

Policy Department External Policies

THE LISBON TREATY AND ITS IMPLICATIONS FOR CFSP/ESDP

SECURITY AND DEFENCE



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The Lisbon Treaty and its implications for CFSP/ESDP

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This briefing was requested by the European Parliament's Subcommittee on Security and Defence.

It is published in the following language: English

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Publisher European Parliament

Manuscript completed on 15 April 2008

Copies can be obtained through: E-mail: xp-poldep@europarl.europa.eu

Brussels, European Parliament, 4 February 2008

The briefing paper is available on the Internet at
<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>

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1. Introduction

On 19th October 2007 in Lisbon, the Member States of the European Union agreed upon the text of the "*Draft Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community*" henceforth known as the *Lisbon Treaty*. The new Lisbon Treaty was formally signed by the Heads of State and Government at the European Council on 13 December 2007. This is the latest step in ongoing efforts to reform the institutions of the European Union as launched in February 2002 with the European Convention and which continued with the ill-fated Constitutional Treaty. The Lisbon Treaty should enter into force on 1st January 2009, once ratified by the 27 Member States.

The principles of the Union's external action are set out in article 10 A [21] TEU and are described as those which "*have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations and the Charter of international law.*"¹ The Union will conduct policy in this area article 12 [25] TEU by defining general guidelines and adopting decisions (the latter incorporates the previous distinction between common strategies, common positions and joint actions).

The Union now acquires *legal personality* article 46a [47] TEU and the pillar structure is overcome with the new High Representative charged with the important role of ensuring coherence between EU institutions and between the institutions and Member States. Whilst *enhanced cooperation* Title IV article 20 [10] TEU is now extended across all areas of the Treaty (now requiring at least 9 Member States), however the articles referring to CFSP and in particular to the Common Security and Defence Policy reiterate the norm of taking decisions by unanimity (except within permanent structured cooperation - see below) as well as underlining that this is an area where legislation is excluded.

A new and detailed section (Chapter 2, Section 2 articles 28A-28E [42-46] TEU) entitled "Provisions on the Common Security and Defence Policy (CSDP)" essentially brings the European Security and Defence Policy (ESDP) and all its developments since the Cologne European Council in 1999 within the Treaty framework. The new CSDP is described as an integral part of the CFSP and can draw upon civilian and military assets to carry out missions outside the Union for "*peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.*"

In response to criticism about the lack of flexibility in the CFSP budget, a new Decision article 28.3 [41.3] TEU will be adopted (after consulting the European Parliament) setting out procedures for "guaranteed rapid access" to the Union's budget and a new "start up fund" is introduced (adopted by QMV) for tasks not charged to the Union's budget (e.g. military crisis management, defence related spending, or procurement of military/defence-related goods by

¹ Following the example set by the European Parliament's Report drawn up by Rapporteurs Corbett and Mendez de Vigo, on the Lisbon Treaty, *the numbers of the articles in the TEU and TFEU indicated first refer to those given in the Treaty of Lisbon; the numbers in [...] are those the articles will have in a future consolidated version of the Treaties (in accordance with the table annexed to the Treaty of Lisbon).*

third states). This "start up fund" will be made up of Member States' contributions (much like the current Athena mechanism).

The key innovations in the area of foreign affairs and defence followed those introduced in the Constitutional Treaty but with the title "Union Minister for Foreign Affairs" being replaced by a new **High Representative for Foreign Affairs and Security Policy**. The High Representative (HR) for Foreign Affairs and Security Policy will be double-hatted as a Vice President of the European Commission and will be supported by a **European External Action Service** (EEAS) - which effectively overcomes the existing pillar I and pillar II structure and incorporates a role for Member States diplomats. The European External Action Service article 13a [27.3] TEU will consist of personnel from the Council General Secretariat, the Commission and seconded staff from national diplomatic services. The inclusion of the latter will be important in fulfilling the EEAS dual mandate of supporting the High Representatives and working "in cooperation with the diplomatic services of the Member States". The modalities, structure and indeed make-up of the EEAS is currently being worked out by the Council and Commission services and Member States before consulting the European Parliament as foreseen in the Lisbon Treaty (Declaration 15).¹

The Lisbon Treaty also confirms the job description of the High Representative for Foreign Affairs and Security Policy whereby Article 9E [18] TEU sets out that the HR will conduct the CFSP and will be appointed, with the agreement of the President of the Commission, by Qualified Majority Voting (QMV). The HR shall chair the Foreign affairs Council and be one of the Vice-Presidents (VP) of the Commission (thereby charged with delivering greater consistency and coordination).

As a Vice-President of the Commission, *the European Parliament extends its role over the double-hatted HR/VP* whereby the European Parliament's consent is required in the appointment (article 9D.7.3 [17 paragraph 6 and 8]) of the Commissioners and in their dismissal through the censure procedure (Article 201 [234.2] TFEU).² The HR/VP is expected to reinforce a recent trend towards greater policy coherence (in formulation and implementation) between the two pillars. As a VP in the Commission he/she is also expected to defend the Commission's interests in the Council, however several references in particular to the Commission's right to be **fully associated** (pre-Lisbon Treaty on European Union article 18.4) have now been deleted. Many such examples will have to be examined in more detail because an amended article 15a [30] TEU could be interpreted more positively and which states that "*Any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission's support, may refer any question relating to the common foreign and security policy to the Council*". The Commission is also an integral part of the concept for the European External Action Service.

A further complication in institutional and personal relations is created by the **new permanent President of the Council** article 9B [15] TEU who will Chair the European Council article 9B.6 [15.6] TEU and more noteworthy shall article 9B.6 [15.6] TEU "*at his or her level and in that*

¹ For several interesting and speculative expert views on how the EEAS may look and operate see: The EU Foreign Service: how to build a more effective common policy", EPC Working Paper No. 28, November 2007.

² Article 9e states: that the High Representative is to be appointed by the European Council, acting by a qualified majority, with the agreement of the President of the Commission (Article 9e: 1); in such a role he/she will (Article 9e:3) preside over the Foreign Affairs Council; he/she will (article 9e:4) also be one of the Vice-Presidents of the Commission and as such be "bound by Commission procedures to the extent that this is consistent" with this article.

capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy". It will be interesting to see how in practice the relationship between the High Representative (chairing the Foreign Affairs Council) and the President will work to achieve a coherent division of labour, e.g. who would lead in negotiations on behalf of the UN and EU-3 with Iran over the current nuclear crisis? To this equation one also needs to situate the HR/VP in the constellation of institutions, roles and chemistry that also include the new Permanent President of the Council and the President of the Commission. The latter article 9D.7 [17.7] TEU, proposed by the European Council, will be elected by the European Parliament.

The new permanent President article 9B.5 [15.5] TEU can hold this position for a two and half year term renewable once i.e. a maximum of five years. He/she will also provide the European Parliament with a report after each meeting of the European Council. The High Representative, who will work closely with the Political and Security Committee, will become a more regular visitor article 21 [36] TEU to the European Parliament where he/she will "regularly consult" the European Parliament on the main aspects and basic choices of CFSP and CSDP "...and inform it of how those policies evolve". It also remains to be seen how the Foreign Minister and Head of State of the rotating Presidency (which ends in the area of CFSP but continues in other council formations) will come before the European Parliament (respective bodies i.e. Plenary and AFET) under the new treaty.

2. The European Security and Defence Policy (ESDP)

The Lisbon Treaty confirms the Amsterdam commitment to the progressive framing of a common Union defence policy which could lead to a common defence when the European Council so decides, but adding the caveat "acting unanimously" article 28A.2[42.2] TEU. The caveat may be an additional reminder that *unanimity* rather than *legislative acts* (excluded by article 15b [31] TEU) and *enhanced cooperation* will remain the norm in CFSP/CSDP.

The scope and range of the Petersberg Tasks have been extended article 28B [43] TEU, although in a similar vein to that already agreed at the Thessaloniki European Council and under the Headline Goal 2010, to include:

"...joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories."

The same article 28B.2 [43.2] TEU reiterates article 28A.4 [42.4] TEU that all such specified tasks are to be defined, and the launch adopted, by Decision of the European Council. The Political and Security Committee's (Nice Treaty) mandate to oversee the "the political control and strategic direction" of crisis management operations is to be carried out under the responsibility of the Council **but importantly it is the HR**, "acting under the authority of the Council and in close contact with the Political and Security Committee, [that] shall ensure coordination of the civilian and military aspects of such tasks". Therefore the PSC remains the main preparatory and management body for CSDP missions but it is the HR (as the principle coordinator of civilian and military instruments) that now has a more prominent role and a specific mandate to ensure coherence, perhaps making the HR the new linchpin in CFSP.

There is a specific reference article 28A.3 [42.3] TEU to making available military and civilian capabilities (including multinational forces) for the implementation of the Common Security and Defence Policy. This paragraph essentially incorporates ESDP (a term which has never existed in the text of the Treaties) in a more transparent and detailed manner within the text of the Treaty and under the new heading Common Security and Defence Policy (CSDP). Similarly the European Defence Agency (EDA) shall oversee the capability definition and development process including having the aim to "strengthen the industrial base of the defence sector" and its "participat[ion] in defining a European capabilities and armaments policy" article 28A.3 and 28D [42.3 and 45] TEU. The reference to an armaments policy establishes an idea promoted by France (at the 2003 Tervuren Summit in the form of an *Armaments Agency*) but strongly resisted by the UK who championed the EDA as a *capability development agency* (thus bringing all the proposals from Tervuren into the Treaty/Headline Goal framework except the innovative but still not implemented "EUFAST" force which would have created a standby force for humanitarian relief operations).

Article 28A.4 [42.4] TEU confirms the established rule and practice of *unanimity* in defence matters with the statement that "*Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously....*". The second clause in that sentence states that such a unanimous decision will be taken "*on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State*". Furthermore, the final sentence in the paragraph offers hope of greater coherence across the instruments and Member States of the Union whereby "*The High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate*". This helps improve long standing questions about leadership and transparency in decision making.

The next sub-paragraph article 28A.5 [42.5] TEU foresees the delegation of a "task" within the Union framework (e.g. an EU mission based upon a unanimous decision) to a "group of member states". Although it is not stated, this could be in the form of a multinational force or EU Battlegroup (as the Union does not have a standing army). This delegation to a group is different from perhaps the most important innovation in the defence area, that of permanent structured cooperation which is introduced in two articles (article 28A.6 and 28E [42.6 and 46] TEU) but elaborated in a specific protocol on permanent structured cooperation.

It is the first time that the term Permanent Structured Cooperation has been introduced into the treaties and although many questions remain about its eventual use (or similarities to enhanced cooperation), we are provided with a number of precise details including the general proposition that (article 28A.6 [42.6] TEU) it would allow those Member States "whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework".

The procedure article 28E [46] TEU for adopting Permanent Structured Cooperation by Council Decision foresees "...qualified majority voting after consulting the High Representative". Other uses of QMV or unanimity amongst participating states are foreseen "within the framework of permanent structured cooperation" but "unanimity" still remains the baseline for all Decisions referring to the launch of a mission (article 28A.4 [42.4] TEU) or the expanded Petersberg Tasks (article 28B [43] TEU). This may reassure those worried that a group within permanent structured cooperation will launch a mission on their own accord on behalf of the EU. However,

those same Member States could lead an *ad hoc* mission outside the framework of the EU i.e. launch an operation without an EU mandate/decision.

More specific details on what is meant by "higher criteria" and "more binding commitments" is set out in a specific protocol (Protocol on Permanent Structured Cooperation Established by article 42 of TEU). Article 1 of the protocol states that permanent structured cooperation shall be open to any Member State which undertakes to proceed more intensively to develop its defence capacities in multinational forces, in the main European equipment programmes, and in the activity of the European Defence Agency (EDA). Furthermore it incorporates the (Headline Goal 2010) Battlegroup Concept in that it is open to those that have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned with support elements including transport and logistics and that can be deployed within a period of 5 to 30 days and sustainable for 30 to 120 days.

Article 2 states that to achieve these objectives Member States participating in permanent structured cooperation shall cooperate on the level of investment in defence equipment. They shall also bring their defence apparatus into line with each other as far as possible, particularly by harmonising 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. In addition they shall take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces, in particular by identifying common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures. They shall work together to make up the shortfalls perceived (and without prejudice to commitments in NATO) in the framework of the "Capability Development Mechanism". Finally they shall also take part, where appropriate, in the development of major European equipment programmes in the framework of the European Defence Agency. The EDA will play an important role (Article 3) in evaluating the performance of Member States' commitment to permanent structured cooperation.

For the moment the specific criteria to be evaluated remain undefined. Instead we are presented with a description of the "EU capability development methodology" which has, since the 2001 Laeken European Council, placed an emphasis upon "voluntary-bottom up" commitments of Member States (to existing initiatives - Headline Goals, shortfalls and procurement) rather than setting "top down" targets requiring national adjustments (such as setting for example a target of 2% of GDP for defence spending - as recently proposed by Pierre Lellouche in *Le Figaro* 31 January 2008 - or to commit 25% within existing defence budgets for Research and Development). The ambition of Member States i.e. to continue the incremental process set in train at Laeken or to set targets for needed structural reform of the defence sector, will only become clearer after ratification when proposals come forward (such as that expected by Spain).

Two other notable changes are the introduction of a ***mutual assistance article 28A.7*** [42.7] TEU which *reads* like a ***mutual defence clause*** in that it states "if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power...". This reminds us of questions raised during the European Convention on whether the EU should have its own mutual defence clause *a la* NATO and on the fate of the modified 1954 Brussels Treaty and the remaining cell at the Western European Union.

The Lisbon Treaty and Mutual Defence

The full text of the Lisbon Treaty's mutual assistance article 28A.7 [42.7] TEU states that:

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

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation”.

This can be compared to that of article V of the 1954 modified Brussels Treaty which states that:

“If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power”.

There are striking similarities in the first part of the Lisbon Treaty text with that of the modified Brussels Treaty. This is not an accident if one recalls that the Lisbon Text (as discussed in the context of the 2004 IGC) was designed to satisfy three groups of states:

- **those seeking a mutual defence commitment** which could be satisfied with the part of the article stating that *“if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter.”*;
- **those seeking to protect their traditional neutral status** (such as Ireland, Austria and Sweden) which could be satisfied with the clause *“This shall not prejudice the specific character of the security and defence policy of certain Member States”*; and
- **those wanting to ensure that the article would not undermine NATO** which could be satisfied with the reminder that *“Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation”.*

Most observers agree that the Lisbon Treaty formula matches the guarantee of the Brussels Treaty and goes beyond it with a reference to NATO. This point was reflected in the debates in the Convention on the Future of Europe and in questions raised about the further need for the modified 1954 Brussels Treaty.

There is also a *mutual solidarity clause* (Part V Title VII, article 188R [222] TFEU) which has essentially been introduced in the form of a Declaration set out in European Council conclusions on 25 and 26 March 2004 following the terrorist attack in Madrid.

Solidarity Clause

European Council, Presidency Conclusions, 25 and 26 March 2004 Declaration on Terrorism which included the incorporation of "the spirit of the Solidarity Clause contained in Article 42 of the draft Constitution for Europe".

The *declaration* states that:

"We, the Heads of State or Government of the Member States of the European Union, and of the States acceding to the Union on 1 May, have declared our firm intention as follows:

In the spirit of the solidarity clause laid down in Article 42 of the draft Treaty establishing a Constitution for Europe, the Member States and the acceding States shall accordingly act jointly in a spirit of solidarity if one of them is the victim of a terrorist attack. They shall mobilise all the instruments at their disposal, including military resources to:

- prevent the terrorist threat in the territory of one of them,
- protect democratic institutions and the civilian population from any terrorist attack,
- assist a Member State or an acceding State in its territory at the request of its political authorities in the event of a terrorist attack.

It shall be for each Member State or acceding State to the Union to choose the most appropriate means to comply with this solidarity commitment towards the affected State."

Whereas the *Lisbon Treaty Solidarity Clause* (Title VII, article 188R) states that:

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

- (a) – prevent the terrorist threat in the territory of the Member States;
- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
- (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

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

3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 15b(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.

For the purposes of this paragraph and without prejudice to Article 207, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 61 D; the two committees shall, if necessary, submit joint opinions.

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action."

The Lisbon Treaty introduces many innovations in the area of CFSP, and ESDP is now more clearly defined within the Common Security and Defence Policy (CSDP). Along with a defined role in the budgetary procedure the article specifically referring to the role of the European Parliament in CFSP/CSDP article 21 [36] TEU has also been expanded to include:

"The High Representative of the Union for Foreign affairs and Security Policy shall regularly consult the European Parliament on the main aspects and basic choices of common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament.

The European Parliament may ask questions of the Council or make recommendations to it and to the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy including the common security and defence policy."

The new innovations along with the existing role and experience of the European Parliament and National Parliaments (the latter having more prominent visibility and a **specific protocol**) bring with them new opportunities for the extension of parliamentary oversight in the further development of EU foreign, security and defence matters.