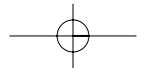
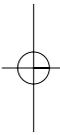
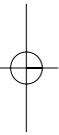
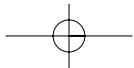
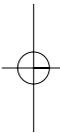
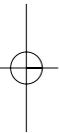




PART III
CONSISTENCY OF THE
EUROPEAN SECURITY
FRAMEWORK





10

Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility

*Ramses A Wessel**

1. Introduction

With the Treaty of Nice (2001) a security and defence policy (ESDP) has finally become part of the competences of the European Union as a subdivision of the Common Foreign and Security Policy (CFSP) that was introduced by the Maastricht Treaty in 1992.¹ While neo-functionalist integration theories might have expected this to happen much sooner, many Member States were (and still remain) hesitant to hand over any powers in this area. Reasons can be found in the close connection between defence policy and the sovereignty of the state as well as in a fear of undermining NATO. This has resulted in a number of compromises which, in turn, raise the question of whether security and defence policy has really been integrated into the legal structure of the EU. No explicit mention is being made in the Union Treaty; yet practice reveals the creation of a number of new organs dealing with the formulation and implementation of military operations (such as the Military Committee and the Political and Security Committee). This half-hearted integration of a new policy area raises a number of legal questions that so far have been left almost untouched in the literature. Since 'security and defence policy' is separated from 'foreign and security policy', one of the key questions concerns the dividing line between the two areas. EU security law is based on

* Professor of the Law of the European Union and other International Organizations, Centre for European Studies and Law Department, University of Twente, The Netherlands. The author wishes to thank the participants in the *Colloquium on European Security Law*, University of Nottingham, 14–15 April 2005 and in particular Martin Trybus and Frederik Naert for their valuable comments. All website addresses cited were active on 17 October 2006, unless otherwise specified.

¹ See in general on the ESDP: R A Wessel, 'The State of Affairs in European Security and Defence Policy: The Breakthrough in the Treaty of Nice' *J of Conflict & Security L* vol 8, no 2 (2003) 265–88 and, more extensively, M Trybus, *European Union Law and Defence Integration* (Oxford: Hart, 2005) ch 3.

both, but at the same time different rules apply for the CFSP and the ESDP. Is it possible for Member States not to participate in the security and defence integration or does the single legal order of the Union prevent this variation? A second question concerns the more general possibilities for closer (or 'enhanced') cooperation. While the Treaty on the one hand allows for groups of Member States to work closer together in the area of the CFSP, the possibilities for an enhanced cooperation in the ESDP are less evident. And, finally, the question is to what extent the proposed new European Constitution further consolidates the somewhat fragmented legal regime on differentiation in the area of foreign, security, and defence policy.

2. Flexibility in the European Union

In order to be able to say something on the special arrangements in the area of foreign, security, and defence policy, a first step is to take a look at the general flexibility regime in the EU. As far as European Community law is concerned, it traditionally builds on the principle of uniformity. This principle implies that all Member States reach a certain objective at the same time and that measures discriminating between Member States are not adopted. Community law is the same for all Member States under all circumstances.² However, from the outset exceptions to this rule were accepted, and related to: the participating states, the moment of entry into force of a measure, and/or the attainment of the objective of a measure. Thus, the original EEC Treaty acknowledged closer cooperation between the Benelux countries; transition arrangements were accepted for new Member States and certain Member States were allowed to refrain from participation in the European Monetary System or other areas of cooperation.³ Secondary legislation also revealed temporary differences between Member States as it sometimes allowed for alternative, optional, or minimum national measures.⁴ In addition Article 220 (now 293) of the EC Treaty allowed for separate treaties to be concluded between Member States on subjects connected with the development of the Community.

The past two decades have presented further examples of an erosion of the principle of uniformity. In 1985 the dissolution of border controls became the subject of an extra-Community arrangement between a restricted number of Member States: the Schengen agreement. In 1986 the Single European Act extended and strengthened the harmonization competences of the EEC, while at the same time

² Cf European Court of Justice, Case 166/73, *Rheinmühlen* [1974] ECR 19. The principle of uniformity runs through the entire case law of the Court. See R Barents, *Het Verdrag van Amsterdam in werking* (Deventer: Kluwer, 1999) 85.

³ Examples of the latter include the Protocols to the original EEC Treaty on Luxembourg and German Internal Trade.

⁴ See for instance the Groundwater Directive 80/68 (OJ 1980, L-20/43) and the Capital Movements Directive 88/361 (OJ 1988, L-178/5).

allowing Member States to continue to apply national measures on certain grounds and under specified procedures.⁵ The 1992 Treaty on European Union allows for different speeds to reach the objectives of an Economic and Monetary Union (EMU) as well as for Member States not to participate at all in the EMU. Comparable exceptions were allowed in the fields of, for instance, social policy (UK) and the development of a defence policy (Denmark).

The idea of a possibly fragmented Union played an important role in particular during the negotiations on the Amsterdam Treaty in 1996/97. The different variations of flexibility were frequently presented as harmful to the Union's unity. Thus concepts like *variable geometry*, *concentric circles*, a *multiple-speed Europe*, or a *Europe à la carte* all seemed to prelude the end of the Union. While these concepts did not make it to the final draft of the Treaty, the development towards a more flexible approach towards cooperation within the EU is reflected in the modifications to the TEU introduced by the 1997 Amsterdam Treaty.

The current Treaty on European Union, as well as the modified EC Treaty, provides for a number of general and specific arrangements allowing for forms of flexible cooperation between a limited number of Member States. The concept of 'flexible cooperation' or 'differentiation' in the context of the present contribution concerns the situation in which the 25 Member States do not necessarily participate to the same extent in every policy or activity of the Union.⁶ The Treaty on European Union nowhere explicitly refers to the notion of flexibility.⁷ However, one can distinguish between at least two broad categories of flexibility within the Unions' legal system. The first category contains the general *enabling clauses* on the basis of which the Council has a competence—through the adoption of secondary legislation—to decide on the establishment of 'enhanced cooperation'. The second category harbours a variety of forms of flexible cooperation linked to specific fields of EU/EC competence, including the so-called *pre-determined* forms of flexibility, ie, forms of differential treatment of certain Member States as laid down in the treaties themselves or in protocols, as well as ad hoc or 'spontaneous' differentiation following an opt-out of Member States with respect to certain decisions.⁸

⁵ See the old Art 100A(4) EC. The Treaty of Amsterdam extended and to some extent clarified its elements. See the new Art 95 EC.

⁶ Cf J A Usher, 'Flexibility: The Amsterdam Provisions', in: T Heukels, N M Blokker, M M T A Brus (eds), *The European Union after Amsterdam, A Legal Analysis* (The Hague: Martinus Nijhoff, 1999) 253.

⁷ See G Edwards G and E Philippart, 'Flexibility and the Treaty of Amsterdam: Europe's New Byzantium?', *Centre for European Legal Studies Occasional Paper No 3* (Cambridge: 1997) 12: 'During the legal and linguistic revision of the text agreed in June (1997), the word "flexibility" disappeared. The need for it was no longer important in the domestic politics of the UK.' See also J Shaw, 'The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy' *Eur LJ* (1998) 63, at 69.

⁸ See more extensively on the theoretical implications of flexibility for the unity of the Union's legal order I F Dekker and R A Wessel, 'The European Union and the Concept of Flexibility. Proliferation of Legal Systems within International Organizations' in N M Blokker and H G Schermers (eds), *Proliferation of International Organizations* (The Hague: Kluwer Law International, 2001), 381–414.

2.1. General EU/EC enhanced cooperation

The first category of flexibility provisions is contained in Title VII EU and introduces a general competence for Member States to use the mechanism to establish 'enhanced cooperation' in, as yet, unidentified areas. Article 43 EU states:

Member States which intend to establish enhanced cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and by the Treaty establishing the European Community [...].

This competence is subject to a number of general and specific conditions—as listed in Article 43 EU and Articles 27A EU (on CFSP), 40B EU (on Police and Judicial Cooperation in Criminal Matters: PJCC) and 11A EC (Community cooperation), Article 11 EC and Article 40 EU—which to a large extent determine the feasibility of the mechanism of closer cooperation. At first sight these conditions may seem to be obvious, but in fact they raise a lot of still unsettled questions of interpretation.⁹

Before the 2004 enlargement of the Union, enhanced cooperation could only be established among a majority of the Member States as Article 43 refers to a minimum of eight participants. However, this provision has not been changed with the increase in the number of Member States, which means that these days less than one third of the Member States would form a sufficient basis for a form of enhanced cooperation.

In making use of the institutions, the states participating in enhanced cooperation are furthermore bound by Article 44 EU, which provides that the relevant institutional provisions apply. An exception is made with regard to the adoption of decisions by the Council. While all states may take part in the deliberations, only the states participating in enhanced cooperation take part in the adoption of decisions, which implies a *de facto* derogation from the unanimity rule on issues where it would normally be applied (since it is not required to have *twenty-five* votes in favour, despite the fact that the legal basis remains the same). In case of qualified majority voting, the rules are adapted according to the number of participating Member States. Except for the administrative costs of the institutions, expenditure is to be borne by the participating Member States, unless the Council unanimously decides otherwise.

2.2. Pre-determined forms of flexibility

The second category of flexibility within the EU/EC legal systems first of all contains the aforementioned *pre-determined* forms of flexible cooperation. While one

⁹ See also Shaw, n 7, above, 70–6; JA Usher, 'Flexibility: The Amsterdam Provisions' in Heukels, Blokker, Brus (eds), n 6, above, 263–264; and C D Ehlermann, 'Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty', 4 Eur L J (1998) 246–70 at 253–9.

could say that these forms of differentiation are instances of the concept of enhanced cooperation,¹⁰ it must be taken into account that they are not established through secondary law but find their basis in primary law, and that some of the specific rules differ from the rules attached to the mechanism of enhanced cooperation.

Pre-determined flexibility may either take the form of a permission granted by all Member States to a group of Member States to act together through Union institutions and legislation (eg, the Social Protocol under the Maastricht regime), or it is reflected in the permission given to Member States *not* to participate in an activity in which they should in principle participate as a matter of Union or Community law (eg, the 1991 Protocols on the basis of which Denmark and the UK are not obliged to take part in the third phase of the EMU; and the 1991 Protocol concerning Denmark's non-participation in the elaboration or implementation of measures having defence implications).¹¹ This last sub-category has gained some popularity under the Treaty of Amsterdam, especially in the context of the new Title in the EC Treaty on the free movement of persons and the integration of the Schengen *acquis* into the legal framework of the Union. Special arrangements were included in Protocols with regard to the UK, Ireland, and Denmark.¹²

Apart from these pre-determined forms of flexibility, the Treaties harbour a variety of general provisions which in one way or another result in a permeation of the principle of uniformity in a specific area of the Union's legal system. These forms of flexibility flow either from possibilities for constructive abstention in voting procedures and partial application of treaties (Article 24 and 34 EU) or from variations in the system of preliminary rulings (Articles 35 EU and 68 EC).¹³

3. Enhanced Cooperation in EU Security Law

3.1. The current legal regime and the European constitution

From the outset, the Common Foreign and Security Policy was excluded from the formal possibilities for flexible cooperation. While the 'Reflection Group', set up in June 1995 to prepare the Amsterdam Intergovernmental Conference, left open

¹⁰ See, in this context, Art 11(5) EC.

¹¹ Cf J A Usher, 'Flexibility: The Amsterdam Provisions' in Heukels, Blokker, Brus (eds), n 6, above, 254–6.

¹² Ibid, at 267–71. The position of Norway and Iceland with regard to their participation in the Schengen *acquis* is not mentioned here, because this concerns a form of flexible cooperation outside the Union's legal system. On 17 May 1999 the Council concluded international agreements with these two countries on their involvement in the Schengen *acquis*. See OJ L-176/35, 10 July 1999.

¹³ Before 'Amsterdam' the EC Treaty already contained such forms of flexibility, for instance those included in Art 95 with regard to the harmonization of national legislation, and in Arts 168 and 169 concerning the area of research and technological development on the basis of which multi-annual framework programmes may be implemented through supplementary programmes involving the participation of certain Member States only.

the possibility of a greater degree of differentiation in CFSP, the Treaty legislator in the end backed down from this idea. The French and the Germans pushed towards improved possibilities for enhanced cooperation, but other states, including Italy, strongly valued a veto-possibility in anything close to defence cooperation. The final draft of the Dutch Presidency still envisaged unanimity for the establishment of CFSP enhanced cooperation, but the IGC in the end decided to limit flexibility in the second pillar to 'constructive abstention' (see below). Missiroli gives the following reason:

[I]t can be argued that, in the end, no European government was really in favour of a specific flexibility clause for the CFSP proper: the smaller countries, in general, for the fear of being outvoted, Italy and Spain for fear of being excluded, Britain for reasons of principle and tradition. Yet even Germany and France did not insist on that point: presumably, the former did not see its urgency after all (and did see, indeed, other ways to bring about enhanced cooperation), while the latter was worried that it might end up infringing a country's right to say 'no' on matters of life and death.¹⁴

At the time of the negotiations on the Nice Treaty it had become clear that the foreseen enlargement with ten new Member States reinforced the need to re-think the possibilities for differentiation in CFSP as well. This opened up the way to a Union-wide application of Article 43 EU. Indeed, the current version is no longer restricted to the first and third pillars, and Title VII (on Enhanced Cooperation) explicitly refers to Article 27 in which the specific legal regime on flexibility in CFSP is laid down.¹⁵ Apart from the general conditions under which enhanced cooperation may be established (see above), Articles 27A-E lay down the specific rules on CFSP flexibility. Article 27A provides that:

Enhanced cooperation in any of the areas referred to in this title shall be aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene. It shall respect:

- the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy,
- the powers of the European Community, and
- consistency between all the Union's policies and its external activities.

Despite these ambitious objectives, the possibilities for developing a flexible CFSP are limited as Article 27B explicitly refers to the implementation of a Joint Action or a Common Position. This means that the contribution of the Nice Treaty in this respect may be less far-reaching than is sometimes proclaimed.¹⁶ In any case,

¹⁴ See A Missiroli, *CFSP, Defence and Flexibility*, Chaillot Paper 38 (Paris: Institute for Security Studies, February 2000) 9–10.

¹⁵ See, in general, on flexibility in the CFSP: T Jaeger, 'Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy', *Eur Foreign Affairs Rev* (2002) 297–316 and M Trybus, 'The Flexibility Phalanx: Differentiation in the Common Security and Defence Policy of the Constitutional Treaty and Beyond', work in progress, 2005 version.

¹⁶ In 2000 in a speech in Warsaw Prime Minister Blair, for instance, claimed that 'there is clearly much greater scope for using enhanced cooperation in the two biggest growth areas of European

it is clear that only the *implementation* of Joint Actions and Common Positions is covered by Article 27B. Hence, the *adoption* of these instruments cannot be subject to enhanced cooperation. The same holds true for the adoption as well as the implementation of any other type of instrument. While one could argue that at least the adoption of Common Strategies (as general policy plans for a specific country or region) should not be subject to differentiation, it is not entirely clear why the implementation of this instrument (through Joint Actions and Common Positions) could not have been part of the regime. After all, Common Strategies have been adopted by the European Council by unanimity, and one can imagine specific parts being implemented by smaller groups of Member States. Along the same lines, one may wonder why enhanced cooperation does not cover the implementation of other 'Decisions' taken by the Council. Indeed, not all CFSP decisions take the form of a Joint Action or a Common Position (as implicitly acknowledged by Article 13, para 3 EU).¹⁷

Moreover, for the purposes of this book it is important to note that the introduction of enhanced cooperation in CFSP is not extended to defence policy. According to Article 27B 'it shall not relate to matters having military or defence implications'. This phrase is not unfamiliar in other dimensions of CFSP: it returns in the regime on qualified majority voting (see below, section 4) as well as in the budgetary provisions in Article 28, para 3 (expenditure arising from operations having military or defence implications shall not be charged to the budget of the EC). It is also used on a structural basis in CFSP decisions to remind us of the special position of Denmark in relation to European defence policy (see below). However, the problem remains how to distinguish defence policy from security policy. Within the framework of the EU Treaty, the most obvious interpretation would be that defence policy can only be based on Article 17. This interpretation finds some support in the 1997 Protocol on the position of Denmark (*infra*), which refers to Article 17 in relation to decisions and actions having defence implications. A similar reference may be found in the new Protocol annexed to the proposed European Constitution, although the scope is widened to Articles III-309–13 (the general Title on security and defence policy) and Article III-295(1), thereby including general guidelines of the European Council. This does not mean that, in turn, all measures based on Article 17 would entail defence implications. The criterion seems to be the 'military' dimension of actions. The reference to 'military and defence policy' in Article 27B EU as well as the reference to 'civilian and military means' in Article III-309 of the Constitution reveals that the Treaty legislator was not unaware of a distinction in this field. For instance, EU police missions would therefore fall under 'security' rather than under 'defence policy'.¹⁸

action: the development of a foreign and security policy and the cross-border fight against crime'. See D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, (Baden-Baden: Nomos, 2004) 163.

¹⁷ *Ibid.*, ch V.

¹⁸ *Ibid.*, 168.

The Constitutional Treaty somewhat modifies the provisions on enhanced cooperation, but more importantly for our topic it extends enhanced cooperation to the CFSP without restricting it to its implementation. Moreover, no general exception was made in relation to the Common Security and Defence Policy, the new name for European Security and Defence Policy. The current legal regime completely excludes any form of enhanced cooperation in security and defence matters and merely allows for 'closer cooperation', that is, cooperation between EU Member States (and possible others) outside the EU Treaty.

In the Constitutional Treaty the general provisions are to be found in Articles I-44 and III-416–23.¹⁹ Article I-44 reveals, inter alia, that enhanced cooperation is to be open to all Member States. This excludes the possibility of excluding certain Member States from CFSP actions. Indeed, the starting point remains the framing of Union-wide policies and enhanced cooperation can only be authorized by the Council as a measure of 'last resort when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least one third of the Member States participate in it' (para 2). In Article III-419 a difference is made between CFSP and other policy areas in the Constitution. Where, on the basis of paragraph 1, the general procedure for the establishment of enhanced cooperation starts with a request to the Commission (followed by a QMV decision of the Council after having consulted the European Parliament), paragraph 2 reflects a more substantive role for the Council in CFSP enhanced cooperation and provides:

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 Union Minister for Foreign Affairs, 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 European decision of the Council acting unanimously.

Another difference may be found in relation to participation in an enhanced cooperation that is already in progress. On the basis of Article III-420, para 2, in CFSP cooperation not only the Council and the Commission shall be notified, but also the Union Minister for Foreign Affairs. The final (unanimous) decision is taken by the Council, after consulting the Union Minister for Foreign Affairs. The latter may also suggest to the Council that transitional measures may be necessary.

¹⁹ See, in general, J Howorth, 'The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility', *Eur Foreign Affairs Rev* (2004) 483–508. See, in general, on security and defence in the Constitution: F Naert, 'European Security and Defence Policy in the EU Constitutional Treaty' *J of Conflict & Security L* (2005) No 2, 187–207.

Whenever a form of enhanced cooperation has been established, all Council members may participate in the deliberations, but only the members participating in the enhanced cooperation have a right to vote (Article I-44, para 3). Regarding the voting procedure, Article I-44, para 3 introduces a complex arrangement:

Unanimity shall be constituted by the votes of the representatives of the participating Member States only. A qualified majority shall be 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. A blocking minority must include at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained.

By way of derogation from the third and fourth subparagraphs, where the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs, the required qualified majority shall be defined as at least 72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.

Finally, paragraph 4 confirms that the acts adopted in the framework of enhanced cooperation shall bind only participating Member States and that they shall not be regarded as part of the *acquis* which has to be accepted by candidate states for accession to the Union.

The possibility of using qualified majority voting in enhanced cooperation is extended by Article III-422, allowing the Council to move to QMV (or to use the ordinary legislative procedure) on the basis of a unanimous decision:

1. Where a provision of the Constitution which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article I-44(3), may adopt a European decision stipulating that it will act by a qualified majority.
2. Where a provision of the Constitution which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt European laws or framework laws under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article I-44(3), may adopt a European decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.

To the surprise of many, in the final hour the European Convention adopted the idea of extending the possibility of QMV to defence issues.²⁰ It seems, however, that the Convention's Presidium pushed its luck; the subsequent IGC decided to include a new paragraph in Article III-422:

3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.

This makes the requirement of unanimity (of participating Member States) in common security and defence matters absolute.²¹

²⁰ See Convention Doc 853/03, 2 and the report of the Plenary of 9–10 July 2003.

²¹ See also Trybus, n 15, above.

3.2. Ad hoc and permanent structured cooperation

Irrespective of the fact that because of the requirement of unanimity, enhanced cooperation in CSDP may be hard to establish, Article I-41 of the new Constitution offers interesting alternatives. First of all, paragraph 3 acknowledges the possibility of groups of Member States making their multinational forces available for the purposes of the CSDP. Article III-310 (1) builds on this idea:

Within the framework of the European decisions adopted in accordance with Article III-309 [on the so-called Petersberg tasks], 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 Union Minister for Foreign Affairs, shall agree among themselves on the management of the task.

This is an almost purely intergovernmental way of allowing individual Member States to decide if and how they wish to participate and how they wish to manage the operation. Despite the ad hoc nature of this form of flexibility, one could argue that a de facto enhanced cooperation in the field of defence cooperation is thus foreseen by the Constitution. At the same time, one has to acknowledge that, even in the current pre-Constitutional era, ESDP missions operate in a flexible manner as far as the composition of the troops is concerned: not all Member States participate in all missions, and some missions are even built on the commitment of one state (eg, the role of France in the Congo mission).²²

In addition to this ad hoc flexibility, paragraph 6 of Article I-41 introduces the notion of 'permanent structured cooperation' for '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'. The permanent structured cooperation is further elaborated by Article III-312 and by a special Protocol (No 23).

According to this Protocol the permanent structured cooperation can be seen as an institutionalized form of cooperation in the field of defence policy between able and willing Member States. In that sense it may be regarded as a special form of enhanced cooperation, although the term is not used. It shall be open to any Member State which undertakes to (Article 1):

- (a) proceed more intensively to develop its defence capacities through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the Agency in the field of defence capabilities development, research, acquisition and armaments (European Defence Agency), and
- (b) have the capacity to supply by 2007 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including

²² See also Naert, n 19, above, 202; and Jaeger, n 15, above, 307.

Differentiation in EU Foreign, Security, and Defence Policy 235

transport and logistics, capable of carrying out the tasks referred to in Article III-309, within a period of 5 to 30 days, in particular in response to requests from the United Nations Organisation, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.

Obviously, no reference is made to the creation of a 'European army'. Any explicit hints in that direction would have been unacceptable for certain Member States. Nevertheless, the tasks of the participating Member States come close to at least a harmonization of the different national defence policies. According to Article 2 of the Protocol, Member States undertake to:

- (a) cooperate with a view to achieving approved objectives concerning the level of investment expenditure on defence equipment;
- (b) bring their defence apparatus into line with each other as far as possible;
- (c) take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces, including possibly reviewing their national decision-making procedures;
- (d) work together to ensure that they take the necessary measures to make good, including through multinational approaches; and
- (e) take part, where appropriate, in the development of major joint or European equipment programmes in the framework of the European Defence Agency.

Moreover, the creation of the so-called European Rapid Reaction Force (ERRF), envisaged by the 1999 Helsinki Headline Goal (60,000 troops),²³ in practice seems to come close to what could be called an 'army', irrespective of the fact that—for political reasons—the Helsinki Document stressed that the ERRF would not amount to 'the creation of a European army'. Interestingly enough, this phrase does not return in the Constitutional treaty.

Participation will be open to all Member States 'which fulfil the criteria and have made the commitments on military capabilities set out in the Protocol on Permanent Structured Cooperation'. A notification of their intention is to be sent to the Council and to the Union Minister for Foreign Affairs (Article III-312). It is interesting to note that in the decision establishing the cooperation, as well as on the accession of new participants, the Council shall act by a qualified majority vote (in the latter case of participating Member States). This means that the establishment (as well as the further development) of the permanent structured cooperation cannot be blocked by other Member States. In the case of the accession of new participants only members of the Council representing the participating Member States shall take part in the vote. A qualified majority shall be 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. A blocking minority must include at least the minimum number of Council members representing

²³ European Council, Presidency Conclusions, 10–11 December 1999; available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/ACFA4C.htm>.

more than 35% of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained.

Participation is not without engagement. If a participating Member State no longer fulfils the criteria or is no longer able to meet the commitments, the Council may adopt (by QMV) a European Decision suspending the participation of the Member State concerned. A special role in this regard is laid down for the European Defence Agency, in assessing the contribution of the participating Member States with regard to capabilities. But voluntary withdrawal is also possible (Article III-312, para 5).

With the introduction of the permanent structured cooperation alongside the general possibility of enhanced cooperation, the new treaty adds to the already existing complexity. As we have seen, any form of enhanced cooperation would be open to all Member States and non-participating states will remain involved in the subsequent decision-making. In contrast, the access of new Member States to an already established form of permanent structured cooperation is in the hands of the participating states only (Article III-312, para 3). There is no automatic right to join in and newcomers will have to 'fulfil higher military capability criteria' (para 1).²⁴

3.3. European Defence Agency

Although the European Defence Agency (EDA) is only to be established on the basis of the European Constitution (Article I-41, para 3 and Article III-311), it is already operational on the basis of a Council Joint Action of 12 July 2004.²⁵ The Agency acts under the Council's authority, in support of the CFSP and the ESDP, but enjoys a separate legal personality (Article 6 of the Joint Action). It has functions in the fields of: defence capabilities development; armaments co-operation; the European defence technological and industrial base and defence equipment market; and research and technology. The mission of the Agency is to support the Council and the Member States in their effort to improve the EU's defence capabilities in the field of crisis management and to sustain the ESDP as it stands now and develops in the future.

The Agency is open to participation by all EU Member States; Member States who wish to participate immediately in the Agency had to notify their intention to do so to the Council and inform the SG/HR at the time of the adoption of the Joint Action. As all Member States, except for Denmark,²⁶ have done so no major differentiation is to be foreseen in this area. And even at this stage Denmark (or any future EU Member State) may participate in the Agency by notifying its intention to the Council and informing the SG/HR. Nevertheless, the EDA Joint Action differentiates between participants and non-participants and even allows

²⁴ *Ibid*, 17.

²⁵ Joint Action 2004/551/CFSP of the Council of 1 July 2004, OJ L-245, 17 July 2004. See also A Georgopoulos, 'The New European Defence Agency: Major Development or a Fig Leaf?' *Public Procurement L Rev* (2005) 103.

²⁶ See section 21 of the Preamble of Joint Action 2005/551/CFSP.

for withdrawal. At least in theory, this could amount to further differentiation in the longer run.

However, more differentiation is to be expected with regard to particular projects of the Agency as a difference is made between participating Member States (Member States who participate in the Agency) and contributing Member States (Member States contributing to a particular project or programme). Projects may also be joined by non-Member States (Article 23). Decision-making is in the hands of a 'Steering Board' composed of one representative of each participating Member State, and a representative of the Commission. The Steering Board acts within the framework of the guidelines issued by the Council and meets at the level of the Ministers of Defence of the participating Member States or their representatives. It may, however, also meet in other compositions (such as National Defence Research Directors, National Armaments Directors, and National Defence Planners or Policy Directors). Contributing states may include third parties.

The Agency returns in the European Constitution in Article III-311, which in fact reflects the institutional arrangements of the 2004 Joint Action. Despite its potential to add to further differentiation within the Union, the EDA also aims at consolidating existing arrangements in the area of armaments cooperation. Both the British-French-German-Italian cooperation in OCCAR (later joined by Belgium and Spain as well) and the broader WEAO are eventually meant to be integrated into the EDA.²⁷

3.4. Denmark

From the outset, the position of Denmark towards the ESDP has been special. After the 'no' of the first Danish referendum regarding the approval of the Maastricht Treaty and the compromise reached at the Edinburgh Summit directly after, it was clear at the Amsterdam IGC that this position needed to be institutionalized. THE Edinburgh compromise that Denmark had no obligation to join the Western European Union (WEU) and would not participate in the adoption and implementation of measures, and actions which have defence implications, was codified in the Protocol on the Position of Denmark to the Amsterdam Treaty in 1997 and maintained in nice four years later.

In the Constitutional Treaty the position of Denmark in this regard returns in Protocol 20, Article 5:

With regard to measures adopted by the Council pursuant to Article I-41, Article III-295(1) and Articles III-309 to III-313 of the Constitution, Denmark does not

²⁷ OCCAR is based on the Convention on the Establishment of the Organisation for Joint Armaments Co-operation and is based in Bonn. The Western European Armaments Organizations (WEAO) was established in the framework of the Western European Union (WEU) and has as its members Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Turkey and the UK. See Burkardt Schmidt, *European armaments cooperation: core documents*, Chaillot Paper No 59 (Paris: Institute for Security Studies, 2003).

participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications. Therefore Denmark shall not participate in their adoption. Denmark will not prevent the other Member States from further developing their cooperation in this area. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures, nor to make military capabilities available to the Union.

The unanimity of the members of the Council, with the exception of the representative of the government of Denmark, shall be necessary for the acts of the Council which must be adopted unanimously.

The rules on qualified majority voting are the same as for the establishment of the permanent structured cooperation (*supra*). All provisions referred to in Article 5 of the Protocol are related to the CSDP. It is striking that no reference is made to Article III-295, para 2. Paragraph 1 establishes the competence of the European Council to define the general guidelines for the CFSP, including for matters with defence implications. Irrespective of the absence of a reference to defence implications in paragraph 2, this provision deals with the implementation of the guidelines, by the Council, in the form of European Decisions. This opens the way for Denmark to participate in the adoption of European Decisions once these do not entail defence implications, but are nevertheless part of ESDP. In practice Denmark indeed already participates in, for instance, the EU Police Mission in Bosnia and Herzegovina, but not in the military operation Althea in the same country or in any other military operation.²⁸

3.5. Common defence

The Nice Intergovernmental Conference did reach an agreement on ‘the progressive framing of a common defence policy’, but Article 17 continues to refer to a ‘common defence’ as a future possibility. At the same time all references to the Western European Union as the ‘defence arm’ of the EU were deleted. Is this the end of the Western European Union and hence of a European collective defence arrangement? No: since no consensus could be reached on the transfer of the original core function of the WEU to the EU, the collective assistance agreement laid down in Article V of the modified Brussels Treaty is untouched. This provision reads:

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

The WEU decided to have its residual functions and structures in place by 1 July 2001 so as to enable the Member States to fulfil the commitments arising from

²⁸ See more extensively on the composition of the missions Frederik Naert, Chapter 4 of this volume.

Articles V and IX (on the WEU Assembly). This means that by now the WEU is essentially returned to the organization that was originally set up to deal with collective defence matters between the Benelux countries and the UK and France in 1948: the Brussels Treaty Organization. Although the 1948 Brussels Treaty was also intended to intensify the economic, social, and cultural collaboration between the Member States,²⁹ the collective self-defence paragraph (at that time Article IV) soon proved to be the key provision.

As only ten EU members are (full) members of the WEU, this results in a form of differentiation with regard to common defence.³⁰ In the current EU Treaty a future transfer of the collective—or ‘common’ in perhaps somewhat more supranational EU terms—defence provision from the WEU to the EU is made dependent on a decision by the European Council only (which may nevertheless need to be adopted by the individual Member States in accordance with their respective constitutional requirements—Article 17). An inclusion of the defence clause in the Union treaty would not only be in line with the established defence policy, but also with the goals the EU has set for itself: ‘to organise, in a manner demonstrating consistency and *solidarity*, relations between the Member States and between their peoples’ (Article 1); ‘to safeguard the common values, fundamental interests, independence and integrity of the Union . . .’; and ‘to strengthen the security of the Union in all ways’ (Article 11).

This seems to be acknowledged by the Treaty legislator, as the proposed European Constitution finally seems to include a common defence clause, albeit somewhat hidden in Article I-41, para 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.

This comes close to the current obligation in Article V of the WEU Treaty. Therefore it is striking that the same provision, in paragraph 2, still refers to ‘common defence’ as an aim to be achieved:³¹

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.

Taking into account that according to the Helsinki (1999) and Laeken (2001) Declarations ‘the development of military capabilities does not imply the creation

²⁹ The official name of the WEU Treaty is still the ‘Treaty of Economic, Social and Cultural Collaboration and Collective Defence’.

³⁰ Full members of WEU are: Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the UK.

³¹ Nevertheless, Art I-16(1) still uses the term ‘might lead’, thereby suggesting a possibility rather than an objective. See also Naert, n 19, above, 192.

of a European army', it is puzzling what it is the European Council will have to decide on. Nevertheless, it is a fact that the original draft presented by the Convention included the possibility of closer cooperation as regards mutual defence. Draft Article I-40(7) stated that '[u]nder this cooperation, if one of the Member States participating in such cooperation is the victim of armed aggression on its territory, the other participating States shall give it aid and assistance by all means in their power, military or other, in accordance with Article 51 of the United Nations Charter.' Despite the fact that this would allow the 'neutral' states (Austria, Finland, Ireland, and Sweden) not to participate, they opposed this clause because, as they said, 'Formal binding security guarantees would be inconsistent with our security policy or constitutional requirements'.³² If one compares the draft provision with the final text in the Constitution, one may wonder whether there is much difference in practice. Even now there seems to be quite a strict mutual defence obligation and in both cases account has been taken of the special position of the neutral states.³³

This is even more the case when the so-called 'Solidarity clause' in Article I-43, is taken into account. This clause does not restrict common defence to 'armed aggression', but in fact extends the obligation to terrorist attacks:

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

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

Paragraph 2 refers to Article III-329 for more detailed arrangements. There we can find a coordinating role of the Council as well as the procedure: the arrangements for the implementation of the Solidarity clause shall be defined by a European Decision adopted by the Council acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs.

However, after the Madrid terrorist attacks in March 2004, the European Council issued a 'Declaration on Solidarity Against Terrorism',³⁴ in which Article III-329 of the Constitution is already incorporated, although the Declaration does not refer to a role for the Union as such, but refers to the 'Member States acting jointly'. In addition, the Declaration leaves it to the Member States to 'choose

³² See their letter of 4 December 2003; A Missiroli, *From Copenhagen to Brussels: European Defence: Core Documents*, Chaillot Paper No 67 (Paris: Institute for Security Studies, 2003) 432. See also Trybus, n 15, above, 19.

³³ See more extensively Heike Krieger, chapter 8 of this volume.

³⁴ Brussels European Council, 25–26 March 2004, Presidency Conclusions.

the most appropriate means to comply with this solidarity commitment'. Irrespective of the legal nature of this Declaration,³⁵ one may see this as a further possibility for differentiation. At least until the entry into force of the Constitution, the Union as such will not have a role to play in this regard and it is up to (groups of) Member States to organize their responses in a rather ad hoc manner.

4. Other Forms of Differentiation in EU Security Law

4.1. Constructive abstention

A special form of differentiation can be established on the basis of the so-called 'constructive abstention' clause, introduced by the Amsterdam Treaty in 1997. The clause is generally regarded as a compromise between the states that aimed for QMV and enhanced cooperation in CFSP matters and those that wished to hold on to the status quo of the Maastricht regime. Compared to enhanced cooperation—allowing Member States to give a positive boost to integration in the area of the CFSP—constructive abstention is more negative as it is basically a decision not to oppose a further step.³⁶ In the current EU Treaty constructive abstention found its place in Article 23, paragraph 1:

Decisions under this title shall be taken by the Council acting unanimously. Abstentions by members present in person or represented shall not prevent the adoption of such decisions.

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, 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 more than one third of the votes weighted in accordance with Article 205(2) of the Treaty establishing the European Community, the decision shall not be adopted.

This provision makes clear that differentiation may only occur in case the abstaining Member States qualifies its abstention in a formal declaration. This way the special position of the non-participating Member States is not only institutionalized, but it is also clear what its position is. Unity and coherence is being achieved both by the rule that the non-participants shall refrain from any action that could be in conflict with the adopted decision and by the fact that this form of differentiation is not possible when the group of non-participating states represents more than one third of the votes. While the 'loyalty obligation' should certainly be seen

³⁵ See on this question: M Reichard, 'The Madrid Terrorist Attacks: A Midwife for EU Mutual Defence?' *Zeitschrift für Europarechtliche Studien* (2004) 313–34.

³⁶ Cf Jaeger, n 15, above, 320 and David Galloway, *The Treaty of Nice and Beyond* (Sheffield, Sheffield Academic Press, 2001) 134–6.

as a legal obligation, both its nature and the absence of jurisdiction of the Court of Justice place its enforcement in the hands of the Council.

As the Treaty only refers to 'a formal declaration' Member States remain free to give any reason they want for non-participation. Abstaining for purely financial reasons is therefore not excluded, resulting in systematic 'free-riding'. Indeed, using the system this way would turn out to be 'destructive', rather than 'constructive'.³⁷ In terms of the size of the potential group there is a striking difference with enhanced cooperation: on the basis of constructive abstention a group would have to represent at least two thirds of the weighted votes in the Council, whereas under enhanced cooperation groups may consist of eight Member States only.

Article 23 explicitly refers to decisions taken by the Council. This implies that decisions (including Common Strategies) adopted by the European Council are excluded from the constructive abstention rules. While it has been argued that constructive abstention could also be used for decisions that can be taken by QMV, the general view—based on both the Treaty text and the ratio of the very notion of constructive abstention—is that it is meant for unanimous voting procedures only.³⁸ On the other hand, irrespective of an explicit reference in the Treaty, implementation decisions seem to be covered by the constructive abstention regime, even when they would be adopted by QMV. After all, if a Member State is not 'obliged to apply the decision', it will also not be asked to apply any implementing measure based on the decision.

The possibility of joining Common Positions and Joint Actions at a later stage is also not regulated by the Treaty, but nothing seems to stand in the way of Member States joining in. In the case of Common Positions this would simply mean an adherence to the policy laid down therein; in the case of Joint Actions, there may be practical as well as financial implications. However, blocking the participation of former 'outs' does appear to be in conflict with the notion that forms of differentiation should only occur in the last resort.

Can constructive abstention also be used in the case of the adoption of decisions in the area of the security and defence policy? As paragraph 1 of Article 23 is not restricted to general CFSP decisions, the answer should be in the affirmative. 'Decisions having military or defence implications' are excluded in paragraph 2 only, which deals with the possibility of QMV. This means that even in the area of the ESDP one can imagine decisions being taken which are supported by a restricted group of 'able and willing' Member States. Based on its general exception, there does not seem to be a need for Denmark to use the constructive abstention clause in these cases.

In the European Constitution, the possibility of constructive abstention returns in Article III-300 in similar wordings. Decisions having military or defence implications remain to be excluded from QMV decision-making (see also Article IV-444 on the simplified revision procedure).

³⁷ Missiroli, n 32, above, 15.

³⁸ See more extensively Thym, n 16, above, 155.

4.2. The implementation of a Joint Action and the Security Council

From the outset the EU Treaty has accepted the possibility of differentiation where the implementation of Joint Actions is concerned. Article 14, paragraph 6 allows for Member States to deviate from Joint Actions ('take the necessary measures as a matter of urgency') in cases of imperative need arising from changes in the situation and failing a Council decision. Moreover, paragraph 7 acknowledges the possibility of 'grave difficulties' for Member States to implement a Joint Action. Although this should be discussed in the Council, to seek an appropriate solution, this provision implicitly takes the possibility into account that one or more Member States does not participate in the implementation of certain Joint Actions.³⁹ Both possibilities return in the Constitution in Article III-297, paragraphs 4 and 5.

Another possibility for differentiation may be found in the provision that the permanent members of the UN Security Council (France and Britain) seem to enjoy a certain freedom to pursue their national interests in the position they take in the Security Council. After all, on the basis of Article 19 EU they have to defend the positions of the Union only when they do not have to compromise 'their responsibilities under the provisions of the United Nations Charter'. While this possibility for differentiation can hardly be expected to be acceptable in the case of binding CFSP acts, it reflects a potential threat to the coherence of other Union positions. Nevertheless, it is difficult to come up with examples of cases where the responsibilities of the permanent members of the Security Council under the UN Charter would lead to a legal conflict with their EU obligations. As one observer holds, a political conflict can, however, be imagined:

It appears that by including a reminder of their UN responsibility, France and Britain intended to stress the awareness of their partners in the Union that they will continue to pursue their particular geopolitical interests in the Security Council where they remain free to do so, and perhaps even that they consider the sensible security interest dealt with in the Security Council to override all other possible interests, including the aims of the EU.⁴⁰

Article III-305, paragraph 2 of the Constitution repeats the current provision. A minor difference is that the new provision is not restricted to the permanent members of the Security Council, but refers in general to 'Member States which are members of the Security Council'. This opens the possibility of a larger group of EU Member States deviating from earlier positions of the Union once related issues are on the agenda of the Security Council during their two-year term as non-permanent member.

³⁹ See also Jaeger, n 15, above, 300 and Ehlermann, 'Differentiation, Flexibility, Closer Cooperation: The New Provisions of the Amsterdam Treaty', EUI Working Paper, 1997, VI.5.

⁴⁰ Jaeger, *ibid*, 301.

5. Differentiation in ESDP Practice and Operations?

Since the end of 1998 the European Union has been actively developing its security and defence policy.⁴¹ The 1992 EU Treaty had already been an important first phase in the on-going quest to consolidate Western European defence cooperation. A closer defence cooperation was planned in the original version of this treaty, albeit that its Article J.4 clearly reflected the compromise, as it referred extremely carefully to 'the eventual framing of a common defence policy, which might in time lead to a common defence'. Another international organization, the Western European Union (WEU), would be asked to 'elaborate and implement decisions and actions of the Union which have defence implications'. On the basis of this provision one could easily be led to believe that we would never witness the creation of a European Security and Defence Policy. Nevertheless, even this carefully phrased compromise obviously helped recalcitrant Member States (the UK in particular) to get used to the idea of a future role for the EU in this area. The Amsterdam Treaty (1997, entry into force in 1999) turned Article J.4 into Article 17, and took another subtle step forward by formulating a common defence policy as an *objective* of the European Union, rather than a mere *possibility*.

On 15 November 1999, for the first time in its history, the Council of the European Union met informally in the composition of Ministers for Foreign Affairs and Ministers of Defence.⁴² While this may seem a logical step in the light of current developments, it highlights the revolution that has taken place within the EU during the past few years. Previously, meetings of defence ministers were unthinkable within the EU framework. During this meeting France and the UK launched their plan for a rapid reaction force, an idea that was adopted by the European Council in Helsinki in December 1999 when it decided to develop an autonomous military capacity. Probably to reassure (the parliaments of) certain Member States, the somewhat ambiguous sentence was added that this does not imply the creation of a European army. Nevertheless, all developments pointed in the direction of a sincere attempt on the part of the EU to create a military force. The European Council formulated a 'headline goal' and decided that by the year 2003 Member States must be able to develop rapidly and then sustain forces 'capable of the full range of Petersberg tasks, including the most demanding, in operations up to corps level; up to 15 brigades, or 50,000–60,000 persons'. These forces should be self-sustaining with the necessary command and control and intelligence capabilities, logistics, and other combat support services and, additionally, appropriate naval and air elements. The readiness requirement is 60 days,

⁴¹ See more extensively R A Wessel, 'The State of Affairs in European Security and Defence Policy: The Breakthrough in the Treaty of Nice' *J of Conflict & Security L*, Vol 8, No 2, 2003.

⁴² Conclusions of the General Affairs Council of 15 November 1999, Council Press Release No 12642/99 (*Presse* 344). The first formal meeting of the Defence Ministers took place in May 2002; see Conclusions of the General Affairs Council, 13–14 May 2002.

with some units at very high readiness, capable of deployment within days or weeks.⁴³ Indeed, in May 2003 the Council confirmed that the EU now has operational capability across the full range of Petersberg tasks. Nevertheless, the goals set in Helsinki in 1999 were not attained and in May 2004 the Council approved a new 'Headline Goal 2010'.⁴⁴ This new capabilities commitment includes the establishment of so-called 'battlegroups': 'force packages at high readiness as a response to a crisis either as a stand-alone force or as part of a larger operation enabling follow-on phases'. On decision-making, the ambition of the EU is to be able to take the decision to launch an operation within five days of the approval of the so-called Crisis Management Concept by the Council. On the deployment of forces, the ambition is that the forces start implementing their mission on the ground no later than ten days after the EU Decision to launch the operation. While the composition of the foreseen battlegroups is not yet clear (they will have to be ready by 2007), one may expect smaller groups of Member States cooperating in them.

The results of these developments found their way into the Treaty of Nice, which was adopted in December 2000. On the basis of that treaty, Article 17 of the Treaty on European Union was modified as follows: the second subparagraph of paragraph 1 on the relationship with the WEU was deleted; the same holds true for the first three subparagraphs of paragraph 3 on the role of the WEU in the implementation of EU Decisions with defence implications. This means that the Union has been given the competence to operate within the full range of the Petersberg tasks: 'humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking' (Article 17, para 2). In that respect it is odd that Article 17 still refers to the 'progressive framing of a common defence policy' after that same policy has entered into force on the basis of the same article. Provisions like these reveal the fact that, although a final consensus was reached on a European Security and Defence Policy, some Member States are more eager to lay everything down in treaty arrangements than others. Nevertheless one cannot overlook the gradual development from the first provision in the Maastricht Treaty ('the *eventual* framing of a common defence policy, which *might in time* lead to a common defence'), to the Amsterdam Treaty ('the *progressive* framing of a common defence policy, which *might* lead to a common defence'), and finally to Nice where all references to the WEU were deleted, thereby making the EU itself responsible for the elaboration and implementation of decisions and actions which have defence implications. In the European Constitution this arrangement returns in Article I-16.

⁴³ See on the feasibility of this headline objective, for instance R de Wijk, 'Convergence Criteria: Measuring Input or Output' (2000) *Eur Foreign Affairs Rev* 397–417; as well as the NATO Parliamentary Assembly Interim Report 'Building European Defence: NATO's ESDI and the European Union's ESDP', Rapporteur Van Eekelen, 5 October 2000.

⁴⁴ Conclusions of the External Relations Council, 17 May 2004. On financing, see also for the Athena mechanism: Council Decision 2004/197/CFSP of 23 February 2004, OJ L-63, 28 February

By now the ESDP provisions have been put into practice and the Union is, and has already been, engaged in a number of operations. The first was Operation 'Concordia'. On 31 March 2003 the EU formally took over NATO's Operation Allied Harmony in the Former Yugoslav Republic of Macedonia, an operation contributing to a stable, secure environment. This decision has been made possible following the agreements reached by the EU and NATO concerning EU-led operations.⁴⁵ Regarding the financing of military operations, the Council had already agreed on a solution in June 2002: costs lie where they fall. In other words: contributing Member States pay their own expenses, although certain expenses (for instance arising from communication, medical arrangements, and the appointment of local personnel) will be charged in accordance with the GNP scale.⁴⁶

In general the operations reveal a large degree of support on the part of the Member States. Nevertheless, it is clear that in many operations not all Member States participate and that, if they do, contributions differ greatly. At the same time, only Denmark formally withheld its participation on a structural basis, which raised the question of the legal basis for the non-participation of the other Member States. After all, the current treaty excludes enhanced cooperation for matters having military and defence implications. Practice thus reveals a form of differentiation that is not foreseen (or perhaps even explicitly excluded) by the treaty. The fact that almost all operations are at the same time characterized by an extensive participation of non-Member States, substantively adds to the variation.⁴⁷

Irrespective of this complex picture, the fact remains that the operations are all 'Union' operations and were based on unanimously adopted Council decisions. In that respect, the final composition of the troops may be less relevant. The same seems to hold true for multinational forces of some Member States. The possibility of making these forces available to the Union is foreseen by the European Constitution (Article I-41, para 3). And, as we have seen, the establishment of the so-called permanent structured cooperation will be embedded within the Union's institutional framework (compare also Article I-41, para 6).

2004, 68, as amended by Council Decision 2004/925/EC of 22 December 2004, OJ L-395, 31 December 2004, 68 and by Council Decision 2005/68/CFSP of 24 January 2005, OJ L-27, 29 January 2005, 59.

⁴⁵ See M Reichard, 'Some Legal Issues Concerning the EU-NATO Berlin Plus Agreement' *Nordic J of Intl L* (2004) 37-68.

⁴⁶ Conclusions of the General Affairs Council of 17 June 2002. With regard to the EU Police Missions, however, it was also agreed that certain costs will be financed out of the community budget; see Council Joint Action 2003/141/CFSP of 27 January 2003, OJ L-53, 28 February 2003. See also Article III-313 of the Constitution: '[...] 2. Operating expenditure to which the implementation of this Chapter gives rise shall also be charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council decides otherwise.'

⁴⁷ See Frederik Naert, Chapter 4 of this volume.

6. Conclusion

A true common foreign, security, and defence policy depends on the positioning of the Union as a cohesive force in international relations. In fact, the whole purpose of establishing a CFSP in the first place was to make an end to the often diverging foreign policies of the Member States. A subsequent fragmentation of the Union's external policy due to à la carte constructions would run counter to the very notion of a common policy.⁴⁸ The 'constitutionalization process' which resulted in the European Constitution in 2004 further strengthened this idea. The further consolidation of foreign, security, and defence policy and in particular the explicit treaty base of the latter explains why the starting points have been maintained.

On the other hand, the current treaty as well as the Constitution explicitly allow for differentiation in the areas of CFSP and CSDP. While both enhanced cooperation and ad hoc regimes are foreseen, CSDP flexibility depends on actual participation of Member States (and third States) in specific operations. The question most frequently asked is whether this variation in foreign, security, and defence policy has consequences for the unity of the Union's legal order.⁴⁹ Political analyses will certainly point to the negative effects of too much fragmentation on the positioning of the Union as a united global force. While there will certainly be much truth in this presumption, legal analyses could be used to take the discussion one step further. Two points could be made in this respect. First, there is no doubt that the way in which flexibility is regulated in the current treaties (including the Constitution) adds to the complexity. The different forms that have been described above all have their own creation, accession, and decision-making rules and differences have been created between the CFSP and the ESDP/CSDP. At the same time, however, it is through the complex restrictions on flexibility that the Treaty legislator attempts to maintain a grip on the cooperation between smaller groups of Member States and to prevent too much variation from occurring. Indeed, despite the introduction of enhanced cooperation in the CFSP as a means to make it less dependent on the whims of individual states, it has not been used in practice.

The second point is that regulation of flexibility in the CFSP/ESDP may prevent extra-EU initiatives by Member States, which could be even more harmful for the unity of the Union. Irrespective of its complexity, the current (and planned) legal regime on differentiation in the CFSP/ESDP provides a framework in which the institutions play a leading role and through which initiatives by

⁴⁸ See more extensively on this point R A Wessel, 'Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe' in J W de Zwaan et al (eds), *The European Union—An Ongoing Process of Integration* (The Hague: TMC Asser Press, 2004) 123–40.

⁴⁹ See *ibid* more extensively and for references.

groups of able and willing Member States are embedded in the Union legal order. As long as operations are fully embedded in the Union's institutional framework and non-participating states refrain from actions that would harm their character as Union operations, they do not seem to be a threat to consistent external action. On the contrary, history has shown that the further development of the ESDP needs some room for smaller-scale initiatives. The new Constitution continues to offer possibilities in this respect.