

European Security and Defence Policy in the Treaty Establishing a Constitution for Europe: Some New Events

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1. Introduction

The Treaty establishing a Constitution for Europe is the result of a complete reform that is distinct from previous processes.¹ Procedurally, the intergovernmental phase was preceded by the work of the European Convention, made up of representatives beyond the state alone, which goes a long way towards explaining the consensus finally reached. Substantively, the result has been a new Treaty, replacing rather than only modifying the existing Treaties currently in force. In terms of the content of the debates and among other differences, the European Security and Defence Policy (ESDP) was not one of the central themes. Rather, the consensus on these topics was forged at the beginning of the Intergovernmental Conference.² This consensus confirms the fundamental approach of the Treaty Project developed by the European Convention, although it introduces certain changes in terms of its initial design.³

In the area of security and defence policy, the Treaty establishing a Constitution for Europe (hereinafter, the Treaty) contains four novel features: first, the conventional formalization of ESDP; second, the recognition of cooperative flexibility in the areas of security and defence within the European Union (EU); third, the regularization of mechanisms for strengthening the operative capabilities of the EU in dealing with crises, and fourth, the new regulation for EU international agreements, which allows the European Court of Justice an entry into the Common Foreign and Security Policy sphere, and in the ESDP. This article analyses the main consequences of these changes for the configuration of the ESDP.

2. Conventional Formalization of the ESDP

The conventional formalization of the ESDP is one of the most significant outcomes of the last reform process. These innovations have reinforced its principal characteristics, although some important changes have also been made.

A. Content

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¹ See Treaty establishing a Constitution for Europe, CIG 87/04, Brussels, 6 August 2004. This is the text I use when referring to Articles.

² The consensus on security and defence matters within the Intergovernmental Conference was developed at the Ministers meeting held in Naples on November 28 and 29, 2003. See: CIG 57/03, December 2, 2003; CIG 57/1/03 REV1, December 5, 2003; CIG 60/03, December 9, 2003; and CIG 60/03 ADD1, of that same date.

³ See Draft Treaty establishing a Constitution for Europe, OJ 2003 C 169/1.

The Treaty incorporates Common Security and Defence Policy, as the ESDP is now called, as an integral part of a common foreign and security policy (Art. I-41.1). The Common Security and Defence Policy (CSDP) is conceived, moreover, as the pre-requisite for the EU's common defence policy, thereby confirming its *phased* character in the progressive definition of this policy. The Treaty maintains the regime envisaged in the current Treaty on the European Union (TEU) establishing a common defence policy (by unanimous decision of the European Council and recommendation to the Member States), as well as the method for determining how this common defence policy will be developed (based on the principle of progressiveness). In addition, it retains the limits on which defence matters requiring cooperation are submitted for consideration within the EU framework (Art. I-41.2).

The Treaty also defines the CSDP's operational parameters (military and civilian instruments) in relation to a specific dimension of common foreign and security policy: the execution of missions beyond the EU, whose objectives are peace-keeping, conflict-prevention, and strengthening international security (Art. I-41.1). The typology of these missions is set forth in Article III-309, which describes the gamut of missions currently specified under Article 17.2 of the TEU, and adds three new ones: joint disarmament operations, military advice and assistance, and post-conflict stabilization. It expressly states that, the EU may contribute to the fight against terrorism, including support for non-EU countries combating terrorism on their own soil.

Besides these elements, two new elements are found in the Treaty regarding security and defence: a clause for collective self-defence (Art. I-41.7) and a solidarity clause (Art. I-43). The new 'self-defence' clause results from the consensus forged at the Intergovernmental Conference, creating a peculiar alteration in the mechanism primarily designed by the European Convention. Specifically, the mechanism of optional ratification (initially set in the Convention proposal) has been substituted by a new clause that reads:

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 NATO, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation (Art. I-41.7).⁴

This clause ensuring collective self-defence will be binding for all EU States. However, its effective scope has two limits. First, North Atlantic Treaty Organization (NATO) commitments will continue to be the basis for mutual defence for its Member States. Second, each Member State is entitled to maintain its own traditional security and defence policy and so decides the type of assistance provided to States under attack. Both limits allow for compatibility between the Member States that form part of NATO, and those that are neutral.

The Treaty's solidarity clause on terrorist attacks and natural, as well as man-made, disasters is contained in Article I-43. The clause's norms of application are contained in Article III-329, which in its turn refers the question to a European decision adopted by the Council of

⁴ Curiously, the new text was proposed by Finland, Ireland, Austria and Sweden, countries outside any military alliance. See CIG 62/03 of December 5, 2003.

Ministers, upon the joint proposal of the Commission and the Union Minister for Foreign Affairs.⁵ The obligations incorporated in the clause - for Member States (joint action in a spirit of solidarity) and for the EU (obligation to mobilize all the instruments at its disposal, including military resources provided by Member States) - are confusing.

The Treaty establishes that Member States shall assist the State suffering one of the aforementioned catastrophes, according to two rules: prior petition by the State's political authorities, and coordination of the assistance within the Council of Ministers. Among the questions provoked by this provision, three stand out. First is its scope of applicability, which depends on how 'terrorist attack' and 'natural and man-made disasters' are defined. Second, the content of the assistance, as it is not clear who will assess the suitability of the means utilized to address the issue. Third, the scope of the commitment undertaken by the EU countries, as to how the levels of assistance will be determined is unclear.⁶

Article III-329 of the Treaty, in its paragraph 3, seems to incorporate a preventive role against terrorist attacks and disasters of natural or human origin for the European Council, which is made responsible for periodically evaluating the risks that threaten the Union. The provision raises at least three questions. First, the European Council is poorly suited for this mission, as it lacks a capacity to make a technical assessment of such risks. It is therefore absolutely critical that the European Council be connected to other EU institutions and organs with the competence to make such assessments. As the provision does not assign specific competence to the European Council to ensure that its evaluation will lead to the certain identification of risk, the effectiveness of the European Council 'new task' will depend on effective coordination among Member States and on the exercise of existing EU powers.

B. Legal Nature

The Treaty retains the intergovernmental nature of the CSDP, and therefore the clear sovereignty of Member States to define the scope of specific aspects of this policy, as well as the degree to which each is committed to action. In effect, unanimity in the Council of Ministers is required for the adoption of any EU-wide decision relating to the exercise of the CSDP, including the decision to undertake a mission (Art. I-41.4). Such unanimity, though not expressly stated, allows for the application of constructive abstention.⁷

Moreover, Article III-300.4 expressly excludes qualified majorities from any decisions having military or defence implications, and blocks the European Council from modifying this

⁵ The Treaty also establishes that the Council shall act in accordance with Article III-300.1 – by unanimity- where this decision has defence implications. This clearly confirms the relation of the solidarity clause with European security and defence matters, although the solidarity clause is formally outside the CSDP realm.

⁶ Declaration number 9, on Articles I-43 and III-329, annexed to the Final Act of the Intergovernmental Conference reads as follows: 'Without prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, none of the provisions of Articles I-43 and III-329 of the Constitution is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards that Member State'. See CIG 87/04 ADD 2; Brussels, 6 August 2004.

⁷ As suggested by the final report of the European Convention Defence Group, which also proposed flexibility respecting constructive-abstention norms. See CONV 461/02, point 53.

situation, using a mechanism contemplated by Article III–300.3. According to this provision, the European Council may unanimously decide that the Council of Ministers shall act by a qualified majority in cases other than those envisaged by the Treaty. Unfortunately, Article III–300.4 does not allow the European Council to modify the procedure envisaged by the Treaty for decisions with military or defence implications.⁸

C. Legal-institutional Functioning

As the Treaty refers to the legal means of defining and fulfilling the CSDP, the changes are only superficial. In effect, the dismantling of the pillar structure of the TEU carries with it the supposed establishment of a single EU legal system, including both ‘legislative acts’ and ‘non-legislative acts’. According to this initial schema, Article I–40.6 excludes legislative acts in the common foreign and security policy sphere, and those relating to CSDP. This exclusion is complemented with specific provisions for the execution of these policies, collected under Articles I–40 to I–41, and in Articles III–294, 295, 297 and 298. A legal subsystem emerges from these articles; it governs both Common Foreign and Security Policy and CSDP and reflects modest differences with the current TEU. Generally, the Treaty accepts the term ‘European decisions’ to refer to acts susceptible to adoption in the Common Foreign and Security Policy and CSDP spheres. Even so, the content and legal effect of these European decisions is identical to the current ‘common strategies,’ ‘common positions’ and ‘joint actions.’

The situation is slightly different with regard to institutional matters. As currently happens, institutional support for the CSDP is found in the single institutional framework of the EU, if indeed the functions and competences of each of its integrated institutions continue being specific to this material sphere. Under the new Treaty, the functions and competences of the European Commission and European Parliament undergo no changes. Also, the European Council and the Council of Ministers continue to be the institutional pillars of the CSDP, and the only bodies competent to adopt decisions in this area. Nonetheless, the Treaty introduces two novel features in its composition and internal organization that may impact on EU security and defence policy: the figure of the President of the European Council and that of the Union Minister for Foreign Affairs.

Firstly, the functions of the President of the European Council, as set forth in Article I–22, bear upon the internal workings of the European Council, imbuing it with continuity and facilitating the efficacy of its working groups. This general improvement ought to produce salutary effects on EU policies specifically dependent on the European Council, including the CSDP. The President is also charged with representation of the EU in foreign affairs, especially in relation to common foreign and security policy (without infringing upon the competence of the Union Minister for Foreign Affairs), and is also responsible for reporting to the European Parliament after meetings of the European Council.

⁸ Article III–300.4 can be given a dual interpretation. One broad interpretation leads to the conclusion that the flexibility clause in Article III–300 has no applicability in all CSDP spheres; unanimity is thus consecrated as a decision-making procedure for the development of this policy, to the extent that it does not lead to a modification of the Treaties. The more restrictive interpretation of Article III–201.4 rests on its very literality, in combination with Article III–313 (financial provisions): that combined reading allows the limitation of unanimity for only those CSDP decisions with repercussions in the military sphere, or for defence (i.e., only those decisions relating to missions that imply the use of military instruments or resources).

Secondly, the post of Union Minister for Foreign Affairs means the fusion of the post of High Representative for Common Foreign and Security Policy, and that of the Commissioner for External Relations (Art. I–28). The Minister’s institutional responsibilities will be two-fold: s/he will preside over the Council of Ministers for Foreign Affairs, and be a member of the European Commission, with the rank of Vice-President. In keeping with this institutional situation, the Union Minister’s functions and competence are of a dual nature.⁹ As Union Minister for Foreign Affairs, s/he will be at the forefront of the Common Foreign and Security Policy and, hence, of the CSDP. This institutional position establishes his/her right to present policy proposals and to execute the decisions adopted by the Council of Ministers or by the European Council. Moreover, s/he will be assigned three other functions (Art. III–296): representing the EU in Common Foreign and Security Policy matters, directing political dialogue in the name of the EU, and representing EU positions before international organizations and at international conferences. Specifically, when the EU has defined its position on a United Nations Security Council agenda item, EU Member States on the Security Council shall request that the Union Minister for Foreign Affairs be asked to present the Union's position (Art. III–305.2).

Comparing the attributes of the President of the European Council with those of the Union Minister for Foreign Affairs, it is beyond doubt that the Treaty reinforces the role of the latter. In terms of representation in the Common Foreign and Security Policy realm, there is a clear risk of overlap, which could be aggravated, depending on the specific personality profiles of those holding the offices. The Union Minister for Foreign Affairs’ capability for action is conditioned by the final form taken by the proposed European External Action Service. The organisation and functioning of this Service shall be established by a European decision of the Council. The Council shall act, in this case, on a proposal from the Union Minister for Foreign Affairs after consulting the European Parliament and after obtaining the consent of the Commission (Art. III–296.3).¹⁰ In this regard, and specific to the CSDP sphere, the Treaty retains the existing Political and Security Committee regulations but includes no reference to the Military Staff or the Military Committee. Given its current nature and composition, the Military Staff may indeed end up being folded into the European External Action Service. Such a change would not affect the Military Committee, a subsidiary organ of the Council with no formal connection with the current High Representative for Common Foreign and Security Policy.

3. Cooperative Flexibility for Security and Defence in the EU Framework

The second change in ESDP’s regulation is the recognition of cooperative flexibility in security and defence. As distinct from the TEU, the new permanent structured cooperation permits a

⁹ As Commission Vice-President, the Union Minister is subject to the procedures that govern the Commission, as long as these are compatible with his/her functions in the Common Foreign and Security Policy. This limitation did not appear in the Draft presented by the European Convention, reinforcing the intergovernmental dependence of the Union Minister for Foreign Affairs.

¹⁰ The Treaty establishes that this service will be composed of officials from relevant departments of the General Secretariat of the Council and the Commission, as well as staff from the national diplomatic services of Member States. It apparently contemplates the creation of a new administrative unit of mixed composition under the authority of the Union Minister for Foreign Affairs, rather the fusion of administrative units now dependent on the Commissioner for External Relations and the High Representative for Common Foreign and Security Policy.

reduced grouping of Member States to establish more intense cooperation in security and defence matters. This flexibility has won the support of the Intergovernmental Conference, even though this has led to important changes in the initial design of the European Convention.¹¹

The permanent structured cooperation is governed by Articles I–41.6 and III–312 of the Treaty and by Protocol number 23. Their objectives are to develop greater defence capabilities, with the ability, by no later than 2007, to deploy combat units within a maximum of 5 to 30 days for a period of between 30 and 120 days. This deployment is for missions contemplated by Article III–309, and in particular in response to requests from the United Nations. To attain these objectives, five benchmarks are established: (1) cooperation in defence equipment investments; (2) harmonization of such investments between national forces; (3) enhancement of availability, interoperability, flexibility and deployability; (4) cooperation in addressing any lacunae as may exist; and (5) participation in joint or European equipment programs within the framework of the European Defence Agency.

On the other hand, and unlike what was set forth in the European Convention’s Draft, the Council has now been empowered to adopt structured cooperation, including participating Member States. This decision must be reached by a qualified majority and based on prior consultation with the Union Minister for Foreign Affairs, and taken within a maximum term of three months after the involved Member States notified their intention to participate. Additionally, the incorporation of a subsequent Member State into the structured-cooperation mechanism shall be subject to majority Council approval, the Union Minister for Foreign Affairs’ opinion and the State’s fulfilment of the Protocol’s criteria and commitments. The Council may also suspend the participation of a Member State if this State no longer fulfils the criteria or is no longer able to meet the commitments referred to in the Protocol. There is also a provision for a Member State to withdraw from the structured cooperation system after communicating its intention to the Council.

Generally, the regulation of structured cooperation makes clear the necessity for any cooperation in EU defence and security matters to become more flexible, permitting Member States to establish broader commitments more speedily. The right of Member States to participate in this cooperation mechanism has been consecrated, provided they meet the *objective* conditions of the protocol and that a qualified majority of the Council approves its participation.¹²

4. Mechanisms that Bear upon the Strengthening of EU Operational Capabilities

In the new Treaty, the mechanism whereby the EU identifies civilian and military capabilities retains its current legal character: Member States shall put their means at the disposal of the EU (Art. I–41.3). However, the Treaty incorporates three novel features that indicate a certain strengthening of EU operational capabilities: (i) the creation of the European Defence Agency; (ii) a mandate mechanism for the execution of EU operations; and (iii) a new system to finance the preparation of CSDP missions.

¹¹ The mechanism of structured cooperation is an idea specifically promoted by the States constituting the European Union of Security and Defence, an initiative signed on April 29, 2003, by France, Germany, Belgium and Luxembourg. The commitments assumed by these countries are in line with the points of the Treaty.

¹² For this purpose, qualified majority is defined as at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.

The European Defence Agency envisaged in Articles I–41.3 and III–311 is configured as a new subsidiary organ of the Council, which defines the Agency's statute, seat and operational rules.¹³ Its creation reflects a commitment assumed by the Member States to progressively improve their military capabilities. Nonetheless, its powers are limited to advising, assessing needs, and promoting the means to fulfil the agreed upon objectives of military capabilities. The envisaged enhancement of the industrial base and defence-technology sector remain subordinated to the Member States' judgment that such action is necessary. At the same time, specific groups within this agency may be created by Member States to carry out joint projects (along the lines of what now occurs at the Western European Armament Organization).¹⁴

The Treaty also contemplates the possibility that the Council of Ministers could entrust a mission's implementation to a group of Member States (Art. I–41.5). This new precept seems to reflect a Council of Ministers deferral to a group of willing and capable Member States, and removes the management of such an operation from the EU. According to Article III–310, the mission's management must be agreed upon among only those Member States, in association with the Union Minister for Foreign Affairs. The Union Minister thus becomes the main communication channel between these States and the EU, paralleling the reports that they must provide to the Council of Ministers.¹⁵

Paragraphs 1 and 2 of Article III–313 of the Treaty reproduce, literally, the provisions of the TEU relating to financing the Common Foreign and Security Policy. This requires this financing to fall under the general EU budget, except those operating expenditures stemming from military or defence operations, or whenever the Council of Ministers should decide otherwise.¹⁶ A change is found in the 'start-up fund' for financing the preparations for the CSDP crisis-management missions envisaged by Article I–41.1 that are not accounted for in the EU budget (operations with repercussions in military or defence spheres).¹⁷ Its creation is subject to adoption of European-wide decisions by the Council of Ministers; such decisions give definition to the constitutional and financial norms of the initial fund, as well as norms governing its

¹³ The European Defence Agency was established before the new Constitutional Treaty entered into force. See Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ 2004 I 245/17.

¹⁴ Neither the Treaty nor the Council Joint Action clarify whether existing arrangements for closer cooperation in the armaments area (such as the Western European Armament Organization, or the Western European Armament Group, both governed within the WEU framework) would be integrated into this agency, although the Joint Action refers to their working relations and talks about incorporation or assimilation of their relevant elements. Such integration is recommended by the Defence Group of the European Convention in its final report. See CONV 461/02, points 64 and 65.

¹⁵ Executing States shall immediately notify the Council of Ministers if undertaking a mission brings new and important consequences, or entails a modification of agreed upon objectives, scope, or means of execution. In such cases, the adoption of the necessary European decisions shall be within the Council of Ministers' competence (Art. III–310.2).

¹⁶ Whenever the costs are not accounted for by the EU budget, these shall be borne by the Member States in the same terms as those set forth at present (in accordance with the gross national product scale).

¹⁷ This fund is different to the current ATHENA mechanism: ATHENA is directed to administer the financing of the common costs of EU operations having military or defence implications. See Council Decision 2004/197/CFSP of 23 February 2004, OJ 2004 I 63/68.

administration and financial control. Once constituted, the fund's use is under the purview of the Union Minister for Foreign Affairs, with advance authorization of the Council of Ministers. This authorization must be reached unanimously, given that Article III-313 does not establish any other procedure. Though this financing mechanism is seen as a positive step, its efficacy is limited by the unanimity required for its use. Unanimity is an absolute requirement, even in the preparatory phase of an operation considering its viability, type, and even the suitability of the operation. It is unclear what kinds of preparations should be defrayed by this fund, and how they differ from the tasks assigned to specific EU organs, such as the Military Staff and the Military Committee.

5. International Agreements and the Competences of the European Court of Justice

Coherent with the attribution of an international legal personality to the EU, Chapter VI of Title V of Part III of the Constitutional Treaty regulates the procedure for the conclusion of international agreements between the EU and third countries or international organizations. This single procedure includes specificities of application for agreements in matters of foreign policy and common security. In comparison with the current Article 24 of the TEU, the Treaty introduces the following new features.

First, the current doubts about the legal imputation of international agreements relating to foreign policy and common security are removed.¹⁸ Secondly, the Treaty clarifies, legally speaking, the competence of the EU to conclude international agreements within the CSDP ambit (Art. III-323.1). Third, some changes are introduced respecting the organs and institutions competent to negotiate and conclude such agreements; these changes reflect the participation of the Union Minister for Foreign Affairs, but in no way do they alter the Council's powers, as it retains the exclusive competence over authorization to open negotiations, approval of negotiation directives, signing powers, and effective conclusion of the agreement.

Finally, the Treaty introduces a general clause allowing any Member State, the European Parliament, the Council, and the Commission to solicit the Court of Justice's opinion on the compatibility of any envisaged agreement with the Constitution. In the event of a negative ruling, said agreement may not enter into force unless it is amended or the Constitution is revised (Art. III-323.11). This provision, thus, allows the European Court of Justice an entry into common foreign and security policy, and into the CSDP. This is despite the Court of Justice's lacking jurisdiction—as Article III-376 establishes—with respect to Articles I-40 and I-41 and the provisions of Chapter II of Title V of Part III on Common Foreign and Security Policy. First, there is the recognition that international agreements in security and defence matters must conform to those procedures outlined in the Treaty's provisions. Secondly, and with respect to content, the European Court of Justice will have competence to study the consonance of any

¹⁸ In fact, the Treaty eliminates the provision under the current paragraph 5 of TEU Article 24, by virtue of which: 'No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with its own constitutional procedures.' There is thus a consecration of EU legal capacity to conclude and take part in international agreements in Common Foreign and Security Policy matters, and its unalloyed responsibility to fulfil the content of the same. In other words, Article III-323.2 (agreements concluded by the Union are binding on the institutions of the Union and on its Member States) will be in force with application in any and all Common Foreign and Security Policy areas.

agreement with the principles and objectives of EU foreign-policy action, since these are established in Article III-292, a provision that is 'inside' the Court of Justice's jurisdiction.

6. Final Considerations

Comparing the relevant provisions of the Treaty establishing a Constitution for Europe with the current characteristics of the ESDP allows an identification of the scope of legal changes to be introduced. In my judgment, the Constitutional Treaty confirms the features of the current ESDP, both in legal terms and in political terms. In legal terms, the ESDP retains its intergovernmental nature and so, its content and scope rely on the sovereign decision of each Member State. In this sense, the recent changes don't contribute significant novel elements to the present-day definition of the ESDP, but they do have implications for its possible future definition.

Specifically, the new mechanism for permanent structured cooperation seems to become the instrument intended for that definition provided the initial hypothesis can be validated. The creation of a 'Euro zone Defence' has two objectives, one short-term, the other medium-term. The short-term goal is an increase in the international visibility of the EU; in the same manner that the euro is 'the coin of the EU' (although not all EU members use it), structured cooperation will be perceived on the international stage as the 'EU policy on security and defence matters.' In fact, the Treaty itself contains the link between the ESDP and the permanent structured cooperation: using the mechanism contemplated in Article I-41.5, the Council may entrust a mission's implementation to the group of Member States participating in the permanent structured cooperation. The medium-term goal is to ensure a positive effect of this structured cooperation on the member states that do not initially participate, which will lead to a later incorporation of the great majority of them.

The hypothesis seems reasonable, if the introduction of the euro and the creation of the European Defence Agency serve as reasonable indicators. Nevertheless, the practical validation of this hypothesis confronts a principal difficulty: the initiation of a European Union crisis operation must be decided by unanimous consensus of all of the Member States, not only those participants involved in the permanent structured mechanism. This unanimity requirement and the intergovernmental nature of the ESDP can also be explained in political terms. An effective external EU action requires consensus between Member States, or at least the agreement of a great majority (permanent cooperation). In political terms, this limitation is in fact the real challenge of EU international role as it means Member States must overcome their differences, some of which involve key security questions and current international legal regulations.