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CFSP after the Footnote Summit

Annegret Bendiek

At the European Council summit in June 2007 the heads of state and government agreed to create the office of a High Representative of the Union for Foreign Affairs and Security Policy and an External Action Service. Yet, at the same time several of the 23 footnotes of the Presidency Conclusion stressed that neither the responsibilities of the member states for their foreign policy nor of their national representation in third countries and international organisations shall be affected in the future. Pro-integrationists like Luxemburg and Italy criticised the outcome of the summit since it does not foresee to transfer further foreign and security policy competences to the EU-level.

The EU leaders agreed on a reform of the constitutional treaty at their summit in June 2007. The Portuguese EU Presidency plans to convene an Intergovernmental Conference (IGC) which on the basis of the summit's political agreement will decide concrete revisions of the existing treaties by autumn 2007. At the summit, the then incumbent British Prime Minister Tony Blair demanded both to reconsider the 2004 IGC's foreign policy conclusions and to bring them in line with a stronger inter-governmental co-operation. The member states agreed on the one hand that the future IGC shall decide not to install the office of a European Foreign Minister but the office of a High Representative of the Union for Foreign Affairs and Security Policy who should be at the same time Vice-President of the European Commission and External Relations Commissioner. The High Representative shall have the right of initia-

tive and permanently preside over the External Relations Council. He/she will be assisted by a European diplomatic service which brings together officials from EU institutions and staff seconded from the diplomatic services of the member states. On the other hand, the EU leaders underlined that the reform treaty must guarantee that the foreign and security policy responsibilities of the member states will not be prejudiced. It shall therefore be stressed that the Union will only act within the boundaries of the competences conferred upon it by the member states in the treaties.

Only a new title?

For everyday language the title "High Representative of the Union for Foreign Affairs and Security Policy" can rarely be used. Indeed, fundamental sovereignty

Box 1**Title V “General provisions on the Union’s external action and specific provisions on the Common Foreign and Security Policy”**

In Article 11, insertion of a paragraph 1 reading as follows (the current text of paragraph 1 being deleted):

“1. The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence. The common foreign and security policy is subject to specific procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts

shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor the compliance with Article [III-308] and to review the legality of certain decisions as provided for by Article [III-376, second subparagraph].”

reservations and reluctance to transfer foreign policy competences to the EU are behind the new title (see footnote in Presidency Conclusions—Brussels, 21/22 June 2007).

In principle, the competences agreed in the 2004 IGC will be implemented in the existing treaties by the reform treaty. In Title V of the existing Treaty on the European Union (TEU)—General Provisions on the Union’s external action and specific Provisions on the Common Foreign and Security Policy—the first chapter on the principles and objectives of the Union’s external action will be replaced by a new text in the Reform Treaty (see box 1).

In the new paragraph the special role of the European Council in setting the EU’s external relations is defined. By explicitly saying that the European Council (heads of state and government) and the Council of the European Union (General Affairs Council) unanimously determine and carry out the Common Foreign and Security Policy (CFSP) the competency of the future High Representative is clearly limited. Moreover considering external representa-

tion, the division of labour between the High Representative of the Union—who at the same time is Commissioner for External Relations and Vice-President of the Commission - the President of the European Council and the President of the Commission regarding external representation remains unclear. Not least therefore, it is foreseeable that on administrative level the External Action Service will become divided alongside institutional separation lines between Council and Commission depending on the external competences so that one part of the Service will work for the Council whilst the other one works for the Commission. For example, while the Council will continue to conduct the political dialogue within the framework of the European Neighbourhood Policy, the Commission will shape external trade relations. The European Security and Defence Policy will keep its institutional special status and therefore will not become a work sector within the new External Action Service.

A second new chapter in Title V of the existing TEU contains the provisions on CFSP as modified in the 2004 IGC, includ-

ing the External Action Service and permanent structured cooperation in the field of defence. Also, there will be a specific legal basis on personal data protection in the CFSP area in order to meet the concerns that the corresponding national legal bases remain unaffected.

In addition to the new procedures of Title V, the IGC shall agree on a declaration, which stresses the following principles for CFSP:

- ▶ The provisions in the Treaty on European Union covering CFSP, including the creation of the High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, “do not affect the responsibilities of the member states, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.”
- ▶ The provisions governing the European Security and Defence Policy “do not prejudice the specific character of the security and defence policy of the member states.”
- ▶ The EU and its member states “will remain bound by the provisions of the Charter of the United Nations” and, in particular, by the resolutions of the Security Council.
- ▶ The Commission will not be granted new powers in CFSP to initiate decisions; also the external role of the European Parliament will not be increased.

The IGC shall furthermore decide that the EU will get “legal personality”. This could in the future enhance the EU’s role when international agreements will be concluded or questions of territorial recognition are concerned. At the same time, the IGC shall make sure that the EU will not be authorised to act beyond the competences conferred upon it by the member states. In the final provisions, the possibility of voluntary withdrawal from the EU is foreseen. Every applicant state will be obliged to respect the criteria for membership as

determined by the European Council and furthermore to promote the values of the Union. This could raise the hurdle for EU membership.

In the EC Treaty on the functioning of the European Union a stipulation important for the EU’s foreign policy will be added: the EU can only join the European Court of Human Rights when the Council unanimously decided so. The member states need to ratify this decision.

“Flexible Integration” and “enhanced cooperation”

The provisions on “flexible integration” or “enhanced cooperation” do not change the fact that national sovereignty instead of CFSP has been protected in the EU’s external relations. The flexibility clause allows the Union to act if the Council unanimously agrees. Yet, this instrument can still not be applied to the objectives of CFSP as it was already decided at the 2004 IGC. Therefore, without altering the treaty the member states are not allowed to declare CFSP as community competence even when they have reached a unanimous decision. Hence, unanimity is still required for decisions relating to CFSP; for the time being qualified majority voting will not be extended to the CFSP area. Moreover, the adoption of legislative acts will not be introduced in CFSP. Decisions covering the Union’s external relations are therefore rarely legally binding. The non-implementation of the flexibility clause in CFSP can be explained by the negative foreign policy experience of the Iraq crisis and the risk of splitting Europe’s foreign policy.

“Enhanced cooperation” in CFSP in its existing form cannot make up for the non-application of the flexibility clause. At the 2004 IGC, it was agreed that the minimum number of member states required for launching an enhanced cooperation will be nine. This rule shall be, as it stands, introduced into the reform treaty (Title IV new). The EU member states simply lack the political will to allow an enhanced co-

operation with less than nine member states on the basis of the TEU. The experience however has shown that it is unrealistic to get together nine countries which agree to form a foreign policy avant-garde group. As a result of this rule, it will become rather unlikely that on the basis of the reform treaty a “Core Europe” in the area of foreign policy will emerge. Outside of the treaty regulations, so-called ad-hoc groups or coalitions of the willing, which consist of less than 9 members, have for some time now been part to Europe’s foreign and security policy reality.

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Incremental advancement

The intended amendments are in fact institutional reforms, which just reinforce the intergovernmental character of CFSP and preserve the foreign policy competences of the member states—if not promote a re-nationalisation of the Union’s foreign and security policy: vague authorities of the High Representative, explicit concessions to the European Council and the member states in the form of decision-making and implementation of decisions, the declaration on member states’ foreign policy sovereignty, the non-application of the flexibility clause and the limited validity of enhanced cooperation do not add to a strengthening of CFSP. The question is whether one can press ahead with the “europeanisation” of CFSP beyond institutional reforms and in the framework of a “weak constitutionalisation”, which does not require an alteration of treaty provisions. When considering the annexes of the Presidency Conclusion from June 2007, two ways of a so-called incremental advancement of European politics become apparent. Both would allow for a deepening of CFSP in geographic as well as in conceptual dimension without having to amend the treaties:

a. Geographic dimension

The Presidency Progress Report on the European Neighbourhood Policy (ENP), the Black Sea Synergy Initiative and the EU Strategy on Central Asia show that the EU geographically extends its external relations and so, establishes an Energy Foreign Policy without altering the TEU. In order to achieve independence from Russian energy the EU has intensified its relationship to Norway and moreover to the 16 ENP partner countries and Central Asian countries.

b. Conceptual dimension

The 2007 Presidency Conclusion’s annexes include the Council Conclusions on Extending and Enhancing the Global Approach to Migration, the Presidency Report on ESDP and the Presidency report on EU activities in the framework of prevention, including implementation of the EU Programme for the Prevention of Violent Conflicts. In these reports, the Union commits itself to contribute to effective multilateralism and to improve the link between internal and external as well as civil and military instruments. For instance, when the EU conducted a military operation in the Democratic Republic of the Congo a joint comprehensive concept for the reform of the security sector in the Congo was elaborated in order to attain coherence between the civil and military means of the Commission and the Council. A better attunement of internal and external as well as civil and military instruments could lead to a centralisation of Europe’s foreign and security policy.

The review of the 2008 EU budget will have to show whether development of CFSP can not only be driven further on paper but financially: namely if it is decided to increase the EU budget. In the light of the 21st century’s foreign policy realities, the EU must better communicate its politics to its citizens in order to maintain the high CFSP’s approval rating and so provide financial support for CFSP.