

1 Unity and Flexibility in the future of the European Union: the challenge of enhanced cooperation

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Enhanced Cooperation and the European Foreign and Security and Defence Policy

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1. Introduction

The aim of the project as a whole is the study of the enhanced cooperation mechanism in the framework of the Lisbon Treaty. This contribution will focus on the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP).¹¹⁷

The concept of enhanced cooperation was introduced into the EU Treaty structure by the Treaty of Amsterdam, although this innovation is generally seen as an institutionalisation of previous ad hoc experiments in flexibility agreed within the Treaty framework at Maastricht with respect to Economic and Monetary Union, social policy and defence; as well as the Schengen Agreement, initially outside the EU Treaty system and brought into its structures also by the Amsterdam Treaty.¹¹⁸ Initially, however, the CFSP was excluded from the scope of the provisions on enhanced cooperation. The Treaty of Nice extended a limited possibility of enhanced cooperation to the CFSP, while still excluding from its scope all ‘matters having military or defence implications’ (Article 27b TEU). The Treaty of Lisbon, as well as expanding the Treaty provision on the EU’s Security and Defence Policy (currently Article 17 TEU), extending both its aims and its tasks and including a commitment to enhance its operational capacity, envisages a transformation of the ESDP into a *Common* Security and Defence Policy. It might seem paradoxical for the Treaty of Lisbon, at the same time as emphasising solidarity and the building of a common policy, to accept the extension of enhanced cooperation and flexibility into the defence sphere.

Indeed, one of the objects of this paper, as well as outlining the ways in which enhanced cooperation has applied to the CFSP (section II) and the ways in which this will be affected by the Treaty of Lisbon (section III), is to examine the extent to which foreign policy, security and defence lend themselves to enhanced cooperation and other forms of flexibility (section IV). The conclusion (section V) is that there is a need to distinguish between foreign policy and defence; the development of an active and credible EU foreign policy cannot readily accommodate differentiated integration as it depends for its force not primarily on either legally binding instruments or coercion but on political weight.¹¹⁹ On the other hand, military and defence capacities and initiatives are perhaps inherently differentiated. In order to explore these issues further we need to start by considering the rationale for enhanced cooperation more generally, and its application to the CFSP.

As one of the leading scholars of enhanced cooperation has pointed out,¹²⁰ there is a certain ambiguity in the rationales underlying the provisions on enhanced cooperation. On the one hand it is seen as a form

¹¹⁷ For a study of the possibilities of differentiated integration in EC external relations, and the impact of internal differentiated integration on EC external policy, not covered by this paper, see E. De Smijter, ‘The External Relations of a Differentiated European Community’ in B. De Witte, D. Hanf, E. Vos (eds.) *The Many Faces of Differentiation in EU Law* (Intersentia, 2001).

¹¹⁸ See generally D. Thym, ‘The Political Character of Supranational Differentiation’, (2006) 31 *European Law Review* 781; D. Král, ‘Multi-speed Europe and the Lisbon Treaty - threat or opportunity?’, *Europeum*, (<http://www.europeum.org/doc/pdf/895.pdf>)

¹¹⁹ As Daniel Thym has put it, ‘foreign policy is not primarily about statutory regulation, but about expressing political support, opposition, and pressure. The added value of European foreign policy stems from the combination of political clout and the strength inherent in united action’ D. Thym, ‘Reforming Europe’s Common Foreign and Security Policy’ (2004) 10 *European Law Journal* 5, at p.12.

¹²⁰ H. Bribosia, ‘Les Coopération Renforcées’ in G. Amato, H. Bribosia and B. de Witte (eds.), *Genèse et Destinée de la Constitution Européenne: Commentaire du traité établissant une Constitution pour l’Europe à la lumière des travaux préparatoires et perspectives d’avenir*, Editions Bruylant, 2007.

of institutionalised differentiated integration, accommodating (as with Schengen and the EMU opt-outs) the desire of some Member States to pursue integration at a faster pace than others, or to extend integration into new areas. On the other hand it is seen as a way to unblock decision-making *impasses*, especially in areas where unanimity is required, such as tax harmonisation, aspects of the movement of people, or perhaps foreign policy. This ambiguity is reflected in the conditions and procedures governing its use, for example the extent to which it is regarded as a measure of last resort; the degree to which the policy objectives of the initiative must be defined in advance; the degree of 'openness' to other Member States and the conditions, if any, under which subsequent participation is allowed. Enhanced cooperation within the CFSP/CSDP reflects this ambiguity, with perhaps a current bias towards the second of these functions – facilitating decision-making. The changes to the provisions in the Lisbon Treaty may be argued to have shifted the balance somewhat towards the first – the accommodation of differentiated integration.

2. Enhanced cooperation and the CFSP under the Treaty of Nice

Under the framework established by Treaty of Nice, enhanced cooperation in the CFSP is dealt with in two sets of provisions: Articles 43-45 TEU establish the general framework, applicable to all three pillars, and Articles 27a-27e TEU establish the specific provisions on enhanced cooperation in the CFSP. We need to examine the following issues: the scope of enhanced cooperation in the CFSP; its aims and substantive conditions; the procedures for establishing it; the procedures for admission of later-joining Member States; the status of measures adopted under the procedures. Since the provisions on enhanced cooperation have not yet been used, we do not have any practice to examine and our analysis will depend on the Treaty provisions themselves.

2.1. Scope of enhanced cooperation in CFSP

According to Article 27b TEU,

Enhanced cooperation pursuant to this title shall relate to implementation of a joint action or a common position. It shall not relate to matters having military or defence implications.

The phrasing of the first sentence recalls that of Article 23(2), second indent, which establishes one of the situations in which qualified majority voting (QMV) is possible. Like QMV in the CFSP, therefore, enhanced cooperation is not intended to launch new policy initiatives but rather to enable a specific implementation of already-determined policies by a group of Member States. This gives it rather restricted scope, in addition to the exclusion of matters with military or defence implications (incidentally also excluded from QMV), particularly if we bear in mind that common positions and joint actions are binding instruments and that all Member States will therefore be under an obligation to give them effect.¹²¹ Thus, enhanced cooperation seems to envisage that some Member States may wish to go beyond others in the degree or intensity of their implementation of policies already formulated.¹²² The CFSP, it must be remembered, is not a pre-emptive competence of the Union. Even where a CFSP action has been taken, it is possible for Member States to continue to act unilaterally as long as they do not act in contravention of the CFSP measure; enhanced cooperation therefore amounts to a form of collective further implementing action by a group of Member States. It may be (although this has not yet happened, at least formally) that unanimous agreement to a specific joint action or common position is made possible if it is understood that its implementation will be by way of enhanced cooperation by a group of Member States.

A key general limitation to enhanced cooperation is that it must 'remain within the limits of the powers of the Union' (Article 43(d) TEU). In this it is unlike forms of cooperation 'external' to the EU, such as the Schengen Agreement, which do provide a way of going beyond existing Treaty powers. Given the emphasis on inclusivity (as many Member States as possible are to be encouraged to take part) this limit ensures that enhanced

¹²¹ Under Article 14 TEU joint actions 'shall commit the Member States in the positions they adopt and in the conduct of their activity'; under Article 15 TEU 'Member States shall ensure that their national policies confirm to the common positions'.

¹²² I. Pernice and D. Thym, 'A New Institutional Balance for European Foreign Policy?' (2002) 7 *European Foreign Affairs Review* 369 at p.382-3. Pernice and Thym argue that this is a necessary limitation on enhanced cooperation in the CFSP given the need for unity in the presentation of a credible common foreign policy; see also Thym at note 3 *supra*.

cooperation does not become a form of *de facto* Treaty amendment. However CFSP powers, at least in terms of substantive scope, are in fact extensive: under Article 11(1) TEU the Union's CFSP covers 'all areas of foreign and security policy'. Since the exercise of enhanced cooperation must respect the Treaties, both the EC Treaty and the TEU (Article 43(b) TEU), it should not infringe Article 47 TEU by encroaching upon Community powers.¹²³

The competence limitation may be more significant in terms of available instruments: CFSP powers are exercised through general guidelines, common strategies, joint actions, common positions, decisions and international agreements.¹²⁴ Could these be extended through enhanced cooperation to include, for example, Community-style regulations or directives, assuming that this would be, as required, in the implementation of a joint action or common position? Or would the adoption of a Community-style regulation fall outside the limits of the Union's powers?¹²⁵ In support of this latter view is the fact that Article 43 TEU authorises the use of 'the institutions, procedures and mechanisms laid down by this Treaty' for the purposes of enhanced cooperation, which suggests that both the range of instruments and the institutional balance should be respected.¹²⁶ Also in support is the provision in Article 27a(2) TEU that Articles 11 to 27 TEU shall apply to enhanced cooperation – thus including the provisions on instruments, institutions and decision-making procedures.

Among the available instruments, the international agreement is perhaps the most problematic from the perspective of enhanced cooperation. The agreement, under Article 24 TEU, would be concluded in the name of the Union and will be binding on the institutions under Article 24(6) TEU. However it would not bind those Member States who were not participating in the enhanced cooperation (Article 44(2) TEU).¹²⁷ Although this might pose difficulties in terms of international responsibility, it should be remembered that the agreement would – at present – be concluded in implementation of a previously agreed common position or joint action to which all Member States subscribed.

As already mentioned, enhanced cooperation may not be used for 'matters having military or defence implications'. Arguably this should not exclude all security matters under Article 17 TEU, since (for example) civilian crisis management missions or humanitarian and rescue tasks may not involve military action; on the other hand some might see the whole of Article 17 as having defence implications and thus excluded.

2.2. Aims and substantive conditions

In general terms, enhanced cooperation should be aimed at 'furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their process of integration'.¹²⁸ To this Article 27a(1) TEU – reflecting CFSP objectives as set out in Article 11 TEU – adds:

Enhanced cooperation [within the CFSP] 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.

Enhanced cooperation is thus about using Union institutions and mechanisms to achieve Union objectives. Both these provisions, with their references to integration, coherence and identity, demonstrate a concern that enhanced cooperation should not be used to establish separate autonomous groupings of Member States – something that is perhaps especially important in the context of the CFSP where the Union's ability to speak with one voice is crucial to its success.

Articles 43 and 27a TEU also set out a number of substantive general and CFSP-specific conditions. These are concerned to ensure first, respect for the Community and Union/CFSP *acquis* and second, consistency

¹²³ Under Article 27a(1) TEU, enhanced cooperation within CFSP must respect the powers of the Community. C.f. case C-91/05 *Commission v Council* (ECOWAS) [2008] ECR I-0000.

¹²⁴ Articles 12, 13(3) and 24 TEU.

¹²⁵ Although adopting a regulation is within Community powers, Article 43(d) requires the measure to remain 'within the limits of the powers of the Union or of the Community', not the Union *and* the Community.

¹²⁶ It may also be noted that under the Lisbon Treaty special provision is made for the use of enhanced cooperation in order to modify voting and decision-making requirements: Article 333 TFEU; see further discussion below; the implication is that, *a contrario*, enhanced cooperation cannot at present be used for these purposes.

¹²⁷ T. Jaeger, 'Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy' (2002)7 *European Foreign Affairs Review* 297 at p.303-5, also questioning the extent to which the Union *per se* could be bound by the agreement in such a case..

¹²⁸ Article 43(a) TEU.

between all the Union's policies and external activities. Thus Article 27a provides that enhanced cooperation 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.

The ongoing maintenance of this consistency is the responsibility of the Council and Commission (Article 45 TEU, c.f. Article 3 TEU).

2.3. Procedures for establishing enhanced cooperation in the CFSP

A minimum of eight Member States are required to initiate enhanced cooperation, approximately one third of the envisaged Member States at the time of the Treaty of Nice. Under Article 43a TEU enhanced cooperation is to be undertaken 'only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaty.' This condition implies a failure of normal decision-making processes and thus the use of enhanced cooperation in a subsidiary role with the effect of mitigating the rigours of unanimous voting. At the same time it is to be open to all Member States, so cannot be used to form a closed exclusionary club.

The participating Member States are to address the request to the Council and the request is then forwarded to the European Parliament and the Commission. As far as the European Parliament is concerned, this is for information only;¹²⁹ the Commission is to give an opinion, 'particularly on whether the enhanced cooperation proposed is consistent with Union policies,'¹³⁰ since as we have seen it should be consistent not only with CFSP objectives and policies but also with Community and other Union policies. There is at present no guidance in the Treaty as to how much detail needs to be given to the Council, or Commission, by the proposing Member States as to the objectives and scope of the proposed action, whether it needs to amount in effect to a draft instrument or merely to consist of a project for acting on a particular matter. Here again absence of practice makes it difficult to assess the level of detail needed to make the process work satisfactorily.

Authorisation is granted by the Council, acting in accordance with the second and third subparagraphs of Article 23(2) TEU. This means that the Council acts by QMV, with votes allocated according to Article 205(2) EC, 255 votes in favour being required, representing at least two-thirds of the Member States.¹³¹ The two-thirds rule means that in addition to the one-third of Member States needed to launch an enhanced cooperation initiative, at least another third of Member States need to be in agreement.

Once enhanced cooperation is established, decisions are taken according to the normal decision-making procedures, with the requirements for QMV adjusted proportionately to those taking part. The High Representative is to keep the European Parliament and non-participating Member States informed, 'without prejudice to the powers of the Presidency and of the Commission'. Expenditure, except for the administrative costs of the institutions, is for the participating Member States only. It is notable that all Member States are entitled to take part in discussion of proposed measures under enhanced cooperation, although only participating Member States will vote or be included for the adoption of unanimous decisions. This again suggests a vision of enhanced cooperation that is primarily concerned with unblocking decision-making failures rather than new more deeply integrative policy departures.

¹²⁹ In contrast, enhanced cooperation under the EC Treaty requires consultation of the European Parliament and in some cases its assent: Article 11(2) EC.

¹³⁰ Article 27c TEU.

¹³¹ Two separate 'brakes' are included in the Article 23(2) procedure: a Member State may request verification that the qualified majority represents at least 62% of the total population of the Union as a condition for adopting the decision. A Member State may also, under this procedure, oppose the adoption of a decision by QMV 'for important and stated reasons of national policy'; in such a case the Council may refer the issue to the European Council for adoption by unanimity.

2.4. Procedures for admitting later-joining Member States

Just as enhanced cooperation must be open to all Member States initially, it must also be possible for non-participating Member States to join at a later stage and the Commission and participating Member States are charged with encouraging further participation of ‘as many Member States as possible’ (Article 43b TEU). At this point, however, those wishing to join must be prepared to comply with the ‘enhanced cooperation acquis’ in the form of the initial decision and any further decisions. From this perspective the right of non-participating States to take part in discussion leading to the adoption of decisions taken under enhanced cooperation is important. Article 27e provides:

Any Member State which wishes to participate in enhanced cooperation established in accordance with Article 27c shall notify its intention to the Council and inform the Commission. The Commission shall give an opinion to the Council within three months of the date of receipt of that notification. Within four months of the date of receipt of that notification, the Council shall take a decision on the request and on such specific arrangements as it may deem necessary. The decision shall be deemed to be taken unless the Council, acting by a qualified majority within the same period, decides to hold it in abeyance; in that case, the Council shall state the reasons for its decision and set a deadline for re-examining it. For the purposes of this Article, the Council shall act by a qualified majority...

It is perhaps significant that the Member State wishing to participate ‘notifies its intention’ to the Council rather than, for example, ‘addressing a request’ as the initial participants do.¹³² Although the Council has the power to refuse, the process is weighted in favour of inclusion: the Council, after receiving an opinion from the Commission, decides by qualified majority. A negative decision requires a blocking qualified majority and even then it is only a decision to ‘hold it in abeyance’ with a date set for re-examination; a definitive refusal is thus not contemplated.

2.5. The status of measures adopted under enhanced cooperation procedures

The status of measures adopted under enhanced cooperation is clearly of great importance. They are binding only on participating Member States although non-participating Member States are not to impede their implementation (Article 44(2) TEU). Further, Article 44(1) TEU provides that they ‘shall not form part of the Union acquis’. The implications of this are unclear, but are probably of more consequence for enhanced cooperation within the framework of the Community, with its doctrines of primacy and direct effect, than for the CFSP. Unlike the negotiated opt-outs from EMU, defence and the ‘Communitarisation’ of Schengen, newly acceding States are not bound to accept enhanced cooperation. It also seems clear that the Union would not be prevented by enhanced cooperation from itself adopting, as part of the normal CFSP, measures in the field covered by enhanced cooperation, subject to the requirement of consistency already mentioned.

Since acts under enhanced cooperation would be adopted under the general CFSP provisions they would likewise be excluded from the jurisdiction of the Court of Justice (with respect to judicial review, for example). Nor is the Court given jurisdiction over the Treaty provisions on enhanced cooperation themselves insofar as they concern the CFSP.¹³³

3. Enhanced cooperation in the CFSP under the Treaty of Lisbon

3.1. The nature of CFSP competence

The Treaty of Lisbon is essentially an amending Treaty; it amends the existing Treaty on European Union and EC Treaty, renaming the latter as the Treaty on the Functioning of the EU (TFEU).¹³⁴ These amendments are major ones and include the replacement of the EC by the EU. Nevertheless, we do not see, as the Constitutional Treaty (CT) proposed, a complete replacement of the previous treaties with a new legal instrument. These

¹³² Compare Article 27e with 27c TEU.

¹³³ Under Article 46 TEU, Articles 27a – 27e are excluded as part of Title V TEU, and the Title VII provisions on closer cooperation only fall within the jurisdiction of the Court to the extent that they are concerned with its operation to the Community and to Title VI.

¹³⁴ For consolidated versions of both treaties as amended by the Treaty of Lisbon, see OJ 2008 C 115.

two Treaties provide for a single Union with legal personality on which competences are conferred (Article 1(1) TEU-revised) and which will 'replace and succeed' the EC (Article 1(3) TEU-revised). The two Treaties are bound more closely together than the TEU and EC Treaty are at present.¹³⁵ In a clever piece of drafting, the TEU and TFEU refer to 'these treaties' throughout. There is much inter-Treaty cross-referencing and the Treaties are linked in other ways. A single set of objectives is applicable to both Treaties and all policies. Article 2 TEU-revised establishes the Union's values and Article 3 its overall objectives. The separate tasks and activities set out currently in Articles 3 and 4 EC will disappear. A single set of legal acts applies across both treaties and all policy areas (although some acts – legislative acts – are excluded from the CFSP). The only substantive area of activity that is spread between the two Treaties – external action – has a set of 'general principles and objectives' (Articles 21 (1) & (2) TEU-revised) which are explicitly stated to apply both to the CFSP Chapter in the TEU and to Part Five of the TFEU and both of these refer back to these general principles and objectives (Article 23 TEU-revised; Article 205 TFEU).¹³⁶ The consistency provision in the TFEU refers to all policies, activities and to all objectives (which are defined in the TEU).

The clearest example of the still somewhat awkward division between the two Treaties is the decision to retain the CFSP provisions in the TEU rather than placing them with the other substantive provisions on external action in the TFEU. This may seem to be anomalous, and in a sense it is, as apart from the Neighbourhood Policy the CFSP is only substantive policy competence established in the revised TEU. However, it is not only a historical and anomalous legacy of the existing treaty structure. It results in – and was presumably intended to achieve – an increase in transparency concerning the separation of CFSP competence from other competences – something which was obviously intended in the Constitutional Treaty but which its provisions did not make fully clear.¹³⁷

Other factors in the Lisbon Treaty achieve a clearer demarcation of CFSP competence from other Union competences.

(i) Article 24(1) TEU-revised emphasises that 'specific rules and procedures' apply to the CFSP; this includes some specificity in the provision for enhanced cooperation.

(ii) With two exceptions (Articles 40 TEU and 275 TFEU) the jurisdiction of the European Court of Justice is excluded from all CFSP provisions.

(iii) Article 252 TFEU (former Article 308 EC) does not apply to the CFSP.¹³⁸

(iv) CFSP decision-making procedures differ from those applicable to other Union policies, especially in terms of the roles of the Commission and the European Parliament.

(v) Legislative acts may not be adopted in the area of CFSP.¹³⁹

(vi) The provision on primacy in Article I-6 of the Constitutional Treaty has been removed; it reappears as Declaration 17 which purports to affirm the application of the principle to 'the Treaties', although the 'well settled case law' to which it refers does not affirm the primacy of TEU (as opposed to Community) law. Nevertheless given the unified legal order there are good arguments for holding that primacy should apply to the whole of Union law, including the CFSP, although primacy in the strong sense in which it applies to Community law is closely directly linked to the direct effect of that law.¹⁴⁰

¹³⁵ At present although there are references to the EC Treaty in the TEU, notably in the Common Provisions, there are rather few references to the TEU in the EC Treaty (e.g. Art 11 EC on closer cooperation referring to Arts 3 and 4 TEU; Art 61(a) & (e) on AFSJ referring to the third pillar; Art 125 on employment refers to the objectives established in Art 2 of the TEU as well as Art 2 of the ECT; Art 268 on the budget referring to CFSP administrative expenditure; Art 300 referring to procedures for amendment set out in Art 48 TEU; Art 301 on economic sanctions; Art 309 referring to the procedure established in Art 7 TEU). In addition, the procedures for accession and amendment are established by the TEU and apply to the Union as a whole and to all the founding Treaties.

¹³⁶ The provision on relations with neighbouring countries is an anomaly here: it is placed in Article 8 TEU-revised, which falls outside the scope of Article 21(3) requiring respect for these general principles. Still, the wording of Article 21 (1) and (2) is sufficiently general to allow for their application to Article 8.

¹³⁷ See further M Cremona, 'The Union's External Action : Constitutional Perspectives' in G. Amato, H. Bribosia and B. de Witte (eds.), *op.cit.* note 4.

¹³⁸ See also Declaration 41.

¹³⁹ Articles 24(1) and 31(1) TEU-revised and Declaration 41.

¹⁴⁰ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*. [1978] ECR 00629.

(vii) The Lisbon Treaty is silent on direct effect. It is thus, as before, an attribute conferred by the interpretation of the Court of Justice. However since the Court has very limited jurisdiction over the CFSP, it will have limited opportunity to declare a CFSP act directly effective. The difficulty remains, however, that there is nothing to prevent CFSP measures from being raised, directly or indirectly, in national courts, which may then have to resolve conflicts between national law and CFSP acts. It is hard to see how national courts would deal with such a question without being able to refer to the Court of Justice for a ruling.

The CFSP is treated as a *sui generis* competence in the TFEU,¹⁴¹ but by refusing to characterise the CFSP as either exclusive, shared (whether pre-emptive or non-pre-emptive), supporting, coordinating or supplementary, the Treaties leave undefined the important question of the relationship between Union and Member State powers in this field. To take one example: it is not clear from the text whether the provision on exclusive competence to conclude international agreements in Article 3(2) TFEU applies to the CFSP.¹⁴² Declarations 13 & 14 affirm that the CFSP will not affect the responsibilities of the Member States for the formulation and conduct of their foreign policy, a statement which is designed to reinforce the presumption (as it is not explicit) that pre-emption will not apply to the CFSP.¹⁴³

Overall, then, the Lisbon Treaty helps to underline the distinctive nature of the CFSP. However the 'specific rules and procedures' applied to the CFSP do not put into question the single legal order; the chapter on the CFSP is included in the same Title as, and is subject to, the general principles governing the Union's external action: it is part of that external action and part of the same legal system, albeit with a different institutional balance and decision-making procedure. Under the pre-Lisbon regime, in contrast, the Court of Justice referred to a 'coexistence of the Union and the Community as integrated but separate legal orders', supported by the 'constitutional architecture of the pillars',¹⁴⁴ including Article 47 TEU which establishes a Community priority.¹⁴⁵ This relationship between EC law and the TEU will fundamentally change. Under the Lisbon Treaty, the same rules will apply throughout and across both treaties unless a specific exception is made, as it is in relation to the CFSP. The relationship between the two Treaties is established in Art 1 TEU-revised and Art 1 TFEU, which provides that both Treaties shall have the same legal value, thereby removing Community priority.¹⁴⁶

Alongside this equal value provision is the non-affect clause, which is taken over from the Constitutional Treaty and which is fundamentally different from the Article 47 TEU as interpreted by the Court of Justice. Article 40 TEU-revised looks both ways and the separation is not, as now, between Treaties, but between policy sectors:

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union [exclusive competence, shared competence, economic coordination and supporting action].

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.¹⁴⁷

¹⁴¹ Article 2(4) TFEU.

¹⁴² In practical terms, the conditions set here for exclusive competence are unlikely to apply to the CFSP: legislative acts are not permitted within the CFSP; a CFSP agreement is unlikely to be necessary in order for the Union to exercise an internal competence (the CFSP is entirely external); its conclusion is unlikely to affect 'common rules', as the nature of CFSP instruments, at least thus far, is not to establish common rules.

¹⁴³ The formulation of their foreign policy by the Member States is of course 'affected' by the CFSP in the sense that they are bound by decisions taken and by the loyalty clause (Arts 4(3) and 24(3) TEU-revised); presumably what is meant here is that they retain full competence to act.

¹⁴⁴ Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council*, judgment of 3 September 2008, para 202.

¹⁴⁵ The Court has held that 'a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of Article 47 EU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences.' Case C-91/05 *Commission v Council* (ECOWAS), judgment of 20 May 2008, para 60.

¹⁴⁶ Note also that the reference to supplementing the European Communities in the current Article 1(3) TEU disappears, and the Union is founded on both treaties rather than on the European Communities as now. The reference to maintaining and building on the Community *acquis* in current Art 2 TEU also disappears – in fact all references to the *acquis communautaire* per se disappear. It is rather ironic that the term *acquis communautaire* disappears, while other uses of *acquis* that have developed out of its original use in relation to the Community legal order, remain, including Article 20(4) TEU-revised which refers to the accession *acquis* in the context of enhanced cooperation.

¹⁴⁷ Article 40 TEU as amended by the Treaty of Lisbon.

The unity of the legal order together with the specificities of CFSP competence established by the Lisbon Treaty, are reflected in the provisions on enhanced cooperation. On the one hand, those provisions cover enhanced cooperation in all policy fields: there is no longer a separate set of rules in the CFSP chapter. On the other hand, CFSP is differentiated from other Union policies in some of the provisions relating to enhanced cooperation.

3.2. Enhanced cooperation in the Lisbon Treaty

Enhanced cooperation is introduced in Article 20 TEU-revised, which establishes the basic principles. It is then elaborated in Article 326 – 334 TFEU. In what follows, in order to avoid repetition, the emphasis will be on the changes introduced by the Lisbon Treaty. What we find is that the barrier to establishing enhanced cooperation in the CFSP has been raised, in that it will be subject to a unanimous vote in the Council, but in other ways its use is less restricted.

3.2.1. Scope of enhanced cooperation in CFSP

Enhanced cooperation may be established ‘within the framework of the Union’s non-exclusive competences’ and in so doing the Member States may use the Union’s institutions and ‘exercise those competences’.¹⁴⁸ As now, therefore, enhanced cooperation may not be used to extend Union competence. The possibility of using enhanced cooperation as a method of simplified substantive Treaty amendment or substantive *passerelle* has been rejected.¹⁴⁹ The important restriction of enhanced cooperation in the CFSP to the implementation of a joint action or common position has disappeared, giving greater flexibility in its use. It is difficult to know what difference this might make in practice; as we shall see, the procedure for authorising enhanced cooperation has been tightened and this might off-set the change.¹⁵⁰ Nevertheless the change signals that enhanced cooperation could be used to establish a new line of policy in CFSP, not merely an implementation of already defined goals. It therefore supports the idea of enhanced cooperation as differentiated integration.

The exception for military and defence matters has also been removed and enhanced cooperation may operate throughout the CFSP and CSDP. That raises the question of the position of Denmark. Could Denmark, while not participating in the Union’s defence policy, decide to join a specific enhanced cooperation initiative in this area? Under Article 6 of the Protocol on the position of Denmark, ‘Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications’. Since enhanced cooperation uses Union institutions and instruments and exercises Union competences, it should be regarded as ‘action of the Union’ even if not, as we shall see, fully part of the Union’s *acquis*, and the phrasing of the Danish defence opt-out is wide enough to cover all defence-related action not only that taken under the ‘mainstream’ CSDP. The conclusion is therefore that Denmark would not have the option of joining enhanced cooperation in defence while its opt-out remains in force.¹⁵¹

3.2.2. Aims and substantive conditions

The aims and conditions for the establishment of enhanced cooperation have not substantively changed. It must ‘aim to further the objectives of the Union, protect its interests and reinforce its integration process’.¹⁵² It must comply with the Treaties and Union law,¹⁵³ be consistent with Union policies¹⁵⁴ and respect the competences,

¹⁴⁸ Article 20 TEU-revised.

¹⁴⁹ H. Bribisia, *op.cit.* note 4, p.629.

¹⁵⁰ D. Thym, ‘Reforming Europe’s Common Foreign and Security Policy’ (2004) 10 *European Law Journal* 5, at p.12.

¹⁵¹ The Protocol allows Denmark to decide at any time to discard the opt-out, but this cannot be done on a selective case-by-case basis.

¹⁵² Article 20(1) TEU-revised.

¹⁵³ Article 326 TFEU.

¹⁵⁴ Article 334 TFEU.

rights and obligations of non-participating Member States.¹⁵⁵ As we have seen there are no longer separate CFSP objectives and thus no special provision is needed in that regard. If we see enhanced cooperation as supporting differentiated integration, and not merely about unblocking decision-making processes, these provisions are important in underlining the basic orientation of enhanced cooperation towards Union objectives and that the enhanced integration of a few must not be at the expense of its overall integration process.

3.2.3. Procedures for establishing enhanced cooperation in the CFSP

The Lisbon Treaty maintains the principle that one-third of Member States is required as a minimum for enhanced cooperation to proceed; thus with 27 Member States the minimum number is nine. There is no explicit provision to raise the number following future enlargements, but of course this minimum can always be raised together with other enlargement-related amendments. The Treaty also maintains the 'last resort' principle, although it is clearer that this is to be determined by the Council as part of its authorisation procedure.¹⁵⁶ In a significant change, the decision of the Council to authorise enhanced cooperation must be taken unanimously, instead of, as now, by QMV,¹⁵⁷ and it will be possible for the authorising decision to lay down conditions of participation.¹⁵⁸ For other (non-CFSP) areas of enhanced cooperation, the Lisbon Treaty will require the requesting Member States to specify the objectives and scope of the proposed enhanced cooperation;¹⁵⁹ however this change does not extend to the CFSP which retains the existing simple request. In addition to the Commission, which is to give an opinion on the consistency of the proposal with other Union policies, the High Representative for Foreign Affairs and Security Policy will give an opinion on its consistency with the CFSP. The European Parliament is, as now, informed. These procedural and substantive conditions reflect the ambivalence in the rationale for enhanced cooperation referred to earlier.

The rules as to ongoing decision-making within enhanced cooperation are unchanged, with one possibly significant exception. Enhanced cooperation may be used as a kind of procedural *passerelle*, to enhance cooperation in the procedural as well as the substantive sense. Where a Treaty provision used in the context of enhanced cooperation requires the Council to act unanimously, the Council may, acting unanimously in its enhanced cooperation formation, decide to act by QMV; and where the Treaty provides for a special legislative procedure the Council may decide, in the context of enhanced cooperation, to act by the ordinary legislative procedure (co-decision).¹⁶⁰ These procedural *passerelles* cannot be used for matters having military or defence implications; in addition legislative acts cannot be adopted under the CFSP so only the first of the two *passerelles*, that referring to QMV, will apply. As Bribosia points out, such a decision will bind those Member States who decide later to join the enhanced cooperation.¹⁶¹ From this point of view the fact that the Council authorisation of enhanced cooperation, including the establishment of conditions, must be taken unanimously is important. If this possibility were to be widely used as a rationale in itself for engaging in enhanced cooperation, it could contribute to the fragmentation of Union law, given that such decisions would not be binding on non-participating Member States.

3.2.4. Procedures for admitting later-joining Member States

Although the Lisbon Treaty continues to emphasise the principle of openness, it has made two changes that will in fact raise the barrier to entry – as well as the provision just discussed which might itself discourage some Member States from joining if, while accepting the substantive policy initiative, they do not wish to be subject to QMV. The first is that the decision to admit a 'new' Member State must be taken unanimously by the Council (in its enhanced cooperation formation).¹⁶² The second is that joining Member States will not only have

¹⁵⁵ Article 327 TFEU.

¹⁵⁶ Article 20(2) TEU-revised. See H Bribosia, *op.cit.* note 4, p.632. This provision is linked to the conception of enhanced cooperation as a method of unblocking decision-making.

¹⁵⁷ Article 329 TFEU.

¹⁵⁸ Article 328(1) TFEU.

¹⁵⁹ Article 329(1) TFEU.

¹⁶⁰ Article 333 TFEU.

¹⁶¹ See H Bribosia, *op.cit.* note 4, p.636-7.

¹⁶² Article 331(2) TFEU.

to accept the '*acquis*' of the enhanced cooperation, but also any conditions that may have been imposed at the outset on participating Member States. If these conditions are not fulfilled, the Council may indicate what arrangements are necessary to fulfil them and set a deadline for the re-examination of the application to join. Transitional arrangements may be established for the application of the enhanced cooperation *acquis* by the newly participating Members.

3.2.5. The status of measures adopted under enhanced cooperation procedures

As now, acts adopted within the framework of enhanced cooperation bind only the participating Member States,¹⁶³ although non-participating Member States are under an obligation not to obstruct their implementation and this obligation may in fact prove to have significant effects in restraining autonomous action by the non-participating Member States in the field covered by enhanced cooperation.¹⁶⁴

It will be remembered that the pre-Lisbon Treaty states that decisions adopted under enhanced cooperation do not form part of the Union *acquis*. The Lisbon Treaty clarifies this expression somewhat: acts adopted under enhanced cooperation are not to be regarded 'as part of the *acquis* which has to be accepted by candidate States for accession to the Union'.¹⁶⁵ If they are not part of the accession *acquis*, they may *a contrario* be regarded as part of the Union *acquis* in other ways, for example in falling within the scope of the loyalty obligation (of participating Member States) established by Article 4(3) TEU-revised, or as forming part of Union law for the purposes of the operation of the Court's case law on fundamental rights.¹⁶⁶

4. Flexibility in the CFSP and CSDP

It is rather striking that although enhanced cooperation has never been used in the CFSP, and before the Treaty of Lisbon was not possible for military and defence matters, other forms of flexibility are available, have been used and will be formalised and extended by the Treaty of Lisbon; moreover these forms of flexibility operate precisely within the military and defence sphere. These developments suggest that flexibility may be inherent in the development of a common security and defence policy, for two reasons. First, the differences between the Member States in relation to their international defence commitments, what the current Treaty calls 'the specific character of the security and defence policy of certain Member States' (Article 17(1) TEU). Second, the requirement that a fully-fledged CSDP imposes in terms of significant commitments as regards operational capacity.

The first of these is reflected in the current Treaty requirements that the Member States' security and defence policy will not be prejudiced, that their obligations under NATO are to be respected, and more specifically that

"The provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO, provided such cooperation does not run counter to or impede that provided for in this title." (Article 17(4) TEU)

This provision has been removed by the Lisbon Treaty along with all references to the WEU,¹⁶⁷ although the Treaty does affirm that those Member States that 'together establish multilateral forces' may make them available to the Union, thereby recognising and impliedly approving the possibility of this form of deeper integration outside the Union framework.¹⁶⁸

The Lisbon Treaty does however continue to recognise both the specific character of some Member States' security and defence policies, and the requirements of NATO obligations, particularly in framing the

¹⁶³ Article 20(4) TEU-revised.

¹⁶⁴ Article 327 TFEU; c.f. the interpretation given by the Court of Justice to Article 10 EC.

¹⁶⁵ Article 20(4) TEU-revised.

¹⁶⁶ See for example Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685; Case C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR I-02629.

¹⁶⁷ Note Article 42(7) TEU-revised which includes the obligation of aid and assistance towards a Member States that is a victim of armed aggression, reflecting Article V of the WEU Brussels Convention.

¹⁶⁸ Article 42(3) TEU-revised.

objective not only of a common Union defence policy but also a 'common defence'.¹⁶⁹ Of symbolic significance is the alteration of 'might' to 'will' and 'should' to 'when' in the revised Treaty provisions on a 'common defence', although the Treaty does not remove the need for individual States to accept the concept of a common defence in accordance with their respective constitutional requirements.

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.

The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.¹⁷⁰

We can see here an increased level of ambition for the CSDP while expressing the determination to act within and in a complementary way to existing multilateral structures and therefore to reflect the different obligations of Member States in those structures, including not only NATO but also the UN Security Council.¹⁷¹

The second factor determining the inherent character of flexibility in the CSDP is operational capacity, and this is relevant in a number of ways. Underlying them all is the principle that the CSDP will use the capabilities provided by the Member States, and an overall commitment of the Member States to both make civilian and military capabilities available to the Union for its CSDP, and to improve their military capabilities. These commitments underpin the flexibility that then operates within the framework they establish. We can identify three examples of this type of operational flexibility: (i) the European Defence Agency; (ii) entrusting implementation of CFSP tasks to specific Member States; and (iii) permanent structured cooperation.¹⁷²

(i) The European Defence Agency (EDA) is one element of the strengthened CSDP which has not had to await the coming into force of the Lisbon Treaty; it was implemented already in 2004 via a Council Joint Action.¹⁷³ The Agency's remit is the development of defence capabilities and it is a response to a perceived need to complement the building up of the CSDP with a greater degree of cooperation and integration in the commercial aspects of defence.¹⁷⁴ It is taking initiatives in the fields of Research and Technology¹⁷⁵ and Defence Procurement.¹⁷⁶ Participation in the European Defence Agency (EDA) is optional¹⁷⁷ but all Member States except Denmark are participating. It is also envisaged that groups may be set up within the Agency bringing together Member States engaged in joint projects.

(ii) The Lisbon Treaty formalises the existing practice of delegating specific operations to one or more Member States.¹⁷⁸ Under Article 42(5) and 44 TEU-revised, the Council may entrust the implementation of a CSDP initiative to a small group of willing and able Member States, 'in order to protect the Union's values and serve its interests'. It is thus made clear that the Union's interests are given priority; this is not a matter of 'borrowing' Union support for an essentially national endeavour. The tasks in issue are those specified in Article 43 TEU-revised – the expanded 'Petersberg tasks', including

¹⁶⁹ Article 42(2) and (7) TEU-revised.

¹⁷⁰ Article 42(2) TEU-revised.

¹⁷¹ C.f. Article 34 TEU-revised.

¹⁷² ee H. Bribosia, 'Les Nouvelles Formes de Flexibilité en Matière de Défense' in G. Amato, H. Bribosia and B. de Witte (eds.), *Genèse et Destinée de la Constitution Européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir*, Editions Bruylant, 2007.

¹⁷³ Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L245/17 of 12 July 2004.

¹⁷⁴ Commission Communication of 12 November 1997 on an EU strategy for defence related industries COM(97) 583 final; Commission Communication of 11 March 2003 'Towards an EU Defence Equipment Policy' COM (2003) 113.

¹⁷⁵ See European Defence Research and Technology Strategy, endorsed by the EDA Board, 10 November 2008.

¹⁷⁶ A voluntary Code of Conduct on Defence Procurement was agreed 21 November 2005, available at <http://www.eda.europa.eu/>. Together with a Code of Best Practice in the Supply Chain, the regime came into force from 1 July 2006. At present all Member States except Denmark and Romania participate.

¹⁷⁷ Article 45(2) TEU-revised.

¹⁷⁸ In particular through the Framework Nation Concept; see Council doc 11278/1/02. For example, the EU military mission in the Democratic Republic of Congo (DRC/Artemis) designated France as the Framework Nation: Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo OJ 2003 L 143/50; Council Decision 2003/432/CFSP of 12 June 2003 on the launching of the European Union military operation in the Democratic Republic of Congo OJ 2003 L 147/42.

“joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation”.

In such cases of delegation, the participating Member States will agree on the management of the task with the High Representative and will keep the Council informed. Any amendment of the scope, objectives or conditions must be adopted by the Council. This type of flexibility in implementing ESDP decisions is likely to remain an important characteristic of the CSDP.¹⁷⁹

(iii) Most significantly, in addition to this ad hoc flexibility, the Lisbon Treaty introduces the possibility of permanent structured cooperation in defence (PSCD) allowing some Member States to integrate security and defence more fully ‘within the Union framework’.¹⁸⁰

Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework.

Permanent structured cooperation represent a certain ambiguity between on the one hand the idea of a small group of States deciding to engage in a deeper form of integration in defence, the creation of a so-called ‘defence eurozone’,¹⁸¹ and on the other a matter of certain Member States being prepared to take the lead and commit resources to ensuring that the Union ‘is capable of fully assuming its responsibilities within the international community.’ These responsibilities include, as Article 42(1) TEU-revised points out, ‘strengthening international security in accordance with the principles of the United Nations Charter’. Permanent structured cooperation will involve those Member States whose military capabilities fulfil higher criteria, who have made more binding commitments with a view to more demanding missions.¹⁸² Certainly there will be closer integration in the sense of ‘pooling and where appropriate specialising their defence means and capabilities’, interoperability and development of common objectives in commitment of forces, alongside greater commitment to defence spending, research and work within the framework of the EDA on defence equipment programmes. However exactly how these higher criteria will be determined and at what level is still unclear. French proposals for a minimum membership of six key Member States (France, Germany, Italy, UK, Spain, Poland) committed to a minimum level of defence spending at 2% of GDP,¹⁸³ are seen by some as too exclusive, especially with respect to the smaller Member States.¹⁸⁴ PSCD is one more stage in the ongoing attempt to increase European defence efficiency and to balance the demands of solidarity and inclusiveness on the one hand with efficiency and commitment on the other.¹⁸⁵ Biscop emphasises the need to be flexible in envisaging different ways in which Member States may participate in PSCD in terms of contribution, timeframe and capacities.¹⁸⁶

Procedurally, in a number of ways permanent structured cooperation resembles enhanced cooperation, but agreed in advance by way of a specific Protocol. Initial and subsequent participation is to be determined by the Council, acting by QMV, and here we should note that the Lisbon Treaty requires the Council to act unanimously when authorising enhanced cooperation. In its decision-making *within* structured cooperation the Council will act unanimously.¹⁸⁷ One of its key features is the establishment not only of entry conditions

¹⁷⁹ C. Törö, ‘The Latest Example of Enhanced Co-operation in the Constitutional Treaty: The Benefits of Flexibility and Differentiation in European Security and Defence Policy Decisions and their Implementation’ (2005) 11 *European Law Journal* 641, at p.648.

¹⁸⁰ Article 42(6) TEU-revised. See generally S. Biscop, ‘Permanent Structured Cooperation and the Future of ESDP’ Egmont Paper 20, 2008.

¹⁸¹ Initial negotiations during the process of the Constitutional Convention envisaged a form of cooperation more separated from Union structures and perhaps closer to the ‘Schengen’ model of differentiated integration; see further H. Bribosia, *op.cit.* note 56, p.840-1; S. Biscop, *op. cit.* note 64, p.5.

¹⁸² Article 42(6) and 46 TEU-revised, together with the Protocol on permanent structured cooperation.

¹⁸³ P. Lellouche, ‘8 propositions pour donner à l’Union une défense commune’, *Le Figaro*, 31/12/2008, <http://www.lefigaro.fr/debats/2008/01/31/01005-20080131ARTFIG00515--propositions-pour-donner-a-l-union-une-defense-commune.php>; W. F. Van Eekelen and S. Kurpas, ‘The Evolution of Flexible Integration in European Defence Policy: Is Permanent Structured Cooperation a Leap Forward for the Common Security and Defence Policy?’ *CEPS Working Document No. 295/June 2008*, p.12.

¹⁸⁴ S. Biscop, *op. cit.* note 64, pp.5-6.

¹⁸⁵ ‘The forthcoming debate on Permanent Structured Cooperation in Defence faces the difficult task of squaring the circle between effectiveness and solidarity, which is bound to be divisive. But it is worth conducting nevertheless.’ W. F. Van Eekelen and S. Kurpas, *op.cit.* note 67, p.15.

¹⁸⁶ S. Biscop, *op. cit.* note 64, p.19.

¹⁸⁷ Article 46(6) TEU-revised.

with respect to military capabilities but also the possibility of suspension if a Member State no longer fulfils the entry criteria; a decision to withdraw is also possible. Unlike enhanced cooperation it will not be tied in advance to a specific initiative but will exist permanently to be called upon for ‘the most demanding missions’.

Flexibility in the sense explored here, which relates less to the purpose or objectives of action and more to the mechanisms used to achieve those objectives, will allow the CDSP to grow incrementally, building on the different strengths – and willingness – of the Member States to achieve the common purpose. In this respect, as in others, the Treaty of Lisbon was designed to reflect existing realities and institutionalise existing powers.

5. Conclusion

The fact that enhanced cooperation has not yet been used in the CFSP, any more than in the other fields of Union policy, may suggest either that it is not filling an unmet need or that the preconditions and limitations on its use are too strict. It is striking, on the other hand, that flexibility is already a feature of the Union’s security and defence policy and that the Lisbon Treaty formalises some pre-existing practices as well as introducing new possibilities.

One form of flexibility not yet mentioned offers a less dramatic solution than enhanced cooperation within the CFSP: the possibility of constructive or qualified abstention under Article 23(1) TEU, which is retained in the Lisbon Treaty.¹⁸⁸ The provision allows a Member State to qualify an abstention to a vote in Council, the effect of which will be that while the Member State accepts that the decision in question will commit the Union, it will not bind that State. Mutual solidarity requires the other Member States to respect this position, while the abstaining State must refrain from action likely to conflict with or impede the Union’s action. This compromise solution allows a Member State to withdraw from a policy decision without impeding the formation of a consensus, while attempting to ensure – most important for the CFSP – that the dissenting Member State will not actively seek to undermine the Union’s position. However, if at least one third of Member States qualify their abstention in this way, the Council decision cannot be taken; the same proportion of Member States may act as a ‘blocking minority’ in these cases and to the authorisation of enhanced cooperation.

Constructive abstention was used by Cyprus in February 2008 in relation to the adoption of the EU Joint Action establishing Eulex Kosovo.¹⁸⁹ As the first example of this practice it is worth citing the Cypriot declaration:

- “1. Cyprus recognises the European Union’s responsibility to contribute to and, to the extent possible, ensure the stability of the Western Balkans. Cyprus also respects the wish of its partners for an active engagement of the European Union in Kosovo.
2. In line with its commitment to the role of the UN Security Council and the latter’s primary responsibility for the maintenance of international peace and security, Cyprus has consistently argued for an explicit decision of the UN Security Council for the EU mission in Kosovo.
3. Notwithstanding its firm views, especially on the question of the legal basis for the involvement of the European Union in Kosovo, and any possible future implications in terms of international law, Cyprus has decided not to hinder the decision of the Council to adopt the Joint Action on the EU Rule of Law Mission in Kosovo.
4. In a constructive spirit of loyalty and mutual solidarity, the Government of Cyprus has arrived at the above decision which is without prejudice to any future decisions on EU action in similar matters and without prejudice to the status of Kosovo.
5. The Government of the Republic of Cyprus would therefore like to inform partners that for the above reasons, it has decided to invoke the provisions of the first subparagraph of paragraph 1 of Article 23 TEU.”¹⁹⁰

The existence of this form of flexibility is in reality probably sufficient to prevent the type of decision-making *impasse* in the CFSP that enhanced cooperation seems designed to avoid. Although there is no good

¹⁸⁸ Article 31(1) TEU-revised. On constructive abstention see further I. Pernice and D. Thym, ‘A New Institutional Balance for European Foreign Policy?’ (2002) 7 *European Foreign Affairs Review* 369 at p.380-382.

¹⁸⁹ W. F. Van Eekelen and S. Kurpas, ‘The Evolution of Flexible Integration in European Defence Policy: Is Permanent Structured Cooperation a Leap Forward for the Common Security and Defence Policy?’ *CEPS Working Document No. 295/June 2008*, p.10. Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, *OJ L 42/92*.

¹⁹⁰ Council doc. No. CM 448/08, 4 February 2008.

reason to exclude the CFSP from the possibility of enhanced cooperation it is perhaps unlikely to be used in practice, at least for this purpose.¹⁹¹

What about the use of enhanced cooperation to establish deeper integration or new policy initiatives within the framework of Union objectives and competences? Under the pre-Lisbon Treaties, as we have seen, the scope for this was very limited since enhanced cooperation was only possible in the implementation of already agreed joint actions or common positions, and was not possible at all in the military or defence fields. The Lisbon Treaty will make it easier, although perhaps not more likely. Within the context of the development of foreign policy, a new policy initiative by a limited number of Member States will lose the impact of a Union policy. It also poses difficulties in that the Union's foreign policy positions with respect to countries, regions or serious issues such as non-proliferation or terrorism inform not only CFSP activity (such as the position to be taken in international fora, for example) but also Community policies. A common position adopted under enhanced cooperation by a limited number of Member States would not have that effect. The Union's foreign policy derives such strength as it has from the process of consensus building rather than reaching a decision at any cost.

On the other hand, the difficulty that the Union has had over the years in establishing any kind of commitment to a 'common defence' illustrates the very different positions of the Member States with respect to defence: permanent members of the UN Security Council, members of NATO, nuclear and non-nuclear powers, neutral States. Any common security and defence policy will have to respect and accommodate those differences, as the Danish defence opt-out recognises. The kinds of operational flexibility already developed in EU security and defence policy, and enhanced by the Lisbon Treaty, are highly practical. Deeper integration with respect to armaments will be managed incrementally and differentially through the EDA. Civilian and military missions require the involvement of Member State capacities and assets and inevitably not all Member States will take place in every mission. Permanent structured cooperation will take this further by establishing in advance a coalition of willing and able Member States who will be ready to take on missions, for example at the request of the United Nations Security Council.¹⁹²

It is also worth noting that the CFSP and CSDP lend themselves more readily than the EC Treaty to accommodating the involvement of non-Member States. A number of candidate and neighbouring States are regularly invited to align themselves to CFSP common positions. A number of non-Member States have regularly been involved in ESDP civilian and military missions.¹⁹³ This is an inclusive flexibility which is an important part of the EU's neighbourhood policy.

These forms of practical and operational flexibility do not threaten the unity of the Union's CFSP or CSDP. The provisions on enhanced cooperation, particularly those that bind it into the Union's institutional framework and which limit its scope to the Union's competences, are not likely to pose a serious threat to unity either. But they may not be as effective – in terms of taking forward integration and policy-making at different speeds and reflecting different capacities – as the alternative forms of flexibility examined here.

¹⁹¹ Jaeger argues that enhanced cooperation is 'less negative' than constructive abstention: T. Jaeger, 'Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy' (2002)7 *European Foreign Affairs Review* 297 at p.302.

¹⁹² The Preamble to the Protocol on permanent structured cooperation recognizes that 'the United Nations Organisation may request the Union's assistance for the urgent implementation of missions undertaken under Chapters VI and VII of the United Nations Charter'.

¹⁹³ For example, Ukraine; see Council Decision 2005/495/CFSP concerning the conclusion of the Agreement between the European Union and Ukraine establishing a framework for the participation of the Ukraine in the European Union crisis management operations, OJ [2005] L182/28.