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## **Options for the Further Development of CFSP and ESDP without a European Constitution**

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## Executive Summary

The Treaty Establishing a Constitution for Europe (TCE)\* sets forth various innovations and adjustments within the Common Foreign and Security Policy (CFSP), as well as within the European Security and Defence Policy (ESDP) that forms part of CFSP. These adjustments seek to enable the European Union (EU) to confront the security challenges of the early 21<sup>st</sup> century. The impending failure of the Constitutional Treaty thus raises a crucial question: To what extent can the EU become an effective international security actor without the measures to enhance flexibility and coherence that are contained in the treaty? Stated briefly, the prospects look reasonably good. Institutional innovations such as the creation of a Union Minister for Foreign Affairs, the establishment of a European External Action Service, and changes in the role of the Foreign Affairs Council are not necessarily dependent on the ratification of the Constitutional Treaty. The EU has been expanding the spectrum of its security-oriented activities since at least 2003, when the European Security Strategy was adopted. The European Defence Agency, which has been set up to coordinate European armaments programmes, was established in 2004. The solidarity clause envisaged by the Constitution could be appended to existing treaties through a joint declaration by EU member states. And while the Constitution would enable forms of flexible cooperation and integration in the field of security policy that are not set forth in the Treaty on European Union (TEU), this type of cooperation already exists in practice: for example, EU military operations such as that in the Democratic Republic of Congo have been implemented by select groups of EU member states.

Thus some of the most important instruments, institutions, and policy options envisaged in the Constitutional Treaty have already been initiated or put into the regular political practice of the EU. Other proposed innovations could also be implemented without a Constitution. Nevertheless, the adoption of the Constitutional Treaty would represent a significant step forward for CFSP and ESDP, as it would place a number of policy developments within a unified, formal framework, thereby enhancing the profile and credibility of the EU in relation to other international actors.

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\* Note: the following abbreviations are used in the text to refer to the various treaties of the European Union: Treaty Establishing a Constitution for Europe: TCE; Treaty on European Union: TEU; Treaty on European Union (Nice version): TEUN; Treaty Establishing the European Community (Nice version): TECN.

## 1. Introduction

The EU-25 are confronted by multiple challenges in the fields of foreign, security and defence policy. At a basic level, these challenges reflect the need to reconceptualise international relations at the beginning of the 21<sup>st</sup> century. In this regard, one of the EU's central tasks is to clarify its selfunderstanding as a global player. On one hand, this involves a clearer determination of the EU's relationship to other international actors. Relations with the United States have cooled, not only as a consequence of the Iraq war. Aspiring world powers, particularly China and India, engage with increasing selfconfidence on the world stage, a development that has important ramifications for the EU. On the other hand, the EU must develop differentiated policy options and instruments, as well as the corresponding operative capabilities, to respond effectively to new security threats.<sup>1</sup> As the attacks in Madrid and London have demonstrated, EU member states are also among the targets of transnational terrorism. In addition, the EU faces a sweeping array of security challenges that range from the proliferation of weapons of mass destruction to the threats that emanate from failing states. Furthermore, underdevelopment, poverty, and environmental problems in many world regions are also intertwined with the above-described threats.

In order to achieve the comprehensive capacity for action required of a global actor, it is urgent that the EU reform its Common Foreign and Security Policy as well as the European Security and Defence Policy that forms an integral component of CFSP. The Treaty Establishing a Constitution for Europe provides a number of significant changes that would enable qualitative progress in several areas. The treaty would lend greater coherence to the external action of the Union, expand its military options for achieving foreign policy objectives, and increase its flexibility, i.e., through instruments and procedures that would not require the participation of all member states. However, after the failed referenda in France and the Netherlands, public debates critical of the Constitutional Treaty have gained traction in an increasing number of member states. In response, the heads of state and government of EU member states have agreed to engage in a „period of reflection“ during which European leaders will examine whether and how the constitutional project can continue moving forward.<sup>2</sup> Will future analyses of CFSP/ESDP refer to the plans laid down in the Constitutional Treaty as merely a passing episode of conceptual thinking? Or is it possible that these reforms could be implemented, in whole or in part, without a Constitution?<sup>3</sup> The challenge here lies in optimising the Treaty of Nice, which provides an inadequate procedural basis for an EU consisting of 25 or more member states.<sup>4</sup>

## 2. CFSP: The Planning, Coordination, and Implementation of European Foreign Policy

Recurrent criticism has been directed toward the lack of coherence in various fields of EU external action, including development, trade, foreign and security policy. In addition, the dualism between the Commission and the Council – and the accompanying opposition between „communitisation“ and intergovernmental policy – is regularly pointed out as an example of structural weakness in European foreign policy. Consequently, a key priority for reform involves the institutional consolidation of those actors who shape European foreign policy.

### 2.1 The Union Minister for Foreign Affairs

The Constitutional Treaty assigns a central role to a new actor in European foreign policy: the Union Minister for Foreign Affairs. This position would consolidate foreign policy competencies at a supranational level, thereby enhancing the EU's policy coherence as well as its representation on the international stage. The minister's dual institutional affiliation – i.e., in both the Council and the Commission – would also provide a potential point of confluence for overcoming the conflicting forces of supranationalism and intergovernmentalism inherent in EU structures. According to the Constitutional Treaty, the Foreign Minister would be appointed by the European Council, acting by qualified majority, with the agreement of the President of the European Commission (Art. 128 §1 TCE). If the Constitutional Treaty were not to enter into force, an amendment procedure according to Article 48 TEU could serve as the basis for establishing the position of Foreign Minister. The means of selection could correspond to the stipulations set forth in the Constitutional Treaty. With regard to the agreement of the President of the Commission, however, it would be necessary to clarify the „doublehatted“ function of the Union Minister for Foreign Affairs, as discussed below.

In general, the Foreign Minister could assume a number of his or her assigned functions without requiring fundamental alterations to the existing treaty framework. These include:

- presiding over the Foreign Affairs Council (Art. 128 §3 TCE);
- functioning as the „face and voice“ of the EU toward third parties in matters of foreign and security policy, conducting political dialogue, and representing the EU's position in international organisations and at international conferences (Art. III-296 §2 TCE);
- participating in the work of the European Council (Art. 121 §2 TCE); and
- making policy recommendations on the development of CFSP, and carrying out these policies as mandated by the Council (Art. 128 §2 TCE).

The integration of the Foreign Minister within the Council on one hand, and the Commission on the other, is more problematic. The Constitutional Treaty states that the Foreign Minister will serve as one of the VicePresidents of the Commission; in addition, he or she will be responsible for the Commission's external relations activities and for coordinating other aspects of the EU's

external action (Art. 126 §5 and Art. 128 §4 TCE). In this context, the Foreign Minister would be bound by Commission procedures, which should not however be allowed to interfere with his or her Council functions, including the implementation of CFSP (Art. 128 §4 TCE). If the member states remain committed to the concept of a doublehatted Foreign Minister, it will be necessary to examine how the Minister's functions within both organs can be precisely delineated by means of an interinstitutional agreement.<sup>5</sup> In this respect, close attention must be paid to the changes that would be required of the Commission.

According to the provisions of the Constitutional Treaty, the Commission is responsible for ensuring the EU's external representation, with the exception of CFSP and other cases set forth in the Constitution (Art. 126 §1 TCE). It has been noted critically that the Foreign Minister's membership on both the Council and Commission threatens to undermine the latter's independent power of initiative, since the Commission could propose policies only in cooperation with the Foreign Minister.<sup>6</sup> Conversely, it can be argued that the Foreign Minister's presence on the Commission might provide that institution with a new opportunity to contribute to the external representation of the EU within the framework of CFSP.

The provisions laid out in the Constitutional Treaty place the Union Minister for Foreign Affairs in a position of triple dependence. The doublehatted function requires the Foreign Minister to be responsible to the Council on one hand, and the Commission on the other. In addition, however, the President of the European Council, as formulated in the Constitutional Treaty, is charged with ensuring the external representation of the EU in matters concerning CFSP, although these responsibilities are limited to his or her „level“ and „without prejudice to the powers of the Union Minister for Foreign Affairs“ (Art. 122 §2 TCE). This constellation of actors threatens to limit the scope of the Foreign Minister's functions. In a negative scenario characterised by power struggles between the Commission and the Council, or between the European Council and the Foreign Minister, this could not only lead to institutional skirmishes over authority<sup>7</sup> but also restrict the EU's ability to act effectively in the field of foreign and security policy.

The Constitutional Treaty leaves a number of open questions regarding the role of the Foreign Minister. What happens if the Foreign Minister becomes entangled in a conflict of interests between the Council and Commission that his dual affiliation prevents him or her from solving? Would this necessitate decisionmaking at the level of the European Council?<sup>8</sup> How would the Foreign Minister's standing be affected if a group of large member states insisted on asserting their interests against his or her opposition? In the past, it is precisely the policy discrepancies between the High Representative and individual member states toward third parties, frequently compounded by divergent articulations of interests, which have been identified as a key weakness of CFSP.

Instead of taking a euphemistic view of the Foreign Minister's doublehatted role, experts and policymakers should use the current „period of reflection“ to consider whether the position of



the Foreign Minister should be redefined. For example, in light of the unavoidable differentiation of the European integration process, it may be more feasible for the Foreign Minister to remain assigned only to the Council, albeit with a significant increase in competencies. This would of course perpetuate both the separation between the Commission and the Council as well as the abovementioned lack of coherence in European foreign policy. Nevertheless, the cooperative relationships between Javier Solana, the High Representative for CFSP, and the former and current External Relations Commissioners Chris Patten and Benita Ferrero-Waldner, demonstrate that a separation of offices does not inevitably give rise to friction. Assuming both a high level of coordination and good personal working relationships among the responsible actors, the appointment of a Foreign Minister with a single institutional affiliation would not fundamentally weaken the EU's capacity to act.

## 2.2 The European External Action Service

The Constitutional Treaty also sets forth the creation of a European External Action Service, which is closely connected to the role of the Foreign Minister and the strengthening of European foreign policy (Art. III-296 §3 TCE). A declaration appended to the Constitutional Treaty states that as soon as the treaty is signed, the Secretary-General of the Council/High Representative for CFSP, the Commission, and the member states are to begin preparatory work to establish the External Action Service (Declaration 24). Preparations to establish the External Action Service began quickly but have been accompanied by various controversies and open questions. Probably the most pivotal question concerns the institutional location of the Service.<sup>9</sup> In June 2005, a progress report on the establishment of the Service was to be submitted to the heads of state and government. Due to the abovementioned decision to engage in a period of reflection regarding the Constitutional Treaty, however, member states thought it advisable not to mention this progress report in the European Council conclusions. Nevertheless, deliberations on the establishment of an External Action Service should continue, despite the fact that some member states have begun to distance themselves from the endeavour.

If the member states agree to create a Union Minister for Foreign Affairs, it will be inescapably necessary to establish an External Action Service to support his or her capacity to act effectively. This Service could also be established without the enactment of the Constitutional Treaty. It should be examined whether an interinstitutional agreement can be reached to this effect. Regardless of whether the Foreign Minister wears a double hat or is assigned to a single institution, the External Action Service would play a central role in supporting the development and implementation of European foreign policy. The Service would also assume a key role in coordinating the external action of member states as well as linking supranational and intergovernmental policy levels. This could be expected to provide positive effects for both the coherence and visibility of European foreign policy.

However, locating the European External Action Service within the institutional framework of the EU may prove difficult. For example, the Service could be set up as a sui generis organisation with its own structure, although this would not involve the creation of a new institution with its own budget. The Commission's Directorate General for External Relations, as well as the Directorate General for External Relations, the Policy Unit, SITCEN, and the Military Staff within the Council's General Secretariat, could be assigned to the Service. Oversight by the European Parliament would remain unlikely. A close institutional attachment to the Commission – possibly to the point of organisational and budgetary integration within the Commission's structures – would counteract a potential weakening of the community model while providing the European Parliament with a certain amount of influence over the Service.<sup>10</sup> However, this option would not be compatible with the concept of a Foreign Minister assigned to only one institution.

Another open question concerns the policy issues that would fall within the ambit of the External Action Service. Should the Service's responsibilities encompass issues that go beyond clear-cut questions of CFSP and ESDP, such as relations with third countries, Neighbourhood Policy, disaster relief, development policy, or even trade policy? A number of smaller member states, as well as France and the United Kingdom, have expressed reservations against a powerful External Action Service with extensive foreign policy competencies. While smaller member states harbour fears of dominance by larger member states, governments in London and Paris are willing to accept limitations to their national foreign policies only to a certain degree.

In this context, it is also important to consider the composition of the Service. According to the Constitutional Treaty, the Service is to be comprised of officials from the relevant departments of the Commission and the General Secretariat of the Council, as well as national diplomats seconded from member states. This method of composition would be compatible with both a double-hatted Foreign Minister as well as a Foreign Minister with a single institutional affiliation. This type of functional cooperation among expert officials is already evident in current practice, in which the Secretary General of the Council/High Representative of CFSP is charged with the coordination of European foreign and security policy. Moreover, the establishment of an External Action Service would set in motion a learning process that – while potentially slowgoing – would ultimately promote the consolidation of divergent bureaucratic cultures and ways of thinking.<sup>11</sup> However, it remains open to question whether strengthening the Council as the centre for foreign and security policy decisionmaking would cultivate a common foreign policy culture.

## 2.3 Changes in the Configuration of the Council

According to the Constitutional Treaty, the Council – in the configuration of the Foreign Affairs Council – is responsible for elaborating the EU's external action and ensuring that this action is coherent (Art. I24 §3 TCE). The Council and the Commission will work together to ensure the consistency of EU external policies, assisted by the Union Minister for Foreign Affairs (Art. III-292 §3 TCE). Consequently, the Council is to serve as the forum for coordinating the activities of both the Union Minister for Foreign Affairs as well as the Ministers for Foreign Affairs of the member states (Art. III-301 TCE). This formal separation of the Foreign Affairs Council from the General Affairs Council is meant to lighten the workload of foreign ministers and enable them to concentrate on their core responsibilities.<sup>12</sup> This proposed reform is also not dependent upon the enactment of the Constitutional Treaty and could be implemented through a decision by the General Affairs Council.<sup>13</sup>

## 2.4 European Decisions, Common Strategies, Common Positions, and Joint Actions

The Constitutional Treaty sets forth a new typology and definition of legal acts to be implemented by the EU. According to the treaty, European decisions are the legal acts that apply to CFSP. These decisions determine both the actions to be undertaken and the common positions to be taken by the EU (Art. III-294 §3b TCE). The currently applicable procedures – common strategies, joint actions, and common positions – are thereby subsumed within one type of legal act.

The common strategy (Art. 13 §2-3 TEU-N) finds expression in Article III-293 of the Constitutional Treaty. Acting upon recommendations by the Council, the European Council will determine and implement the strategic interests and goals of the EU by unanimously adopting European decisions. These decisions can be both geographic (i.e., affecting the EU's relations with a particular country or region) or thematic in nature. Such decisions will specify both their duration as well as the resources to be made available by the EU and its member states (Art. 293 §1 TCE). The joint action (Art. 14 TEU-N) is reflected in Article III-297 of the Constitutional Treaty. In responding to specific international situations and developments, the Council will determine the EU's operational actions by adopting European decisions that delineate the objectives, scope, means to be made available to the Union, and if necessary the duration of a particular action (Art. III-297 §1 TCE). Finally, the common position set forth in Article 15 of the Treaty of Nice is reflected in Article III-298 of the Constitutional Treaty.

By and large, the Constitutional Treaty upholds the principle of unanimity for decisionmaking processes affecting CFSP (Art. I40 §6 and Art. III-300 TCE). To be sure, the Constitutional Treaty provides for certain changes in CFSP decision-making procedures, but the document contains no decisive breakthroughs. The existing principle whereby the European Council controls decisions on the use of qualified majority voting remains untouched.

If the Constitutional Treaty does not ultimately enter into force, CFSP will continue to be characterised by the familiar instruments of common strategies, joint actions, and common positions. The specifications set forth in the Treaty of Nice regarding qualified majority voting will also continue to apply. With or without a Constitution, member states retain strong reservations against transferring sovereignty in the field of foreign and security policy to the supranational level.

### **3. ESDP: Enhancing Military Capacity for Action**

The European Security and Defence Policy should be understood as part of CFSP. Since the end of the past decade, ESDP has developed with remarkable dynamism. Despite obvious weaknesses with regard to relevant capacities and instruments, the EU now has the possibility to supplement its foreign and security policy actions with military measures.

#### **3.1 An Expanded Spectrum of Tasks**

The Constitutional Treaty expands and specifies the spectrum of measures subsumed under the rubric of the Petersberg Tasks, i.e., humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management, including peacemaking (Art. 17 §2 TEU-N). In this respect, the text of the Constitution takes into account the primary threats delineated in the European Security Strategy of December 2003, which include weapons of mass destruction, terrorism, and failing states. Future EU missions may thus encompass the following measures and tasks (Art. III-309 §1 TCE):

- joint disarmament operations;
- humanitarian and rescue tasks;
- military advice and assistance tasks;
- conflict prevention and peacekeeping tasks; and
- tasks of combat forces in crisis management, including peacemaking and postconflict stabilisation.

According to the Constitutional Treaty, the objectives, scope, and general conditions for implementation of missions conducted under the expanded spectrum of the Petersberg Tasks are to be stipulated in European decisions adopted unanimously by the Council (Art. III-309 §2 TCE). As set forth in the Treaty of Nice (Art. 25 TEU-N), the Political and Security Committee will exercise political control and strategic direction of crisis management operations, although in the future this will occur not only under the responsibility of the Council but rather under the joint responsibility of the Council and the EU Foreign Minister (Art. III-307 §2 TCE). In addition, the Foreign Minister and the Political and Security Committee, acting under the authority of the Council, are responsible for coordinating the civilian and military aspects of EU missions (Art. III-309 §2 TCE).

An additional innovation contained in the Constitution provides the Council with the authority to allow an unspecified number of willing and capable member states to engage in missions that would be conducted under the legal framework and in the name of the EU. Member states acting in this manner would enjoy greater legitimacy by integrating their operations within the framework of the EU; for its part, the EU could enhance its international profile by authorising such missions.

A glance at the EU missions conducted to date, however, reveals that these missions already correspond to the logic laid out in the Constitutional Treaty. Not a single mission conducted under the European flag has involved the participation of all member states (this is a given considering Denmark's defence opt-out). The Concordia military mission in Macedonia involved the participation of 13 of the then 15 member states (excluding Denmark and Ireland) as well as eight of the ten states that joined the EU in May 2004 (excluding Malta and Cyprus). And 22 of the current 25 EU member states are involved in Operation Althea, the military mission in BosniaHerzegovina that commenced in December 2004 (excluding Denmark, Malta, and Cyprus). Thus the conduct of military missions by a group of member states is already a fact of EU policy.

### 3.2 The European Defence Agency

The creation of a European agency for armaments and procurement has been a subject of discussion for years. The guiding idea underlying this debate focuses on the more efficient use of national research and development capacities in the armaments sector through the consolidation and joint financing of various projects. The process of integrating and consolidating defence projects has also raised the question of convergence criteria and standards in the field of weapons technology. The proposals contained in the Constitutional Treaty are directed toward these issues. Articles I41 §3 and III-311 TCE provide the framework for the agency in the field of defence capabilities development, research, acquisition, and armaments, which is subordinated to the Council. The spectrum of tasks to be tackled by this agency – the European Defence Agency (EDA) – encompasses the following:

- contributing to the identification and evaluation of current and planned military capabilities of member states;
- promoting the harmonisation of operational needs and the adoption of effective and compatible procurement methods;
- proposing multilateral projects and programmes to be implemented by member states and coordinating specific cooperation programmes;
- coordinating joint research activities; and
- strengthening the European defence sector through targeted policies and military expenditures.

The EDA was established under a joint action in the summer of 2004 (Council Joint Action 2004/551/CFSP, 12 July 2004). The agency acts under the authority of the Council which, in the

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configuration of Ministers of Defence, determines the guidelines and financial framework for the agency's work. The EDA is chaired by the High Representative for CFSP, Javier Solana. This function will be assumed by the EU Foreign Minister should the Constitutional Treaty enter into force.

The EDA plays a particularly important role in the implementation of the 2010 Headline Goal. While European leaders had agreed on the first European Headline Goal at the Helsinki European Council of 1999, doubts were raised during ensuing Capability Commitment and Capability Improvement conferences with regard to the EU's military capabilities. After the Council approved the European Capabilities Action Plan (ECAP) in 2001, member states sought to analyse the EU's most significant capability deficits, and to remedy these deficits within the framework of project groups that were established beginning in September 2003. Although considerable qualitative deficits in the fulfilment of the Helsinki Headline Goal were identified at the end of 2003, member states agreed on a new 2010 Headline Goal in June 2004. The new Headline Goal builds on the Helsinki Headline Goal and, taking recent technological and strategic developments into account, seeks to address key capability gaps and thereby to contribute to the implementation of the European Security Strategy.

One important feature of the EDA is its embeddedness within the institutional framework of the EU. Previous forms of cooperation had the disadvantage that their agreements were non-binding, and states that failed to fulfil their commitments could not be sanctioned. While states are still not subject to punitive measures in the current constellation, the EDA can now exercise powerful political pressure on member states to fulfil their commitments. This is connected to an important degree to the guidelines contained in the Protocol on Permanent Structured Cooperation, which is appended to the Constitutional Treaty. This protocol stipulates that all member states wishing to engage in this form of cooperation must fulfil certain prerequisites.<sup>14</sup> States that fail to satisfy these criteria may be suspended from participating in permanent structured cooperation (Art. III-312 §4 TCE).

In addition to coordinating the implementation of ECAP and monitoring and evaluating member state commitments to ECAP, the EDA is also tasked with strengthening the industrial and technological base of the European defence sector (Art. III-311 §1 TCE). In September 2004, the Commission produced a Green Paper on Defence Procurement, which sought to clarify the rules pertaining to the contracting and supply of defence materials. During consultations on the Green Paper, the EDA announced an action plan to establish an intergovernmental regime that will monitor procurement procedures in which member states claim exceptional circumstances in order to invoke Article III-436 TCE, under which EC Public Procurement Rules do not apply.

The European Defence Agency will continue to exist, with the same palette of tasks and responsibilities, regardless of the fate of the Constitutional Treaty. Its role in the implementation of the 2010 Headline Goal, and its attempts to push forward the fulfilment of European defence capability requirements, will remain unaffected as well.

A continuing obstacle to enhanced European armaments collaboration is presented by Article 296 §1 TEC-N, which allows member states to withhold information whose disclosure is considered contrary to its essential security interests. In addition, member states are permitted to take measures to protect their essential security interests as concerns the production of or trade in arms, munitions, and war material. This protective mechanism is repeated in Art. III-436 of the Constitutional Treaty. As a result, the divergent efforts on the part of the Commission and Council to improve collaboration within the fragmented European defence equipment market are likely to lead to cross-pillar conflicts of interest and competencies, with or without a Constitution.

### 3.3 Solidarity and Mutual Assistance

There is widespread agreement among European leaders regarding both the commitment to a broad concept of security as well as the new types of security challenges that predominate at the beginning of the 21<sup>st</sup> century. The Constitutional Treaty's solidarity clause (Art. I-43 TCE) refers explicitly to the possibility of terrorist attacks on the sovereign territory, institutions, and civilian populations of member states. This clause also encompasses both natural and man-made disasters. According to the treaty, member states affected in any of these instances will receive corresponding assistance from the other member states of the Union. While Article III329 sets forth the framework for the application of the solidarity clause, the exact form of such assistance remains a matter of interpretation. In addition, the clause is activated not automatically but rather upon the request of an affected member state's political authorities. In the spirit of the solidarity clause, the heads of EU states and governments issued a declaration of solidarity against terrorism in response to the Madrid terrorist attacks of March 2004.<sup>15</sup> The instruments to be employed by member states in exercising solidarity include the use of military resources.

The solidarity clause does not address the matter of a military attack against the sovereign territory of a member state. However, Article I-41 §7 of the Constitutional Treaty includes an „aid and assistance“ provision: if a member state is the victim of an armed attack, „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.“ The specific character of the security and defence policy of particular member states is not to be violated through the application of this provision, however.

If the Constitution does not enter into force, it should be examined whether this aid and assistance provision could be enacted by an amendment of primary law, or whether member states could pledge their commitment to mutual assistance through a declaration appended to the existing EU treaties. In the case that only a limited number of member states are willing to enter such a commitment, the possibility should be left open for them to sign on to a declaration that would then be binding on only those member states.

## 4. Additional Mechanisms of Flexible Cooperation within CFSP and ESDP

European foreign, security, and defence policy must be able to react quickly and in a targeted manner to international challenges. Yet the EU is comprised of member states that do not always possess the necessary capabilities, that are characterised by divergent security policy traditions, and whose national law and/or budgetary guidelines may set restrictions on how they conduct their foreign and defence policy. As a result, the EU's ability to act effectively in these areas will depend on possibilities for flexible cooperation among member states, particularly as the Union continues to enlarge.

### 4.1 Enhanced Cooperation

The concept of enhanced cooperation, as refined in the Treaty of Nice, provides a starting point for differentiated integration in the field of CFSP. However, these possibilities for flexible integration relate only to the implementation of a joint action or common position. In addition, if an individual member state declares its opposition to a particular enhanced cooperation initiative due to important reasons of national policy, it can prevent a qualified majority vote that would otherwise allow such an initiative to be implemented (Art. 23 §2 TEU-N). Further, the mechanism of enhanced cooperation must remain open to those member states that opted not to participate from the beginning. Finally, enhanced cooperation may be undertaken only as a last resort, i.e., after it has been determined that a particular objective within the EU treaties cannot be achieved within a reasonable period of time. As a result, enhanced cooperation has not proven to be a particularly useful instrument for the „everyday business“ of CFSP, and it has no relevance whatsoever for ESDP<sup>16</sup> since matters having military or defence implications are excluded from enhanced cooperation (Art. 27b TEU-N).

The Constitutional Treaty would elevate the status of enhanced cooperation as an instrument of EU foreign, security, and defence policy. Enhanced cooperation in the field of CFSP would no longer be limited to joint actions and common positions, and matters of military and defence policy would no longer be automatically excluded. Consequently, the instrument of enhanced cooperation would generally have greater applicability for the development of European foreign, security, and defence policy. However, the following specifications would apply:

- As a rule, the Constitutional Treaty provides that enhanced cooperation can be established by a European decision taken by a qualified majority vote of the Council. This is not the case, however, for matters of foreign and security policy. Enhanced cooperation in these areas requires unanimous authorisation by the Council (Art. III-419 §2 TCE).
- In general, the same procedures and instruments set forth in the Constitution with regard to individual policy areas also apply to enhanced cooperation. In certain cases requiring decisionmaking by unanimity, a *passarelle clause* can be invoked in which, by unanimous vote, the Council can stipulate that it will act by qualified majority vote and under ordinary



legislative procedures (Art. III-422 TCE). However, this possibility does not apply to decisions having military or defence implications (Art. III-422 §2 TCE).

- Finally, it is important to note that, even under the Constitution, enhanced cooperation is permitted only as a last resort, when specific objectives cannot otherwise be achieved within a reasonable period of time (Art. I-44 §2 TCE).

If enhanced cooperation is to become an effective procedure for action in the fields of CFSP and ESDP, the special regulations laid out in the Treaty of Nice would have to be rescinded. Apart from certain limitations – particularly the stipulation that enhanced cooperation requires unanimous authorisation by the Council – the Constitutional Treaty represents an important step in this direction. Without a Constitution, an expansion of enhanced cooperation to go beyond the formulation of joint actions and common positions, and to include issues of military and defence policy, could be realised only through treaty amendments. As mentioned above, however, enhanced cooperation has had minimal relevance for CFSP up to this point. A more promising approach for enhancing the flexibility of European foreign, security, and defence policy is provided by the instrument of permanent structured cooperation, which would enable action by groups of member states.

## 4.2 Permanent Structured Cooperation

Flexibility, and allowing groups of member states to take responsibility in moving forward with CFSP and ESDP, represent key prerequisites in enabling an EU of 25 or more member states to avoid policy stalemate and to promote effective action in the fields of foreign and security policy. According to the Constitutional Treaty, permanent structured cooperation may be established by member states whose military capabilities fulfil higher criteria and who make binding commitments to each other regarding the implementation of highly demanding missions (Art. I-41 §6 and Art. III-312 TCE). The obligations and prerequisites to be fulfilled by interested member states are elaborated in Protocol 23 appended to the Constitutional Treaty. These include the intensive development of defence capacities by:

- upgrading national contributions;
- participating in multinational forces;
- participating in the main European equipment programmes; and
- participating in the activities of the European Defence Agency.

In addition, such states must commit themselves to developing, by 2007 at the latest, the capacity to contribute to EU battle groups, either as a national contingent or as a component of multinational force groups. They must also commit to participating in the development of multinational or European equipment programmes within the framework of the European Defence Agency. The EDA will be tasked with assessing these contributions. If a participating member state is no longer able to fulfil the necessary criteria, the Council can adopt a European decision to suspend this member state's participation (Art. III-312 §4 TCE).

The instrument of permanent structured cooperation does not conflict with the stipulations concerning missions conducted under the auspices of the expanded spectrum of the Petersberg Tasks. According to the Constitutional Treaty, the Council can charge a group of member states with the implementation of a mission „to protect the Union’s values and serve its interests” (Art. I-41 §5 TCE). The prerequisite for this is that the states concerned must be willing and have the capability to perform the required tasks (Art. III-310 §2 TCE). The participating states are to agree among themselves on the execution of the mission, in consultation with the EU Foreign Minister, and must report regularly to the Council regarding the mission’s progress. If shifting circumstances (e.g., due to the expansion or spread of a particular conflict) should have significant consequences on the implementation of the mission or require changes in the mission’s objectives, the Council is tasked with adopting the appropriate European decisions (Art. III-310 §2 TCE). The instrument of permanent structured cooperation can also be understood as providing a platform for the development of joint military structures.

It should be pointed out once again that the military operations of the EU are already characterised by the formation of groups of member states. The EU military mission in the Democratic Republic of Congo (Operation Artemis) provides a relevant example. In this operation, France served as lead nation, with the additional participation of Austria, Belgium, Germany, Greece, the Netherlands, Spain, Sweden, and the United Kingdom. In light of both international and intra-European expectations regarding the need for the EU to develop a comprehensive operative military capacity, it would appear necessary to anchor permanent structured cooperation firmly within the EU treaties. Should the Constitution not be enacted, the way would then need to be paved for an amendment to the existing treaties. If the member states are unable to reach agreement on such an amendment, the formation of groups of member states to carry out certain policies and tasks can nevertheless continue to proceed without a basis in treaty law, as is clearly the case today.

## 5. Conclusion

Promoting a dynamic process of integration within CFSP and ESDP in times of crisis requires reform efforts that will help to balance out the increasingly heterogeneous interests that characterise an enlarging EU. Regardless of whether they are instituted in the context of the Constitutional Treaty or modifications to the Treaty of Nice, such reforms must address the complexity of EU procedures and decision-making processes. As discussed in this paper, key reform projects are already being implemented in the fields of EU foreign, security, and defence policy. Consequently, these policy areas will continue to be developed even if the Constitutional Treaty never enters into force. In such a case, policymakers can consider whether to implement the innovations contained in the Constitutional Treaty through amendments and additions to the existing *acquis*. It will be decisive for the legitimacy and effectiveness of CFSP and ESDP that foreign and security policy decisions, and their resulting actions, arise from a framework that is accepted by all member states. In any case, it would be a mistake to institute these changes in a manner that could be construed as a move toward the „communitisation“ of these policy areas. As was the case in past CFSP reforms, there will continue to be limits regarding the transfer of competencies to the supranational level.

Aside from this „internal“ assessment, it is equally important to consider the „external“ dimension of reforms within the fields of CFSP and ESDP. Through the Treaty of Nice, the European Security Strategy, and various EU strategy documents concerning specific countries, regions, and thematic areas, EU member states have set a benchmark for themselves that they need to fulfil with regard to the effective implementation of the values and objectives of EU foreign, security, and defence policy. In order for the Union to be accepted by other international actors, it will need to complete the abovedescribed legal, institutional, and actorspecific developments that have been initiated within the EU system. The credibility and power of the EU as a global actor will depend to a decisive extent precisely on the achievement of these objectives.

## Notes

- <sup>1</sup> See A Secure Europe in a Better World, European Security Strategy, Brussels, 12 December 2003.
- <sup>2</sup> See „Declaration by the heads of states and governments of the member states of the European Union on the ratification of the treaty,” Brussels, 18 June 2005, SN 117/05, European Council, 16-17 June 2005.
- <sup>3</sup> For greater detail on relevant sections of the Constitutional Treaty, see Franco Algieri, „Von der Macht der Zeitumstände und der Fortführung eines integrationspolitischen Projekts,” in *Die Europäische Verfassung in der Analyse*, ed. Werner Weidenfeld (Gütersloh: Bertelsmann Stiftung, 2005), pp. 205-227; Franco Algieri and Thomas Bauer, „Eine Frage der Macht: Die EU auf dem Weg zum sicherheits und verteidigungspolitischen Akteur mit globaler Reichweite,” in Weidenfeld, pp. 228-249; Elfriede Regelsberger, „Mehr Sichtbarkeit, Kohärenz und Effizienz für die GASP: Chancen und Risiken im neuen Verfassungsvertrag,” in *Der Vertrag über eine Verfassung für Europa: Analysen zur Konstitutionalisierung der EU*, ed. Mathias Jopp and Saskia Matl (BadenBaden: Nomos, 2005), pp. 323-341; Udo Diedrichs and Mathias Jopp, „Die Sicherheits und Verteidigungspolitik der EU nach dem Verfassungsvertrag: Innovationen, Experimente, Impulse,” in Jopp and Matl, pp. 343-366.
- <sup>4</sup> See Jörg Monar, „Optionen für den Ernstfall: Auswege aus einer möglichen Ratifizierungskrise des Verfassungsvertrags,” *Integration* 28:1, pp. 1632 (2005); Bettina Thalmaier, „Optionen für einen PlanB im Falle des Scheiterns der Ratifikation des Verfassungsvertrags,” CAP Working Paper, Munich; Janis Emmanouilidis and Bettina Thalmaier, „Non, Nee, Ne, Nie oder Non: Konsequenzen, Optionen und Empfehlungen im Falle einer Ablehnung der Verfassung,” *EU Reform Spotlight* 3 (2005).
- <sup>5</sup> On interinstitutional agreements within CFSP, see Andreas Maurer, Daniela Kietz, and Christian Völkel, „Interinstitutional Agreements in the CFSP: Parliamentarization through the Back Door?,” *European Foreign Affairs Review* 10:2, pp. 175-195 (2005).
- <sup>6</sup> Daniel Thym, „Die neue institutionelle Architektur europäischer Außen und Sicherheitspolitik,” *Archiv des Völkerrechts* 42:1, p. 50 (2004).
- <sup>7</sup> Nadia Klein and Wolfgang Wessels, „Eine Stimme, zwei Hüte, viele Pioniere? Die Gemeinsame Außen und Sicherheitspolitik nach dem EUKonvent,” *WeltTrends* 12:42, p. 22 (2004).
- <sup>8</sup> Matthias Ruffert, „Schlüsselfragen der Europäischen Verfassung der Zukunft. Grundrechte, Institutionen, Kompetenzen, Ratifizierung,” *Europarecht* 39:2, p. 186 (2004).
- <sup>9</sup> See, e.g., Giovanni Grevi and Fraser Cameron, „Towards an EU Foreign Service,” Issue Paper 29, European Policy Centre (2005); Annette Heuser, „Diplomaten für Europa: Eckpunkte zur Gestaltung des Auswärtigen Dienstes,” *EU Reform Spotlight* (2005); Andreas Maurer and Sarah Reichel, „Der Europäische Auswärtige Dienst,” *SWPAktuell* 53, Stiftung Wissenschaft und Politik (2004).
- <sup>10</sup> See „Motion for a Resolution by Jo Leinen on behalf of the Committee on Constitutional Affairs on the institutional aspects of the European External Action Service,” PE 357.422, 12 May 2005.
- <sup>11</sup> Cf. Thym, Note 6, pp. 5860.
- <sup>12</sup> Cf. Regelsberger, Note 3, pp. 323341; Thym, Note 6, p. 48.
- <sup>13</sup> See Presidency Conclusions, Helsinki European Council, Annex III, 1011 December 1999.
- <sup>14</sup> See Section 4.2 below.
- <sup>15</sup> See „Draft Declaration on Solidarity against Terrorism,” European Council, 25 March 2004.
- <sup>16</sup> Regelsberger, Note 3, p. 340.

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