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The (Reform) Treaty of Lisbon: What's in it? How Significant

Finn Laursen



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Miami - Florida European Union Center

University of Miami
1000 Memorial Drive
101 Ferré Building
Coral Gables, FL 33124-2231
Phone: 305-284-3266
Fax: (305) 284 4406
Web: www.miami.edu/eucenter

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The (Reform) Treaty of Lisbon: What's in it? How Significant?*

Finn Laursen ♦

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 outline the most important provisions of the Lisbon Treaty. 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, 2007).

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 in this chapter we shall compare the 2003 and 2008 versions of the Union's Consolidated Treaties.

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. Most likely there will be a second referendum in Ireland in 2009, possibly including 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. But nothing can be taken for granted when it comes to the use of referenda.

The Essentials of the Lisbon Treaty

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

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♦ **Finn Laursen** is Canada Research Chair in EU Studies Director, EUCE, Dalhousie University, Halifax, NS, Canada

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 it was in the Constitutional Treaty, 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. 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.

Box 1: Composition of the European Parliament
<i>Art. 14 TEU (Lisbon)</i>
(...)
2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.
The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

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.

Box 2: Elected President of the European Council

Article 15 TEU

(...)

5. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure.

6. The President of the European Council:

shall chair it and drive forward its work;

shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;

shall endeavour to facilitate cohesion and consensus within the European Council;

shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

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

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.

Box 3: Decision Making in the Council

Art. 16 TEU (Lisbon)

1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.

(...)

3. The Council shall act by a qualified majority except where the Treaties provide otherwise.

4. As from 1 November 2014, a qualified majority shall 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.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

(...)

5. The transitional provisions relating to the definition of the qualified majority which shall be applicable until 31 October 2014 and those which shall be applicable from 1 November 2014 to 31 March 2017 are laid down in the Protocol on transitional provisions.

6. The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union.

The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council,

in liaison with the President of the European Council and the Commission.
The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.
(...)
8. The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.
9. The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established in accordance with Article 236 of the Treaty on the Functioning of the European Union

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 reduced-in-size Commission there will be strict equal rotation between the Member States (Art. 17(5) TEU). Thus 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.

Box 4: Composition of the Commission

Art. 17 TEU (Lisbon)

(...)
4. The Commission appointed between the date of entry into force of the Treaty of Lisbon and 31 October 2014, shall consist of one national of each Member State, including its President and the High Representative of the Union for Foreign Affairs and Security Policy who shall be one of its Vice-Presidents.
5. As from 1 November 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.
The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States. This system shall be established unanimously by the European Council in accordance with Article 244 of the Treaty on the Functioning of the European Union.
(...)

7. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in paragraph 3, second subparagraph, and paragraph 5, second subparagraph.

The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

8. The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 234 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the

Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission.

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 Competencies

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. But most common policies, including the internal market, the Common Agricultural Policy, social policy and environment policy are shared competences. 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.

Box 5: Exclusive competences

Article 3 TFEU

1. The Union shall have exclusive competence in the following areas:

(a) customs union;

(b) the establishing of the competition rules necessary for the functioning of the internal market;

- (c) monetary policy for the Member States whose currency is the euro;
 - (d) the conservation of marine biological resources under the common fisheries policy;
 - (e) common commercial policy.
2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Box 6: Shared competences

Article 4 TFEU

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
 - (a) internal market;
 - (b) social policy, for the aspects defined in this Treaty;
 - (c) economic, social and territorial cohesion;
 - (d) agriculture and fisheries, excluding the conservation of marine biological resources;
 - (e) environment;
 - (f) consumer protection;
 - (g) transport;
 - (h) trans-European networks;
 - (i) energy;
 - (j) area of freedom, security and justice;
 - (k) common safety concerns in public health matters, for the aspects defined in this Treaty.
3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

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 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 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) under AFSJ.

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 means for instance that the EU will have to work to consolidate human rights in its commercial policy.

Box 7: External Action Objectives	
Treaty of Nice (consolidated)	Treaty of Lisbon (consolidated)
CFSP	External Action
<i>Article 11 TEU</i>	<i>Article 21 TEU</i>
<p>1. The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:</p> <ul style="list-style-type: none"> — to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter, — to strengthen the security of the Union in all ways, — to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders, — to promote international cooperation, — to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms. 	<p>(...)</p> <p>2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:</p> <ul style="list-style-type: none"> safeguard its values, fundamental interests, security, independence and integrity; consolidate and support democracy, the rule of law, human rights and the principles of international law; preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; help develop international measures to preserve and improve the quality of the environment and

	<p>the sustainable management of global natural resources, in order to ensure sustainable development;</p> <p>assist populations, countries and regions confronting natural or man-made disasters; and</p> <p>promote an international system based on stronger multilateral cooperation and good global governance.</p>
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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.

Box 8: Scope of and Decision-Making for Commercial Policy	
Treaty of Nice	Treaty of Lisbon
<p><i>Article 133 TEC</i></p> <p>1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of</p>	<p><i>Art. 207 TFEU</i></p> <p>1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in</p>

<p>dumping or subsidies.</p> <p>2. The Commission shall submit proposals to the Council for implementing the common commercial policy.</p> <p>3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations. The relevant provisions of Article 300 shall apply.</p> <p>4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.</p> <p>5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.</p> <p>By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.</p> <p>The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.</p> <p>This paragraph shall not affect the right of the Member States to maintain and conclude</p>	<p>measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.</p> <p>2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.</p> <p>3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.</p> <p>The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.</p> <p>4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.</p> <p>The Council shall also act unanimously for the negotiation and conclusion of agreements:</p> <p>(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;</p> <p>(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of</p>
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<p>agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.</p> <p>6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.</p> <p>In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.</p> <p>The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.</p> <p>7. Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property in so far as they are not covered by paragraph 5.</p>	<p>such services and prejudicing the responsibility of Member States to deliver them.</p> <p>5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.</p> <p>(...)</p>
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Common Foreign and Security Policy

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.

Box 9: CFSP competence
<p><i>Article 24 TEU</i> (ex Article 11 TEU)</p>
<p>1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.</p> <p>The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.</p>

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 box 10).

Box 10: Decision making in CFSP
<p><i>Article 31 TEU</i> (ex Article 23(1) TEU)</p>
<p>1. Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise. The adoption of legislative acts shall be excluded.</p> <p>When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity,</p>

the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted.

2. By derogation from the provisions of paragraph 1, the Council shall act by qualified majority:
when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article 22(1),

when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative,

when adopting any decision implementing a decision defining a Union action or position,
when appointing a special representative in accordance with Article 33.

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

3. The European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2.

4. Paragraphs 2 and 3 shall not apply to decisions having military or defence implications.

5. For procedural questions, the Council shall act by a majority of its members.

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.

Box 11: High Representative for Foreign Affairs and Security Policy

Article 18 TEU

1. The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his term of office by the same procedure.
2. The High Representative shall conduct the Union's common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.
3. The High Representative shall preside over the Foreign Affairs Council.
4. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

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).

Box 12: European External Action Service

Article 27

(...)

3. In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

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.

Box 13: Change in CFSP Instruments	
Nice Treaty (consolidated)	Lisbon Treaty (consolidated)
<i>Article 12</i>	<i>Article 25</i> (ex Article 12 TEU)
<p>The Union shall pursue the objectives set out in Article 11 by:</p> <ul style="list-style-type: none"> — defining the principles of and general guidelines for the common foreign and security policy, — deciding on common strategies, — adopting joint actions, — adopting common positions, — strengthening systematic cooperation between Member States in the conduct of policy. 	<p>The Union shall conduct the common foreign and security policy by:</p> <ul style="list-style-type: none"> defining the general guidelines; adopting decisions defining: actions to be undertaken by the Union; positions to be taken by the Union; arrangements for the implementation of the decisions referred to in points (i) and (ii); and by strengthening systematic cooperation between Member States in the conduct of policy.

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.

Box 14: Budget provisions for CFSP
<i>Article 41 TEU</i>
<p>(...)</p> <p>3. The Council shall adopt a decision establishing the specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the common foreign and security policy, and in particular for preparatory activities for the tasks referred to in Article 42(1) and Article 43. It shall act after consulting the European Parliament.</p> <p>Preparatory activities for the tasks referred to in Article 42(1) and Article 43 which are not charged to the Union budget shall be financed by a start-up fund made up of Member States' contributions.</p> <p>The Council shall adopt by a qualified majority, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, decisions establishing:</p> <ul style="list-style-type: none"> the procedures for setting up and financing the start-up fund, in particular the amounts allocated to the fund; the procedures for administering the start-up fund; the financial control procedures. <p>When the task planned in accordance with Article 42(1) and Article 43 cannot be charged to the Union budget, the Council shall authorise the High Representative to use the fund. The High Representative shall report to the Council on the implementation of this remit.</p>

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.

Box 15: Scope of CSDP	
Treaty of Nice (consolidated)	Treaty of Lisbon (consolidated)
<p style="text-align: center;"><i>Article 17TEU</i></p> <p>1. The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.</p> <p>The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.</p> <p>The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments.</p>	<p style="text-align: center;"><i>Article 42</i></p> <p>1. The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.</p> <p>2. The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.</p> <p>The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.</p>

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.

Box 16: Extension of 'Petersberg' tasks	
Treaty of Nice (consolidated)	Treaty of Lisbon (consolidated)

<i>Article 17</i>	<i>Article 43</i>
(...) 2. Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.	1. The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.

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.

Box 17: European Defence Agency (EDA)
<i>Article 42</i>
(...) 3. Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council. Those Member States which together establish multinational forces may also make them available to the common security and defence policy. Member States shall undertake progressively to improve their military capabilities. The Agency in the field of defence capabilities development, research, acquisition and armaments (hereinafter referred to as "the European Defence Agency") shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities.

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).

Box 18: Enhanced cooperation in CFSP
<i>Art. 329(2) TFEU</i>
(...) 2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is

consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information. Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.

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.

Box 19: Permanent Structured Cooperation

Article 42 TEU

(....)

6. 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. Such cooperation shall be governed by Article 46 [established by QMV, but governed by unanimity among participating states]. It shall not affect the provisions of Article 43 [concerning tasks].

'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.'

Box 20: Entrustment of task to a group of states

Art. 44 TEU

1. Within the framework of the decisions adopted in accordance with Article 43, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. Those Member States, in association with the High Representative of the Union for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task.

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.

Box 21: Mutual assistance clause

Article 42 TEU

(...)

7. 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.

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.

Box 22: Mutual solidarity clause

Article 222 TFEU

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:

- 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;
- 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.

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.

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