stabilisation as well as “fight against terrorism, including by supporting third countries in combating terrorism in their territories.” Both civilian and military means can be used.

The emphasis on operational capacity has led to the establishment of a European Defence Agency. In fact, this agency has already been established in 2004.

Flexibility Provisions in CFSP and CSDP

The Lisbon Treaty will introduce more flexibility in CFSP, including CSDP. This is an important aspect of the treaty.

First, the Lisbon Treaty allows for ‘enhanced cooperation’ in all areas, including CFSP and CSDP (Art. 20 TEU). The current treaty does not allow for ‘enhanced cooperation’ in defence. Establishing enhanced cooperation will require a minimum of nine Member States (Art. 20(2) TEU), against eight currently. Enhanced cooperation in CFSP, including CSDP, further requires unanimity in the Council (Art. 329(2) TFEU).

The Lisbon Treaty also introduces the new concept of ‘permanent structured cooperation’ in the defence area. This is considered an important innovation by many observers (e.g. Angelet and Vrailas, 2008). Contrary to ‘enhanced cooperation’ it does not require unanimity to be established, but a QMV. The idea is that Member States with greater willingness and capacity in the area of defence ‘shall’ go together in some kind of closer cooperation of a more permanent kind. This cooperation is geared towards increasing the military capabilities of the Member States and thus the Union.

‘Constructive abstention’ mentioned above, and which is not new, can also be seen as a kind of flexibility, but more *ad hoc*.

More importantly, for the expanded Petersberg tasks, the Lisbon Treaty mentions the possibility of entrusting “the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task” (Art. 44 TEU). Such a group is often referred to as a ‘coalition of the able and willing.’

All in all there are now a number of flexibility provisions which can be applied in the areas of CFSP and CSDP.

Mutual Defence and Solidarity

A somewhat controversial new mutual defence or mutual assistance clause has been added to the treaties by the Lisbon Treaty (Art. 42 TEU). The language can resemble the collective defence articles of the WEU and NATO treaties. Notice the provisos though. The obligation of assistance “shall not prejudice the specific character of the security and defence policy of certain Member States”, read non-aligned Member States. Further, commitments must be consistent with NATO commitments, a stipulation considered important by the more pro-Atlantic Member States, including the UK.

Finally, we should mention the new mutual solidarity clause, which is part of the TFEU. This deals with terrorist attacks against Member States or natural or man-made disasters in Member States. The article asks for solidarity and mobilisation of all instruments, including military resources. This is the Union’s response to events like 9/11 in general and the terrorist bombings in Madrid and London in particular.

SIGNIFICANCE OF CHANGES

If ‘institutions matter,’ as claimed by many social scientists, the Lisbon Treaty should be expected to produce more efficiency and legitimacy in general and more coherence and effectiveness in the Union’s external action.

The extended use of the so-called ordinary legislative procedure involving the EP more should in principle produce more ‘input’ or procedural legitimacy.

The increased use of QMV in the Council should increase efficiency, which in turn may also be good for legitimacy to the extent that grid-lock can be avoided or at least be reduced (‘output’ legitimacy).

The new permanent President of the European Council should be able to give the EU more continuity and direction.

The new triple-hatted HR should bring more coherence to external action. The EEAS and EDA are important new agencies that should help increase the capacity for external action, by providing information, analysis and increased capabilities. If the Member States are willing to use QMV the possibility is there in the treaty also for CFSP, although still based on preceding unanimity in the European Council, where the Union’s strategic interests are defined. In the end much will depend on the political will of the

Member States. As long as unanimity dominates you have 27 veto points in EU-27, and you will have more in the future as the Union will move on and take in more Member States.

The EU is promising much in its treaties. The list of objectives, values and good intentions is long. But the Member States have ring-fenced CFSP in the Treaty. It remains intergovernmental. So the discrepancy between rhetoric and action will most likely remain considerable. Those who favour increased capacity for international action of the EU can hope that there will be a convergence of interests among the Member States. Interaction, actor socialisation and learning processes may gradually produce collective European identities among foreign policy decision-makers in Europe, which in turn may affect interests. But the rationale of collective action will then still have to be communicated to the European publics in a convincing way.

The Lisbon Treaty has also increased the possibility of some Member States going ahead without waiting for the laggards. Flexibility, multi-speed integration, in various forms, have contributed to the integration process in the past, so why not in other areas, including CFSP? Schengen cooperation started among a small group of five states. Today it involves most Member States. Economic and Monetary Union (EMU) did not include all Member States at the outset, but the number of participating states has increased since 1999, when the single currency was introduced, and more Member States are expected to join in the coming years. This is why the increased possibility of flexibility in CFSP may also turn out to be a useful tool in the future.

In the area of defence in particular we know that things will only move once France and the UK have agreed and preferably Germany has joined. Then other Member States may 'bandwagon.' The development of a common defence policy, made possible by the Treaty of Maastricht, only started after the historic meeting of minds at the Franco-British summit at Saint Malo in 1998 (see for instance Howorth, 2007). Then things suddenly moved very fast. But it may be that a kind of plateau has been reached now and that further incentives and instruments are needed. The Lisbon Treaty has added to the toolbox, but it cannot change the constraints of domestic politics. National leadership is also required.

BIBLIOGRAPHY

Alecu de Flers, Nicole (2008), „The Provisions on CFSP and CSDP in the Lisbon Reform Treaty: Stumbling Blocks or Milestones?,” *Hebrew University International Law Research Paper* No. 08-08 (September 3).

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1262921

Angelet, Bruno and Ioannis Vrailas (2008), *European Defence in the Wake of the Lisbon Treaty*. Egmont Paper 21. (May). Brussels: Royal Institute for International Relations.

BBC News, 18 June 2007: “Blair sets out EU treaty demands”,

http://news.bbc.co.uk/2/hi/uk_news/politics/6763121.stm

Björklund, Marianne (2007), “EU-länderna överens om nytt fördrag,” *Dagens Nyheter*, 23 June. <http://www.dn.se/DNet/jsp/polopoly.jsp?d=1042&a=664057>

Buck, Tobias, James Blitz and Ian Bickerton (2007), “EU treaty breaks years of deadlock,” *Financial Times*, June 24.

Council of the European Union (2004a), *Draft treaty establishing a Constitution for Europe as approved by the Intergovernmental Conference on 18 June 2004. Vol. I. Treaties*. July.

Council of the European Union (2004b), *Draft treaty establishing a Constitution for Europe as approved by the Intergovernmental Conference on 18 June 2004. Vol.II. Protocols, Declarations*. July.

Council of the European Union (2006), “Brussels European Council 15/16 June 2006: Presidency Conclusions,” Brussels, 17 July.

Council of the European Union (2007a), IGC 2007 Mandate,“ POLGEN 74. Brussels, 26 June

<http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf>

Council of the European Union (2007b), “Brussels European Council 21/22 June 2007: Presidency Conclusions,” Brussels, 20 July

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf

Dagand, Sophie (2007), “The impact of the Lisbon Treaty on CFSP and ESDP,” *European Security Review*. No. 37 (February). Brussels: ISIS Europe.

http://www.isis-europe.org/pdf/2008_artrel_150_esr37tol-mar08.pdf

De Poncins, Étienne (2008), *Le traité de Lisbonne en 27 clés*. Paris : Éditions Lignes de Repères.

Devuyst, Youri (2008), "The European Union's Institutional Balance after the Treaty of Lisbon: 'Community Method' and 'Democratic Deficit' Reassessed," *Georgetown Journal of International Law*. Vol. 39, No. 2 (Winter), pp.247-325.

European Convention (2003), *Draft Treaty Establishing a Constitution for Europe*. Luxembourg: Office for Official Publications of the European Communities.

European Parliament (2008a), Directorate General External Policies of the Union, Policy Department External Policies, "The Impact of the Lisbon Treaty on ESDP," Briefing Paper. January. <http://www.statewatch.org/news/2008/feb/ep-esdp-lisbon.pdf>

European Parliament (2008b), Directorate General External Policies of the Union, Policy Department External Policies, "The Lisbon Treaty and its Implications for CFSP/ESDP," Briefing Paper. Brussels, February. <http://www.statewatch.org/news/2008/feb/ep-esdp-lisbon-study.pdf>

European Union (2007), "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007," *Official Journal of the European Union* C306, 17 December.

European Union (2008), "Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union," *Official Journal of the European Union* C115, 9 May.

Financial Times (June 24, 2007a), "Details of new treaty seep out."

Financial Times (June 24, 2007b), "A clumsy deal is better than none."

Finland (2008), "Regeringens proposition till Riksdagen med förslag om godkännande av Lissabonfördraget om ändring av fördraget om Europeiska unionen och fördraget om upprättandet av Europeiska gemenskapen och till lag om sättande i kraft av de bestämmelser i fördraget som hör til området för lagstiftningen," RP 23/2008 rd. Helsinki.

Griller, Stefan and Jacques Ziller, eds. (2008), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Vienna: Springer Verlag.

Hans, Barbara (2007), "EU Breaks its Deadlock: The Lisbon Coup," *Spiegel Online*, 19 October. <http://www.spiegel.de/international/europe/0,1518,512446,00.html>

Howorth, Jolyon (2007), *Security and Defence Policy in the European Union*. Houndmills: Palgrave Macmillan.

Hughes, Kirsty (2008), *Shaping Lisbon's Legacy: Who will make Foreign Policy*. Paris: Friends of Europe.

Justaert, Arnout and Skander Nasra (2008), "EU Foreign Policy: Exploring the integrative potential of the Lisbon Treaty," *IIEB Working Paper* No. 32 (July).

<http://soc.kuleuven.be/iieb/docs/wp/IIEBWP032.pdf>

Kietz, Daniela and Volker Perthes, eds. (2007), *Handlungsspielräume einer EU-Ratspräsidentschaft. Eine Funktionsanalyse des deutschen Vorsitzes im ersten Halbjahr 2007*. Berlin: Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit. http://www.swp-berlin.org/common/get_document.php?asset_id=4315

Kurpas, Sebastian and Henning Riecke (2007), „Is Europe back on track? Impetus from the German EU Presidency,” *CEPS Working Document* No 273 (July). Brussels: Centre for European Policy Studies.

Laursen, Finn (2006), "Re-weighting of Votes and Composition of Commission: When Size Matters," in Finn Laursen, ed., *The Treaty of Nice: Actor Preferences, Bargaining and Institutional Choice*. Leiden: Martinus Nijhoff Publishers, pp. 409-431.

Laursen, Finn, ed. (2008), *The Rise and Fall of the EU's Constitutional Treaty*. Leiden: Martinus Nijhoff Publishers.

Mahony, Honor (2007a), „Germany sends letter to salvage EU constitution,” *EUobserver*, 23 April. <http://euobserver.com/9/23921>

Mahony, Honor (2007), "EU treaty blueprint sets stage for bitter negotiations," *EUobserver*, 20 June. <http://euobserver.com/9/24317>

Mahony, Honor (2007b), "Stakes high as EU tries to put 2005 referendums behind it," *EUobserver*, 21 June. <http://euobserver.com/9/24320>

Mahony, Honor (2007), "EU leaders scrape treaty deal at 11th hour," *EUobserver*, 23 June. <http://euobserver.com/9/24343>

Mahony, Honor (2007), "Ireland and Poland get 'opt-out' option on EU rights charter," *EUobserver*, 26 June. <http://euobserver.com/9/24355>

Parker, George (2007), "EU leaders strike deal on 'reform treaty'," *Financial Times*, June 22.

Parker, George, Jan Cienski and Bertrand Benoit (2007), "Poland cites war dead in EU row," *Financial Times*, June 20.

Parker, George, Tobias Buck and Bertrand Benoit (2007), "Key clause dropped from draft EU treaty," *Financial Times*, June 21.

Regelsberger, Elfried and Wolfgang Wessels (2005), "The evolution of the Common Foreign and Security Policy: a case of an imperfect ratchet fusion," in Amy Verdun and

Osvaldo Croci, eds., *The European Union in the Wake of Eastern Enlargement: Institutional and policy-making challenges*. Manchester: Manchester University Press, pp. 91-116.

Rettman, Andrew (2007a), "Germany threatens to call treaty conference over Poland's head," EUobserver, 22 June. <http://euobserver.com/9/24341>

Rettman, Andrew (2007b), "Polish twins accused of bad taste in Brussels," EUobserver, 25 June. <http://euobserver.com/9/24351>

Sauron, Jean-Luc (2007), *Comprendre le Traité de Lisbonne : Texte consolidé intégrale des traités, explications et commentaires*. Paris: Gualino éditeur.

Sieberson, Stephen C. (2008), *Dividing Lines between the European Union and its Member States: The Impact of the Treaty of Lisbon*. The Hague: T.M.C.Asser Press.

Spongenberg, Helena (2007), "Berlin declaration's 'fortune' is lost in translation," EUobserver, 27 March. <http://euobserver.com/9/23786>

Sweden (2008), Lissabonfördraget. Regeringens proposition 2007/08:168. Stockholm.

United Kingdom, House of Commons (2008), Foreign Affairs Committee, *Foreign Policy Aspects of the Lisbon Treaty*. Third Report of Session 2007-08. London: The Stationary Office Limited.

Wessels, Wolfgang and Franziska Bopp (2008), „The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?“ *Challenge Research Paper* No 10 (June).

http://www.libertysecurity.org/IMG/pdf_The_Institutional_Architecture_of_CFSP_after_the_Lisbon_Treaty.pdf

Wilga, Maciej (2008), "Poland and the Constitutional Treaty: A short Story about a 'square root'?" in Finn Laursen, ed., *The Rise and Fall of the EU's Constitutional Treaty*. Leiden: Martinus Nijhoff Publishers, pp. 225-248.

Wouters, Jan; Dominic Coppens and Bart De Meester (2008), "The European Union's External Relations after the Lisbon Treaty," in Stefan Griller and Jacques Ziller, eds., *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Vienna: Springer-Verlag, pp. 143-203.