Chapter 7: Constitutional Aspects of The Common Foreign and Security Policy

General

7-1 Most of the constitutional changes made by the Treaty on European Union are incorporated in the Treaty establishing the European Community and are therefore considered in the context of the latter Treaty.[1] But the common foreign and security policy is peculiar to the Treaty on European Union and is largely outside the scope of the Treaty establishing the European Community.[2] Three of the institutions of the European Communities - the European Parliament, the Council and the Commission[3], - and certain other bodies[4], have a role in carrying out the common foreign and security policy; but the Court of Justice of the European Communities has no jurisdiction over the relevant provisions[5] and would not, for instance, have power to examine the constitutional validity of acts in this field.[6]

7-2 In constitutional terms, the general importance of the provisions on the common foreign and security policy lies in the fact that the European Union comes closer to resembling a modern state by having acquired powers in the military and foreign policy fields. A close examination of the provisions shows, however, that they fall short of vesting military and foreign policy powers in the hands of the executive authorities and that they do not seek to deprive the Member States of their existing powers in these fields. In this, they come nowhere near the provisions of (for example) the United States constitution.[7] Instead, they are directed towards the formal obligation to cooperate and may perhaps be regarded as a stepping-stone towards the European Union's wider control of foreign and military affairs in the future. This is not mere speculation: some of the provisions themselves refer to future developments.[8] From a legal and constitutional point of view, the use of language in which future hopes or expectations are expressed is somewhat unsatisfactory: the provisions in question should therefore be regarded in a similar light to those Common Provisions in which the language is clearly more political than legal.[9]

7-3 It is not the purpose of this chapter to examine the provisions of the common foreign and security policy on their political merits, but simply to study their constitutional implications. Since most of the provisions are institutional and administrative, rather than technical, in the military or diplomatic sense, they do in general have some constitutional importance.

Scope of the Common Foreign and Security Policy

7-4 Under the Treaty on European Union it is the duty of the European Union to define and implement a common foreign and security policy.[10] The objectives of the policy are

- to safeguard the common values, fundamental interests, independence and integrity of the European Union in conformity with the principles of the United Nations Charter;
- to strengthen the security of the European Union in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders;
- to promote international cooperation; and

- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.[11]

7-5 These objectives are to be pursued by the European Union by
- defining the principles of and general guidelines for the common foreign and security policy;
- deciding on common strategies;
- adopting joint actions;
- adopting common positions;
- strengthening systematic cooperation between Member States in the conduct of policy.[12]

7-6 At the same time, it is the duty of the Member States to support the European Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity; to work together to enhance and develop their mutual political solidarity; and to refrain from any action which is contrary to the interests of the European Union or likely to impair its effectiveness as a cohesive force in international relations. It is the duty of the Council to ensure compliance with these principles.[13]

The Role of the European Council: Guidelines and Strategies

7-7 It is the duty of the European Council to define the principles of, and general guidelines for the common foreign and security policy, including matters with defence implications[14]; and to decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.[15] "Common strategies" have to set out their objectives and duration and the means to be made available by the European Union and the Member States.[16]

7-8 On the basis of the general guidelines defined by the European Council, it is for the Council to take the necessary decisions for defining and implementing the common foreign and security policy[17]; to recommend common strategies to the European Council[18]; to implement common strategies, in particular by adopting "joint actions" and "common positions"[19]; and to ensure the unity, consistency and effectiveness of action by the European Union.[20] Since the adoption of joint actions and common positions represents the principal mechanism by which the common foreign and security policy is implemented, they call for closer scrutiny.

Joint Actions

7-9 Joint actions address specific situations where operational action by the European Union is deemed to be required. They lay down their objectives and scope, the means to be made available to the European Union, if necessary their duration, and the conditions for their implementation. The Council has the power and duty to adopt joint actions.[21] Joint actions commit the Member States in the positions they adopt and in the conduct of their activity.[22] To ensure the implementation of a joint action, the Council may request the Commission to submit to it any appropriate proposals relating to the common foreign and security policy.[23] Additional provisions on joint actions cover prior consultations, situations in which Member States need to take urgent measures and difficulties arising from the implementation of joint actions.[24]

Common positions

7-10 Common positions define the approach of the European Union to a particular matter of a geographical or thematic nature. Member States are required to ensure that their national policies conform to the common positions. The power and duty to adopt common positions rest with the Council.[25]

Information and consultation

7-11 It is the duty of Member States to inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that the European Union's influence is exerted as effectively as possible by means of concerted and convergent action.[26]

7-12 One specific area in which the Member States are required to coordinate their action is in international organisations and at international conferences; they must also uphold common positions in such forums.[27] Although a common position may not have been defined by the Council, there is nevertheless a general and residual duty on the part of Member States to cooperate. At the same time, if no common position has been defined, Member States may agree to differ on the policies which they pursue, provided that the manner in which they do so respects the general principles of cooperation and coordination. There is no constitutional sanction against doing so. Where not all the Member States participate in international organisations and at international conferences, Member States which do take part are required to follow the common position - if one has been defined.[28] Again, in the absence of a common position, the Member States represented in the organisation or conference would appear to have a good deal of latitude. But they do have an obligation to keep the Member States not represented in the organisation or conference informed of any matter of common interest.[29] Special rules apply to the Member States which are members of the United Nations Security Council: they are required to concert and keep the other Member States fully informed. Member States which are permanent members of the Security Council are required, in the execution of their functions, to ensure the defence of the positions and the interests of the European Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.[30]

Security Policy

7-13 All questions relating to the security of the European Union are included in the common foreign and security policy.[31] These include the progressive framing of a common defence policy, as well as humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management.[32] There is a voluntary element in this process: for example, the progressive framing of a common defence policy is to be supported, "as Member States consider appropriate", by cooperation between them in the field of armaments.[33]

7-14 In framing a common defence policy, the Treaty envisages that this may lead to a common defence, if the European Council so decides; and, if it does so decide, it will have to recommend to Member States the adoption of such a decision in accordance with their respective constitutional

requirements.[34] In other words, there is no power in the Treaty alone to institute a "common defence". How far a "common defence" involves the creation of a joint command or of an integrated defence force is unresolved.

7-15 However, the policy of the European Union in furtherance of these provisions does not prejudice the specific character of the security and defence policy of certain Member States and respects the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.[35] Nor do these provisions prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the WEU and the Atlantic Alliance, provided such cooperation does not run counter to or impede that provided for under the common foreign and security policy.[36]

7-16 As an instrument of "operational capability", the European Union is relying on WEU; and there are some slightly unusual provisions in the Treaty to this end, expressed in a unilateral and in some ways tentative manner. Thus, according to the Treaty, the Western European Union (WEU) is an integral part of the development of the Union providing the Union with access to an operational capability notably in the context of the humanitarian and other matters already mentioned. It supports the European Union in framing the defence aspects of the common foreign and security policy as set out in the provisions on security policy. The European Union accordingly undertakes to foster closer institutional relations with the WEU with a view to the possibility of the integration of the WEU into the European Union, should the European Council so decide; and, as before, if it does so decide, it has to recommend to Member States the adoption of such a decision in accordance with their respective constitutional requirements.[37]

7-17 Meanwhile, the European Union may avail itself of the WEU to elaborate and implement decisions and actions of the European Union which have defence implications.[38] The power of the European Council to establish guidelines in on foreign and security policy is not thereby prejudiced.

7-18 Membership of the European Union is not identical with membership of the WEU, so when the European Union avails itself of the WEU to elaborate and implement decisions of the European Union on the humanitarian and other tasks referred to earlier, all Member States of the Union will be entitled to participate fully in the tasks in question. The Council, in agreement with the institutions of the WEU, will adopt the necessary practical arrangements to allow all Member States contributing to the tasks in question to participate fully and on an equal footing in planning and decision-taking in the WEU.

The Role of the Presidency

7-19 In matters coming within the common foreign and security policy, the Presidency[39] represents the European Union.[40] The Presidency is responsible for the implementation of decisions taken in accordance with the common foreign and security policy and in that capacity is required in principle to express the position of the European Union in international organisations and at international conferences.[41] (The Member State holding the Presidency will not, however,

necessarily be a member of the organisation or represented at the conference.) In the foregoing tasks, the Presidency is to be helped by the Secretary-General of the Council, who exercises the function of High Representative for the common foreign and security policy[42], and if need be by the next Member State to hold the Presidency; and the Commission is to be fully associated in these tasks.[43] In addition, the Council may, whenever it deems it necessary, appoint a special representative with a mandate in relation to particular policy issues.[44] The Council has in fact appointed a High Representative holding office separately from the office held by the Secretary-General.[45]

The Role of the European Parliament

7-20 In the formulation and implementation of the common foreign and security policy, the European Parliament has the following rights and duties:

- to be consulted by the Presidency on the main aspects and the basic choices of the policy;
- to have its views duly taken into consideration by the Presidency;
- to be kept regularly informed by the Presidency and the Commission of the development of the European Union's common foreign and security policy;
- to ask questions of the Council or make recommendations to it; and
- to hold an annual debate on progress in implementing the policy.[46]

The Role of the Council

7-21 In the formulation and implementation of the common foreign and security policy, the Council plays a leading part. More specifically, it has the following powers and duties:

- to take the decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines adopted by the European Council[47];
- to recommend and implement common strategies[48]
- to ensure the unity, consistency and effectiveness of action by the European Union[49];
- to adopt and, where necessary, review joint actions[50];
- to request the Commission to submit proposals on the implementation of a joint action[51];
- to deal with major difficulties experienced in implementing a joint action[52];
- to adopt common positions[53];
- to preside over the information and consultation procedures among Member States[54];
- to appoint special representatives, as necessary[55];
- to receive questions and recommendations from the European Parliament[56];
- to receive questions and proposals from the Member States and the Commission[57];
- to convene extraordinary meetings, in cases requiring a rapid decision[58];
- to take decisions, in accordance with the prescribed procedure[59];
- to conclude agreements with one or more states or international organisations[60];
- to be helped by a Political Committee[61] and by a Secretary-General[62]; and
- to take appropriate budgetary decisions.[63]

7-22 There is some constitutional importance in the question, how far the prescribed procedure for taking Council decisions in connection with the common foreign and security policy reduces the

Member States' independence in this field. The procedural provisions are as follows. At first sight, the Member States' independence is fully guaranteed, since the basic principle governing decisions by the Council is that they must be unanimous; this means that any single Member State may block a given decision.[64] However, in derogation of the basic principle, the Council may act by qualified majority[65]:

- when adopting joint actions or common positions or taking any other decision on the basis of a common strategy and
- when adopting any decision implementing a joint action or a common position.[66]

7-23 It nevertheless follows, both from the derogation itself and from further provisions, that the Member States' independence is not seriously undermined. First, if joint actions, common positions or other decisions are adopted on the basis of a common strategy, they must derive from a decision on common strategy taken by the European Council; and there is no provision in the Treaty for the European Council to decide matters by simple or qualified majority.[67] Secondly, if a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken, in which case the Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.[68] Thirdly, the provisions allowing qualified majority voting do not apply to decisions having military or defence implications.[69] For purely procedural questions, the Council acts by a simple majority of its members.[70]

The Role of the Commission

7-24 For a general definition in the Treaty of the Commission's role in the common foreign and security policy, there is a provision that the Commission is to be fully associated with the work carried out in this field.[71] Almost identical wording is used in the context of the tasks of the Presidency: the Commission is to be fully associated in those tasks.[72] Together with the Presidency, the Commission has to keep the European Parliament regularly informed of the development of the policy.[73] It may be requested by the Council to submit any appropriate proposals to ensure the implementation of a joint action[74]; it may refer to the Council any question relating to the policy and may submit proposals to the Council[75]; and it may request that the Council should be convened at short notice in cases requiring a rapid decision.[76] This amounts in practice, as well as in law, to a substantial remit for the Commission in the common foreign and security policy field.

The Role of the Political Committee

7-25 Monitoring the international situation in the areas covered by the common foreign and security policy is entrusted to a Political Committee. It is also the duty of the Political Committee to contribute to the definition of policies by delivering opinions to the Council at the request of the Council or on its own initiative; and to monitor the implementation of agreed policies. The exercise of the Committee's powers and duties is without prejudice to the responsibility of the Presidency and the Commission.[77]

The Role of the Committee of Permanent Representatives

7-26 Since the provisions on the Political Committee are expressly intended to be without prejudice to provisions of the Treaty establishing the European Community giving constitutional status to the Committee of Permanent Representatives, it may be assumed that the latter Committee also has a role, probably along the traditional lines of preparing the work of the Council and carrying out the tasks assigned to it by the Council, in the foreign and security policy field.[78]

The Role of the Diplomatic Services

7-27 Member States' diplomatic and consular missions, Commission delegations in non-member states and international conferences and their representations to international organisations, are required to cooperate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented and to increase cooperation by exchanging information, carrying out joint assessments and helping to implement the provisions in the Treaty establishing the European Community on the representation of citizens of the European Union abroad.[79]

1. See Chapters 11 to 24.

2. This is implicit in the wording of the third paragraph of Article 1 (formerly A), EU Treaty, which distinguishes the European Communities from the policies and forms of cooperation established by this Treaty.

3. See paragraphs 7-13 to 7-16.

4. See paragraphs 7-17 and 7-18.

5. Article 46 (formerly L), EU Treaty.

6. The Court's powers, to examine the legality of acts of the Institutions, under Article 230 (formerly 173), EC Treaty, are limited to acts under that Treaty: Article 220 (formerly 164), EC Treaty. Its powers in relation to the Treaties establishing the other two Communities are contained in corresponding provisions in those Treaties.

7. Article I, section 10, and Article II, section 2, Constitution of the United States.

8. Article 17(1), first paragraph (formerly J.4), EU Treaty, refers to "the progressive framing of a common defence policy, ... which might lead to a common defence, should the European Council so decide".

9. As in Article 2 (formerly B), fifth indent, EU Treaty.

10. Article 11(1) (formerly J.1), EU Treaty.

11. Ibid.

12. Article 12 (formerly J.2), EU Treaty.

13. Article 11(2) (formerly J.1(4)), EU Treaty.

14. Article 13(1) (formerly J.3 et al), EU Treaty.

15. Article 13(2), first paragraph (formerly J.3 et al), EU Treaty.

16. Ibid, second paragraph. For an example, see Common Strategy of the European Council of 19 June 2000 on the Mediterranean region (CFSP/458/2000).

17. Article 13(3), first paragraph (formerly J.3 et al), EU Treaty.

18. Ibid, second paragraph.

19. Ibid.

20. Article 13(3), third paragraph (formerly J.3 et al), EU Treaty.

21. Article 14(1) (formerly J.3(1)), EU Treaty. "If there is a change in circumstances having a substantial effect on a question subject to joint action, the Council shall review the principles and objectives of that action and take the necessary decisions. As long as the Council has not acted, the joint action shall stand." Article 14(2), EU Treaty. For an example of a Joint Action, see CFSP/189/1999 concerning a contribution by the European Union to the re-establishment of a viable police force in Albania.

22. Article 14(3) (formerly J.3(3)), EU Treaty.

23. Article 14(4) (formerly J.3(4)), EU Treaty.

24. Article 14(5) to (7) (formerly J.3(5) to (7)), EU Treaty.

25. Article 15 (formerly Article J.5), EU Treaty. For an example, see the Common Position of 28 November 1994 defined by the Council on the objectives and priorities of the European Union towards Ukraine (CFSP/779/94). An example of a Council Regulation implementing a Common Position, see Council Regulation EC/1146/2001 concerning certain restrictive measures in respect of Liberia. While the legal basis of the Common Position was Articles 12 to 15, EU Treaty, the legal basis of the Regulation was Article 301, EC Treaty.

26. Article 16 (formerly J.6), EU Treaty.

27. Article 19(1) (formerly J.9(1)), first paragraph, EU Treaty.

28. Ibid, second paragraph.

29. Article 19(2) (formerly J.9(2)), first paragraph, EU Treaty.

30. Ibid, second paragraph.

31. Article 17(1) (formerly J.7(1)), first paragraph, EU Treaty,

32. Ibid and Article 17(2) (formerly J.7(2)), EU Treaty.

33. Article 17(1) (formerly J.7(1)), fourth paragraph, EU Treaty.

34. Note 31 above.

35. Article 17(1) (formerly J.7(1)), third paragraph, EU Treaty.

36. Article 17(4) (formerly J.7(4)), EU Treaty.

37. Article 17(1) (formerly J.7(1)), second paragraph, EU Treaty.

38. Article 17(3) (formerly J.7(3)), first paragraph, EU Treaty. See also the Protocol to the EU Treaty, discussed in paragraphs 10-4 and 10-5.

39. Article 203 (formerly 146), EC Treaty. See Chapter 17.

40. Article 18(1) (formerly J.8(1)), EU Treaty.

41. Article 18(2) (formerly J.5(2)), EU Treaty.

42. Article 18(3) (formerly J.8(3)), EU Treaty.

43. Article 18(4) (formerly J.8(4)), EU Treaty.

44. Article 18(5) (formerly J.8(5)), EU Treaty

45. On 13 September, 1999, the Council appointed the former Secretary-General of NATO, Mr Javier Solana, to that position.

46. Article 21 (formerly J.11), EU Treaty.

47. Article 13(3) (formerly J.3(3)), first paragraph, EU Treaty.

48. Ibid, second paragraph.

49. Ibid, third paragraph.

50. Article 14(1) and (2) (formerly J.4(1) and (2)), EU Treaty.

51. Article 14(4) (formerly J.4(4)), EU Treaty.

52. Article 14(7) (formerly J.4(7)), EU Treaty.

53. Article 15 (formerly J.5), EU Treaty.

54. Article 16 (formerly J.6), EU Treaty.

55. Article 18(5) (formerly J.8(5)), EU Treaty.

56. Article 21 (formerly J.11), second paragraph, EU Treaty.

57. Article 22(1) (formerly J.12(1)), EU Treaty.

58. Article 22(2) (formerly J.12(2)), EU Treaty. Meetings are convened by the Presidency of its own motion or at the request of the Commission or a Member State.

59. Article 23 (formerly J.13), EU Treaty.

60. Article 24 (formerly J.14), EU Treaty.

61. Article 25 (formerly J.15), EU Treaty. See Council Decision CFSP/143/2000, setting up the

Interim Political and Security Committee. The joint legal basis of this decision is Article 207, EC Treaty.

62. Article 26 (formerly J.16), EU Treaty.

63. Article 28 (formerly J.18), EU Treaty, applying various provisions of the EC Treaty.

64. Article 23(1) (formerly J.13(1)), first sentence, EU Treaty. The rest of Article 23(1) deals with the consequences of abstention, but does not derogate from the general principle.

65. For the meaning of "qualified majority", see Article 205(2) (formerly 148(2)), EC Treaty: Article 23(2) (formerly J.13(2)), third paragraph, EU Treaty. The system of majority voting in the Council is discussed in Chapter 17.

66. Article 23(2) (formerly J.13(2)), first paragraph, EU Treaty.

67. See Articles 4 and 13 (formerly D and J.3), EU Treaty.

68. Article 23(2) (formerly (J.13(2)), second paragraph, EU Treaty. The words "by unanimity" at the end of this provision are superfluous, since the European Council does not have power to act by majority.

69. Ibid, fourth paragraph. However, the legal basis of Council Regulation EC/381/2001, creating a rapid-reaction mechanism, was Article 308, EC Treaty, which requires unanimity.

70. Article 23(3) (formerly J.13(3)), EU Treaty.

71. Article 27 (formerly J.17), EU Treaty.

72. Article 18(4) (formerly J.8(4)), EU Treaty.

73. Article 21 (formerly J.11), first paragraph, EU Treaty.

74. Article 14(4) (formerly J.4(4)), EU Treaty.

75. Article 22(1) (formerly J.12(1)), EU Treaty.

76. Article 22(2) (formerly J.12(2)), EU Treaty.

77. Article 25 (formerly J.15), EU Treaty.

78. Article 207 (formerly 151), EC Treaty. See Chapter 17.

79. Article 20 (formerly J.10), EU Treaty; Article 20 (formerly 8c), EC Treaty.