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EUROPEAN UNION EXTERNAL ACTION UNDER THE TREATY OF LISBON:  
INSTITUTIONAL ASPECTS AND THE ROLE OF THE EUROPEAN PARLIAMENT

Master's thesis

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## **Introduction**

The Treaty of Lisbon that entered into force on 1 December 2009 marks the latest results of the constitutional reform of the European Union. It has been portrayed as a major breakthrough in the consolidation of a more cohesive external policy for the Union, with the aim of enabling it to become an ambitious global player. At the same time, the Treaty of Lisbon has significantly increased the powers of the European Parliament, both in its functions as a co-legislator and in the role of a democratic supervisor. Because the whole European integration process is a result of, and has an impact on, international relations, the Parliament, as one of the key Union institutions, has acquired a growing role in the Union's external policy.

The fundamental idea of current research is to explore and develop further the legal possibilities established by the Treaty of Lisbon with a view to combine those two objectives. The author seeks an answer to the question how the Parliament's competences under the Treaties should be interpreted and implemented in order to improve the coherence and effectiveness of the Union's external action. While studying the options available, the author focuses on the legal conceptions that are based on the principles of democratic supervision, while making use of the comprehensive synergy of Parliament's different roles.

The author has been working as a lawyer in the Legal Service of the European Parliament since autumn 2007. His main task is to advocate the Committee on Foreign Affairs and its Subcommittee on Security and Defence of the Parliament on legal issues of the Union's and the Parliament's external competences. The author has enjoyed a unique opportunity to follow and even participate in the transfer of primary law framework established after the Treaty of Nice into the new framework of the Treaty of Lisbon, as far as the Union's external action is concerned.

There is no secret that the task of legislator's lawyer is always twofold. From one side, he has to guarantee that the rules of the Treaty are strictly followed. From another side, legitimate ways in conformity with the principles, objectives and spirit of the Treaties have to be invented in order to shape the Parliament's political will into legal texts. At the same time, the Parliament's external dimension has developed not only because of the Union's ever expanding agenda, but also because of the Parliament's own efforts at getting a role in

international affairs. Current thesis conforms to those developments. The author presents and studies the legal arguments that aim to achieve the objective to increase the Union's global dimension, but are based at the same time on the values of enhanced democratic scrutiny.

The topic of research is especially relevant at the moment, as in the summer of 2010 we are still in the very early period of introducing the Treaty of Lisbon rules into practice. Legal argumentation lines that are taken now are of utmost importance, as they become precedents for the implementation of the Treaty of Lisbon, but might also form valuable sources of interpretation for future case-law in the Court of Justice. Much will depend on how the various changes embodied in the Treaty of Lisbon will be established in practice.

While writing the thesis, the author has used traditional methods of jurisprudence. Different legal argumentation lines are presented in logical order with systematic connections established. The author admits that the institutional architecture of the Treaty of Lisbon for external action allows for a range of different readings and interpretations. The author has brought out comparative viewpoints on complex legal issues leading to comprehensive analysis. While practicing in the field of the thesis, the author has gathered and analysed plenty of information presented at the meetings of parliamentary committees as well as during the discussions with experts from other institutions and inside Parliament's secretariat. Using those methods of investigation, the author has tried to develop balanced views on relevant legal issues. Following those lines, the author finds the research method that is based on the combination of theoretical and practical analysis to be the most appropriate one to write current thesis.

The thesis consists of four parts.

In the first part, the author analyses a new legal framework for inter-institutional relations. He compares the roles of key-players in the Union's external action theatre and concentrates on the legal problems in their competences that may affect the achievement of the objectives of the Treaty. Subsequently, the thesis develops three legal theories that might be used while differentiating the common foreign and security policy from the Union's other external action. The distinction is inevitable, as the level of Parliament's involvement and legal mechanisms for expressing its will are remarkably different in two areas.

The second part concentrates on the Parliament's role in the common foreign and security policy. The author examines how and whether the Parliament's role has increased and offers various legal interpretations for the innovations of the Treaty of Lisbon. The legal argumentation behind the Parliament's calls for consistency between different fields of the Union's external action is developed.

In the third part, the author explores the Parliament's powers under the Treaty on the Functioning of the European Union. Major improvements are analysed, including the extension of the requirement for the Parliament's consent, the obligation to inform the Parliament fully and immediately of all stages regarding international agreements and the possibilities of using the power of legislative delegation in external affairs.

Finally, the fourth part examines the organisation and functioning of a new European External Action Service that together with a new High Representative of the Union for Foreign Affairs and Security Policy should contribute in the majority of the functions analysed in parts II and III. The Parliament's prerogatives vis-à-vis the European External Action Service are studied from a legal point of view.

This research does not claim to be an exhaustive examination of every institutional aspect of the Union's external action under the Treaty of Lisbon. The author has chosen the topics that allow different legal interpretations or the cases when during the implementation of new rules problems have occurred in practice, making the complex legal scrutiny inevitable in order to find solutions that are legitimate and in full compliance with the text, principles and objectives of the Treaties.

This thesis contains the personal opinions of the author that must not be interpreted as the official or unofficial positions of the Legal Service of the European Parliament.

## PART ONE

### NEW TREATY FRAMEWORK FOR THE UNION'S EXTERNAL ACTION

#### 1.1 Institutional framework

Desire to enhance further the democratic and efficient functioning of the institutions so as to enable them to carry out better, within a single institutional framework, the tasks entrusted to them, is vested in the Preamble of the Treaty on the European Union (hereinafter: TEU). In accordance with that aim, each institution must act within the limits of the powers conferred on it in the Treaties. As established in Article 13(2) TEU, the inter-institutional relations must be guided by the principle of mutual sincere cooperation.

With the elaboration of the Treaty of Lisbon (hereinafter: LT), the extensive review of inter-institutional relations was evoked. The entry into force of the Treaty did not close the institutional reform of the Union, but quite the contrary, it set in motion an intense period of institutional adaptation that is currently taking place in Brussels and Member States, particularly for the conduct of the Union's external relations.<sup>1</sup> The LT has been portrayed as a major breakthrough in the consolidation of a more cohesive EU external policy and there is little doubt that the scope of organisational restructuring in the Union's external action is wide-ranging.<sup>2</sup> From another hand, the institutional outcome of the LT seems paradoxical, as although the main purpose of the reform was to clarify the responsibilities, the new system will be based on an even greater extent on coordination and cooperation between even more institutions and institutional players.<sup>3</sup>

From the perspective of the Parliament, it is interesting to see to what extent the implementation of institutional reforms will bring about changes at the policy level and thus affect the legitimacy of the Union's external action and its democratic credentials. Merging of inter-governmental and Community pillars and functions into one framework could increase

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<sup>1</sup> See also: Piet Eeckhout, "The European Union and International Law under the Treaty of Lisbon", *European Journal of International Law*, Firenze, 2009.

<sup>2</sup> Ekaterina Bogdanova, Carlos Hernandez, Jacek Kucharczyk and Jeff Lovitt, "A new beginning? Democracy support in EU external relations under the Lisbon Treaty", PASOS Policy Brief No 1, Warsaw, 2010.

<sup>3</sup> See also: Pieter Jan Kuijper, "Of "Mixity" and "Double-hatting". EU External Relations Law Explained", Amsterdam, 2008, p. 15-16. Hervé Bribosia, "The Main Institutional innovations of the Lisbon Treaty", Stefan Grillier and Jacques Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, Wien, New York, 2008, p. 77-78.

the democratic legitimacy of the common foreign and security policy (hereinafter: CFSP) activities and provided a continuous strategic dialogue on equal footing between all institutions.<sup>4</sup> However, although the CFSP and external action under the Treaty on the Functioning of the European Union (hereinafter: TFEU) have much more in common after the LT, like a joint catalogue of principles and objectives, the double-hatted leadership vested in the High Representative of the Union for Foreign Affairs and Security Policy (hereinafter: High Representative) or the unified procedure for entering into international agreements, the full merger of those policies has not taken place. As the position of the Parliament has been traditionally weak in non-communitarised areas, such as the CFSP and strong in policies where the Union exercises exclusive or shared competence under now-TFEU, then the research of how the Parliament can use the legal tools and interconnections provided by the new framework is very challenging for the author. The purpose of current chapter is to pinpoint the most important legal changes in the institutional relations and *inter alia* the position the Parliament in that revised inter-institutional framework.

The institutional framework in the external action of the Union consists of five key-actors: the European Council and its President, the Council, the High Representative, the Commission and the EP.

### **1.1.1 Role of the European Council**

The European Council provides the Union with the necessary impetus for its development and defines the general political directions and priorities (Article 15(1) TEU), it lays down strategic guidelines for the Union's external action (Article 16(6) TEU) and identifies the Union's strategic interests, determines the objectives and defines general guidelines for the CFSP (Article 26(1) TEU).

Article 15(5) TEU foresees a novelty, as the European Council shall elect its President for a term of two and a half years, who shall according to lines of Article 15(6) TEU also at his level and in that capacity, ensure the external representation of the Union on issues concerning the CFSP, without prejudice to the powers of the High Representative. However, he does not have autonomous decision making powers in Union's external action. Nor have

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<sup>4</sup> See also: EP resolution of 10 March 2010 on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP in 2008, presented to the European Parliament in application of Part II, Section G, paragraph 43 of the Interinstitutional Agreement of 17 May 2006, paragraph 9.

the European Council and its President rarely the legal power to take action below the general and strategic level of Union policy and intervene in its everyday action.

As compared to pre-Lisbon era, the overall dominance of the European Council in this policy field has not been substantially modified, but it is interesting to see that its meetings attract in general more attention than the meetings of other EU institutions, which provides it with a special impact on publicity and questions of legitimacy. Especially the function as an institutional actor of the European Council on its own in the international system is of relevance as it even increases the number of actors representing the Union externally.<sup>5</sup> In that sense, its functions may collide with the functions of the Parliament that has played the central role as a democracy watchdog and enjoyed all kind of generous publicity in that theatre. The first hints from the hidden competition between those two institutions could be seen in a surprise collision over the legal interpretation of Article 15(6)(d) TEU. According to that article, the President of the European Council shall present a report to the EP after each of the meetings of the European Council. TEU foresees three types of meetings of the European Council – regular meetings convened twice every six months (Article 15(3) TEU), special meetings convened when the situation so requires (Article 15(3) TEU) and extraordinary meetings in the CFSP framework if international developments so require (Article 26(1) TEU). After the extraordinary summit of the Heads of States and Governments held on 11 February 2010 that was convened on the initiative of the President of the European Council, Herman Van Rompuy, the question was raised whether the latter must officially present a report to the Parliament.

The claims for non-reporting could be legally based on the fact that the summit was proclaimed as an unofficial meeting of Union leaders where no decisions were taken on behalf of the European Council. However, two important legal arguments go against such narrow interpretation of Article 15(6)(d) TEU. Firstly, the extraordinary summit of the Head of States and Governments of Member States convened by the President of the European Council is institutionalised and explicitly regulated under treaty framework. Such summit must take a legal form of a special meeting of the European Council, where the obligation to present a report to the Parliament also applies. Secondly, even if one could imagine unofficial summits at that high level convened by the President of the European Council to take place beyond the treaty framework, the reporting duty about the main results of that summit before

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<sup>5</sup> See also: Wolfgang Wessels and Franziska Bopp, “The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?”, Research Paper No 10, Brussels, 2008, p. 14-15.

the representatives of the citizens comes from the very essence of the EU democratic nature. The principle of mutual sincere cooperation of the institutions stemming from Article 13(2) TEU could also be mentioned here. From Herman Van Rompuy's perspective, one could understand the wish to distance himself from someone who could be portrayed as a European Council spokesman, accountable to the EP. The author agrees that such public positioning could indirectly start affecting his legal prerogatives coming from the Treaties. However, those considerations do not justify a possible infringement of Article 15(6)(d) TEU and thereby float the inter-institutional balance. On 24 February 2010, the President of the European Council reported to the EP about the outcome of the meeting.

### **1.1.2 Role of the High Representative**

The High Representative is undoubtedly the central actor in the execution of the Union's external action. He has three functions, described as 'hats':

- Conduct the CFSP (Article 18(2) TEU). That function covers the pre-Lisbon competence of the High Representatives for the CFSP;
- Preside over the Foreign Affairs Council (Article 18(3) TEU). That function covers the role previously performed by the 6-monthly rotating Presidency;
- Vice-President of the Commission (Article 18(4) TEU). That function covers the pre-Lisbon competence of External Affairs Commissioner.

Although in legal terms, he has three main functions, the semi-official terminology describes the post as 'double-hatted', as the function to preside over the Foreign Affairs Council is mainly covered by the CFSP hat, although in legal terms nothing hinders the Foreign Affairs Council to legislate also within TFEU competences.

In the CFSP, the High Representative represents the Union, conducts political dialogue and expresses the Union's international positions (Article 27(2) and 34(2) TEU), puts into effect the CFSP (Article 18(2) and 26(3) TEU), organises the coordination of Member States actions in international organisations and conferences (Article 34(1) TEU), exercises authority over Special Representatives (Article 33 TEU) and takes responsibility over political control and strategic direction carried out by the Political and Security Committee (Article 38(2) TEU).

As a Vice-President of the Commission, he ensures consistency of the Union's external action. He is responsible within the Commission for responsibilities on external relations and for coordinating other aspects of external action (Article 18(4) TEU).

Under double-hatted functions, he proposes negotiating directives and negotiates international agreements relating exclusively or principally to the CFSP (Article 218(3) TFEU)<sup>6</sup> and exercises the authority over Union delegations representing the Union in third countries and at international organisations (Article 221 TFEU).

Vis-à-vis the European Parliament, he conducts the consulting (Article 36 TEU) and informing tasks (Article 218(10) TFEU).

The question of the appointment of the High Representative is interesting as regards the Parliament's legal possibilities in exercising the democratic supervision. Double-hatted High Representative is appointed by two different legal procedures. According to Article 18(1) TEU, the High Representative is appointed by the European Council, acting by a qualified majority, with the agreement of the President of the Commission. The European Council may end his term of office by the same procedure. The EP is not legally involved in those procedures. However, under Article 17(7) TEU, the High Representative is also subject to a vote of consent by the EP as a member of the Commission. Pursuant to Article 17(8), the EP may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative shall resign from the duties that he carries out in the Commission. Hence, only the European Council, not the EP, may officially end the tenure of the High Representative as far as the CFSP hat is concerned, even if he has to lay down his hat as a Commissioner for external relations after a successful motion of censure by the EP. But under opposite circumstances, the cessation of his term by the European Council following the procedure of Article 18(1) TEU terminates automatically also his duties as the Vice-President of the Commission. The procedure under Article 246 TFEU will be initiated then and a new appointee will have to appear in the hearing before the EP before taking up his duties but to whom the Parliament has no veto power any more.

This being said, it appears that the penultimate power in the appointment procedure lies in the European Council. Such a big impact of the Member States complies with the principle of national sovereignty characterising traditional II pillar (CFSP) competences. However, as far as the nomination and censure of the Vice-President hat is concerned, the restricted powers of the President of the Commission (who is faced with *fait accompli* while proposing the college to the Parliament) and the EP do not seem to be in accordance with the overall inter-

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<sup>6</sup> See also: Chapter 3.1.3.

institutional framework established by the LT. To compensate that imbalance, one could argue that the powers of the European Council are corresponded by the Parliament's right to approve the High Representative indirectly when it votes on the whole College. Yet, if the Parliament denies its approval to the College, the High Representative, although appointed by the European Council, would not be able to exert his functions as a member of the Commission. Therefore without the approval of the EP, the appointment of the High Representative remains "incomplete".<sup>7</sup>

Secondly, there seems to be a basic lack of transparency and legal certainty concerning the accountability of the High Representative. It is in the interest of the EP to underline that the responsibility of the Commission to the Parliament unconditionally applies to the High Representative in his function as a Vice-President of the Commission. While the broad responsibilities of the High Representative might weaken the role of the Commission vis-à-vis the Council, then the Parliament may call for even stronger control over the double-hatted post due to its parliamentary accountability as a member of the Commission.

In conclusion, the post of the High Representative should reinforce a recent trend towards greater policy coherence in formulation and implementation between the two pillars. He is responsible for conducting the Union's foreign, security and defence policy, taking advantage of his two hats. As a Vice-President in the Commission he is also expected to defend the Commission's interests in the Council. However, some doubts have been raised about the real efficiency of the integrated post. The important reason why the High Representative might not be able to meet high expectations is that the LT does not sufficiently neutralise the duality within the Union's external policy to enable the High Representative to execute its dual functions<sup>8</sup>. Apart from his appointment, the High Representative is – as part of the Commission – also responsible to the EP. Thus the High Representative is responsible to three bodies at the same time – the Commission, the Council and (to a lesser extent) to the EP – which will represent a difficult balancing act<sup>9</sup>.

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<sup>7</sup> See also: Udo Diedrichs, "The European Parliament in CFSP: More than a Marginal Player?", *The International Spectator*, Rome, 2004, p. 44-45.

<sup>8</sup> Jan Wouters, Dominic Coppens and Bart De Meester, "External Relations after the Lisbon Treaty", in Stefan Griller and Jacques Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, Wien, New York, 2008, p. 155.

<sup>9</sup> Wolfgang Wessels and Franziska Bopp, "The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?", Research Paper No 10, Brussels, 2008, p. 20.

### **1.1.3 Role of the Council**

As provided in Article 16(1) TEU, the Council of the EU exercises, jointly with the EP, legislative and budgetary functions; it carries out policy-making and coordinating functions. With regard to the external action of the Union, the Foreign Affairs Council is the one of a few configurations established directly by primary law (at treaty level). Presided by the High Representative, it shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent (Article 16(6) TEU). By this provision, the separation and hierarchy between the powers of the European Council (comprises the Heads of State) and the Council (the Foreign Affairs Council consists of the Ministers of Foreign Affairs) is revealed. At the same time, the function to ensure the consistency of the Union's external action is identical also to the task of the High Representative under Article 18(4) TEU.

The author finds that a legally sound option would be to interpret the Council's task under Article 16(6) TEU as the part of its legislative function – this is to follow the principle of coherence while exercising its legislative powers and the CFSP policy-shaping competences. The similar task of the High Representative could then mean the pure implementation and conducting the external action. Such approach has its clear legal remits under the II pillar. It complies with the Council task to frame the CFSP and take decisions on the basis of strategic guidelines defined by European Council (Article 26 TEU). Along with the High Representative playing the central role in both the preparatory and executive level of the CFSP, the Council has essential role at all policy-making levels, including the power to adopt the decisions defining operational actions, positions and arrangements in accordance with Articles 25, 26, 28 and 29 TEU.

As regards the TFEU external competences (the Union's other external action), the co-decision powers of the Council in different policy areas should be emphasised. However, in most of those areas, the Parliament had no legislative competence before, so the LT has actually reduced the role of the Council here and favoured the EP.

As regards inter-institutional balance in the Union's external action, an additional player comes into battlefield besides the Council as the EU institution. The desire to terminate the powers of the rotating Presidency in external action seems not to be fully achieved by the LT. Furthermore, instead of transferring of all competences characteristic to executive powers to

the High Representative, the LT has provided the legal framework for future rivalry here without clear-cut legal solutions. Indeed, the rotating Presidency, consisting of six-monthly terms per Member State, has still a large margin of powers while acting in the configuration of the General Affairs Council.

The division of functions between the configurations of the General Affairs Council and the Foreign Affairs Council seems obscure. The latter must be empowered with the matters falling under Union's external action, following the logic of Article 16(6) TEU. However, in recent practice, the General Affairs Council has been hijacking much of the authority from the Foreign Affairs Council. In principle, this means the institutional equilibrium moving from the High Representative to Member States, as the chairmanship is the only important difference between those Council configurations. For example, the establishment of the EEAS was in the agenda of the General Affairs Council on 26 April 2010. On 10 May 2010, the General Affairs Council approved mandates for the negotiation of Association Agreements with Armenia, Azerbaijan and Georgia. According to Article 16(6) TEU, these items should have fallen under the competence of the Foreign Affairs Council. The first High Representative of the Union for Foreign Affairs and Security Policy Catherine Ashton has already advertised the idea that the minister of foreign affairs of the Presidency could deputise and replace her within the tasks of the CFSP. The EP has tried to stand against such ideas, as this goes against the very aim of the new treaty framework and introduces the degree of inter-governmentalism to Union policies, always been much feared by MEPs.

#### **1.1.4 Role of the European Commission**

According to Article 17(1) TEU, the European Commission exercises coordinating, executive and management functions, takes initiatives and oversees the application of Union law. With the exception of the CFSP and other cases provided for in the Treaties, it shall ensure the Union's external representation. The overwhelming majority of the tasks performed by the Commission in Union's external action derive from TFEU competences. It has vast powers as regards the legislative initiative on EU external policy areas. Alas, as an executive body, it manages the budget of the Union under its Chapter IV (Union as a global player). It also carries out programming and executive tasks as regards external financing instruments.<sup>10</sup> Besides that, the Commission runs wide powers in the process of negotiating and

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<sup>10</sup> See also: Chapter 3.3.

implementing international agreements under Article 218 TFEU, starting from the exercise of drafting negotiating directives and finishing with decisions leading to the suspension of the application of the agreement and agreeing on the modifications to it.

As regards the CFSP, Article 24(1) TEU provides that the specific role of the Commission is defined by the Treaties. The author admits that while the Commission has maintained its important role in other areas of Union's external action, its powers in the CFSP have been essentially reduced, as the LT repealed large number of its tasks and prerogatives enacted in pre-Lisbon TEU and terminated its full involvement in all CFSP matters (tasks included previously in Articles 14(4), 21 and 22 TEU). In most cases, the Commission has lost its powers in favour of the High Representative or the Council. Besides that, the Commission has also lost the monopoly to run the delegations in third countries and international organisations. Commission delegations are replaced by Union delegations at treaty level (Article 221 TEU) and furthermore, as delegations are placed under the authority of the High Representative, they will be included in the EEAS in accordance according to the logic of new treaty framework. Reduction of Commission's role is in conformity with Declaration No 14 of the LT, holding that the provisions covering the CFSP do not give new powers to the Commission.

However, these tendencies may be interpreted also adversely, if one emphasises on the double-hatted nature of the High Representative. Then it could be argued that the Commission has even gained more powers to affect (via its Vice-President) the decisions of the Council in the CFSP. Such interpretation seems however quite demagogic and derivates from the wish of the Member States, expressed in Declaration No 14. No doubt that the argumentation following the lines of linking the High Representative's CFSP tasks to the Commission would be favourable development for the EP, too. The author treats such constructions as the inadvisable exploitation of the LT possibilities.

### **1.1.5 Role of the European Parliament**

The EP shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties, according to Article 14(1) TEU. Those functions of the Parliament are interlinked with one another and the Parliament may make good use of such comprehensive synergy, supported by LT regulations. For example, it may use its political control functions to make better decisions as

a budgetary authority or it may remind other institutions its prerogatives as a legislator to make them politically accountable before it, following the principles of democratic scrutiny. But the functions are mutually connected also as regards the consistency between the Union's external action and its internal policies.

There is no secret that the Parliament, as one of the three key Union institutions, has acquired a growing role in the Union's foreign policy<sup>11</sup>. Parliament's rights to gather information about the Union's external action and contribute to shaping Union's foreign policies and setting their objectives by expressing its views and making recommendations to other key-actors may be summarised as the function of democratic scrutiny. The functions of the Parliament under LT framework for external action and its positioning vis-à-vis other institutions will be scrutinised thoroughly under Parts II, III and IV of current thesis. The author will not reiterate the conclusions of those parts here.

## **1.2 Policy framework**

In this chapter, the author explains how to differentiate between two main policy areas within the Union's external action. The legal reasoning for the distinction is given with the analysis of the Parliament's different roles. Considering the aim of the LT being the strengthening of the consistency and effectiveness of the Union's external action, the author will study whether the legal framework created fosters the coherence or, on the contrary, paves way for the rivalry between those policy areas.

Title V of TEU "General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy" in conjunction with Part Five of TFEU "External Action by the Union" form the legal framework on the level of primary law for the external action of the Union. The Union's external action consists of two parts: the CFSP, exercised under the competences within Chapter II of Title V TEU; and other external action, exercised under the competences stemming from the TFEU. Chapter I "General Provisions on the Union's external action" of Title V TEU is the novelty of the LT, providing common clauses for both parts.

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<sup>11</sup> See also: Stelios Stavridis and Charalambos Tsardanidis, "The Cyprus Problem in the European Parliament: A Case of Successful or Superficial Europeanization?", *European Foreign Affairs Review* 14, Kluwer Law International BV, The Netherlands, 2009, p. 131.

### 1.2.1 Differentiation between the CFSP and other external action

The nature and extent of EP powers varies remarkably between two areas. The old pillar structure is still very visible for the EP, as its role in the CFSP remains quite negligible while in other areas of external relations, the Parliament's powers are considerably strengthened.<sup>12</sup> In order to decide over the level and intensity of parliamentary involvement, the correct treaty legal basis together with applicable procedure must be established. The institutions should not use one legal basis to circumvent restrictions laid down in another. All decisions in the Union's external action matters must in themselves specify the legal basis on which they are adopted, in order to identify the procedure followed for their adoption and the procedure to be followed for their implementation. The essential difference between the CFSP and TFEU policies for the Union institutions is indeed the mere fact that different decision-making procedures apply.<sup>13</sup>

The CFSP is in legal terms still based on a distinct set of provisions, as Article 24 TEU states that "the CFSP is subject to specific rules and procedures".<sup>14</sup> That principle corresponds to Article 2(4) TFEU, holding that the Union shall have competence, in accordance with the provisions of TEU, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.<sup>15</sup> Subsequently it should be born in mind that the CFSP and the common security and defence policy (hereinafter: CSDP) competence of the Union is indeed mentioned separately and only in Article 2(4) TFEU. It is not regulated neither within the area of exclusive competences (Article 3 TFEU) nor within the shared competences (Article 4 TFEU) nor supporting competences (Article 6 TFEU). Hence, the CFSP is not subject to the principle of conferral, as set out in Article 2(2) TFEU, pursuant to which the Member States may only exercise their competence to the extent that the Union has not exercised its competence. This means that the exercise by the Union of its competence in the CFSP matters does not impinge on the exercise by Member States of their

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<sup>12</sup> See also: Kateryna Koehler, "European Foreign Policy after Lisbon: Strengthening the EU as an International Actor", in Nasimi Aghayev (eds.), *"Caucasian Review of International Affairs"*, Frankfurt am Main, 2010, p. 57-72; Bruno De Witte, "The Constitutional Law of External Relations", in Ingolf Pernice and Miguel Poiares Maduro (eds), *"A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention"*, Baden Baden, Nomos, 2004, p. 95-106.

<sup>13</sup> See also: Marise Cremona, "Defining competence in EU external relations: lessons from the Treaty reform process", in Alan Dashwood and Marc Maresecau (eds), *"Law and Practice of EU External Relations"*, Cambridge: Cambridge University Press, 2008, p. 39-46; Bruno De Witte, "The Constitutional Law of External Relations", in Ingolf Pernice and Miguel Poiares Maduro (eds), *"A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention"*, Baden Baden, Nomos, 2004, p. 95-106.

<sup>14</sup> Wolfgang Wessels and Franziska Bopp, "The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?", Research Paper No 10, Brussels, 2008, p. 2-3.

<sup>15</sup> See also: Marise Cremona, "The New Treaty Structure of the EU", Kings College London, 2008, p. 9.

competence in foreign affairs. At the same time, the exercise of the competence is subject to Member States' obligation under Article 24(3) TEU to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and comply with the Union's action in this area. Member States have to refrain from any action which is likely to impair the Union's effectiveness as a cohesive force in international relations.<sup>16</sup> As a result, TFEU and TEU competences have not been merged.

At first sight, in compliance with Article 40 TEU, the exercise of choosing the right legal basis might look as a simple reaffirmation of the principle that the appropriate legal basis should be chosen for Union acts. This has to be done in line with the principle of inter-institutional balance and respecting the powers and prerogatives of the institutions and the limits to Union action set out in the Treaty. But while asking on what legal basis a decision might be made in a particular case (and choosing between the CFSP and other competences) it becomes more difficult.<sup>17</sup> As regards the differentiation of the CFSP and other external action, numerous ambiguities remain, in particular over the basis on which it should be decided whether to use CFSP or other competencies to achieve a particular external objective.

The applicable theories while choosing between the tools of the CFSP and other external action and respective legal bases in "borderline cases" will be developed below. The author is on the opinion that the determination of legal basis for a given external action requires the consideration of the aim as well as of the content of the Union measure envisaged.<sup>18</sup> Those theories try to bring clarity into the cases where the external action at the Union level is inevitable in order to sufficiently achieve common objectives.

### **1.2.2 Theory on principles and objectives**

The first theory argues that the objective of the desired external action determines the policy area, proper legal basis and the procedure. The shortlist of essential principles and objectives,

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<sup>16</sup> See also: Ricardo Passos and Stephan Marquardt, "International Agreements", in Giuliano Amato, Hervé Bribosia, Bruno De Witte (eds.), *"Genèse et destinée de la Constitution européenne"*, European University Institute, Florence, 2007, p. 894; Declaration No 13 concerning the CFSP annexed to the LT which provides that the CFSP provisions of the TEU do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy, and that the EU and its Member States will remain bound by the provisions of the Charter of the United Nations.

<sup>17</sup> See also: Marise Cremona, "The New Treaty Structure of the EU", Kings College London, 2008, p. 11.

<sup>18</sup> See also: Alan Dashwood, "Article 47 TEU and the relationship between first and second pillar competences", in Alan Dashwood and Marc Maresecau (eds.), *"Law and Practice of EU External Relations"*, Cambridge: Cambridge University Press, 2008, p. 103.

common to all relations of the Union with the wider world (applying thus equally to the CFSP and TFEU competences) is brought out in Article 3(5) TEU. Inter alia, the Union shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations (hereinafter: UN) Charter. The more specific determination of the principles for the Union's external action is set in Article 21(1) TEU.

While the codification of most essential purposes for any EU external action is welcomed, that catalogue bears no use when one has to differentiate between the CFSP and other external action due to the reasons analysed above. Interestingly enough, the principles reflected in Article 21(1) TEU constitute the extension of the objectives of the CFSP in pre-Lisbon treaty framework (listed in Article 11 TEU) to all external action. Although Article 21 TEU provides a very complete and well-done overview of the objectives of EU external policy, integrating the CFSP and former European Community aspects<sup>19</sup>, the author finds that such codification makes the application of the analysed theory very difficult in legislative practice where the institutions have to make choices between policy areas and treaty provisions.

As regards Union's specific objectives within the CFSP, Article 22(1) states that on the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union. That Article 5(3) and 21(2) TEU apply also to the CFSP is reiterated further in Article 23 TEU, holding that the Union's action on the international scene, pursuant to this Chapter<sup>20</sup>, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions for Union's external action. Article 26(1) empowers the European Council to identify the Union's strategic interests, determine the objectives of and define general guidelines for the CFSP, including for matters with defence implications.

The author finds that these specific provisions to the CFSP do not specify anything in addition and in comparison to Articles 5(3) and 21(2) TEU. Furthermore, they delegate the powers to identify the principles and objectives of the CFSP to the European Council. Such delegation is regrettably ambiguous in view of legal clarity, but at the same time it fits perfectly to the

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<sup>19</sup> See also: Pieter Jan Kuijper, "Of "Mixity" and "Double-hatting". EU External Relations Law Explained", Amsterdam, 2008, p. 16.

<sup>20</sup> Chapter II of Title V of the TEU, "Specific provisions on the common foreign and security policy".

dynamic character of the CFSP where law is generally persuaded to be merely a tool in achieving political objectives common to the Union and Member States. In order to add to this ambiguity, the author would like to draw attention on Article 352(1) TFEU that empowers the Union to adopt appropriate measures if action by the Union should prove necessary to attain one of the objectives set out in the Treaties even when the Treaties have not provided the necessary powers to the Union. Article 352(4) TFEU however reads that this mechanism cannot serve as a basis for attaining objectives pertaining to the CFSP. Hence, this provision assumes that there is such a thing as "objectives pertaining to the CFSP" although they are nowhere defined. It also reinforces the request for a separation between the CFSP on the one hand and other powers on the other hand.<sup>21</sup>

As regards the principles and objectives applicable for other external action, the current theory cannot be applauded either. Such objectives are also not defined at treaty level. Article 205 TFEU states that the Union's action on the international scene, pursuant to this Part<sup>22</sup> shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V TEU, making current theory perfectly useless. However, contrary to Chapter 2 of Title V TEU, Articles 8-12 TFEU contain some general principles which has to be integrated and taken into account across all policy fields. In the external action, those principles aim to guide in particular the areas of development and common commercial policy.<sup>23</sup>

The determination of the external competences and objectives of the Union in the LT is an appreciated development from the perspective of improving the Union's external action. But apart from that, the LT only names the objectives, without linking them to one another or establishing any hierarchy, prioritising mechanisms or keys to resolve potential conflicts between the different objectives.<sup>24</sup> Furthermore, provisions applicable only to the CFSP or only to the non-CFSP part do not establish additional objectives nor do they explore the common principles and objectives applicable to all external action further. This being said, the author admits that the theory based on objectives and principles does not indicate which

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<sup>21</sup> Marise Cremona, "The New Treaty Structure of the EU", Kings College London, 2008, p. 15.

<sup>22</sup> Part Five of TFEU, The Union's External Action.

<sup>23</sup> See also: Marianne Dony, "The EU's External relations and Their Evolving Legal Framework", in Mario Telò (eds.), *The European Union and Global Governance*, Abingdon, New York: Routledge, 2009, p. 150-151.

<sup>24</sup> See also: Finn Laursen, "The (Reform) Treaty of Lisbon: What's in it? How Significant", European Commission, Brussels, 2009, p. 1-29; Stefan Griller, Jacques Ziller (eds.), "The European Union's External Relations after the Lisbon Treaty", Springer, Wien, New York, 2008.

Union legal instrument must be used and the legal framework on which this should be based upon.

### **1.2.3 Theory on inter-pillar hierarchy**

As shown above, the principles and objectives applying to other areas of external action apply also to the CFSP. The second theory is based on the concept of *lex specialis* and *lex generalis*. In present case, *lex specialis* applies for TFEU competences, where different policy areas where the EU has external competence are described, while the competence under *lex generalis* must be used for the CFSP functions. The theory represents the idea behind Article 24(1) TEU, holding that the Union's competence in matters of the CFSP 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. All areas of foreign policy is a term wide enough to enable the Union take any action under the CFSP that it finds necessary.

Article 40 TEU establishes a non-affect clause between two areas. It reads that the implementation of the CFSP 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 TFEU. 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 the CFSP. The logical solution must therefore be to treat the CFSP (all areas of foreign policy) as a general competence alongside the specific competences creating distinct areas of external policy in TFEU. This logic suggests that despite the apparently even-handed wording of Article 40 TEU, the principle which prioritises TFEU powers should effectively be maintained by applying *lex generalis/lex specialis* principle: the general competence (legal basis) should be used only where action under a more specific provision is not possible.<sup>25</sup>

However, Article 40 TEU does little to clarify the limits of competence and raises a number of new questions. At first, it seems to make clear that the CFSP competences and the Union's

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<sup>25</sup> Marise Cremona, "Defining competence in EU external relations: lessons from the Treaty reform process", in Alan Dashwood and Marc Maresecau, "*Law and Practice of EU External Relations*", Cambridge: Cambridge University Press, 2008, p. 45-46.

other competences are to be equally protected against each other<sup>26</sup> and there does not appear to be a presumption in favour of using non-CFSP powers wherever possible. Pre-Lisbon Article 47 TEU that indicated the European Community competence to have primacy over the CFSP is borne out by the LT, as revised TEU and TFEU are to have the same legal value<sup>27</sup> While carrying through the equal value principle, it leaves us with a serious difficulty in working out the relationship between the two Treaties. Because first, the competence conferring powers are split between the two treaties; and second, the scope of the CFSP is left undefined.<sup>28</sup>

In the opinion of the author, giving a priority to *lex specialis* does not really fit into the approach of Article 40 TEU which protects the CFSP from being affected by the exercise of other competences. The theory assumes that the CFSP powers may and must be chosen when the use of TFEU competences is not possible, but that is in contrary to Article 40(2) TEU claiming that the implementation of TFEU competences must not affect the CFSP powers. Nor does this approach sit well with Art 352(4) TFEU, given that objectives pertaining to the CFSP should be definable independently from TFEU competences.

The importance of the concept of *lex specialis* and *lex generalis* comes out in the most decisive way when the question of judicial challenge is raised. Under Article 24(1) TEU, the Court of Justice still lacks jurisdiction with respect to the CFSP, with the exception of its jurisdiction to monitor compliance with Article 40 TEU (and to review the legality of decisions providing for restrictive measures against natural or legal persons). The Court shall decide whether the EU should act under the CFSP jurisdiction or under TFEU competences. That competence is not a novelty, but the difference with pre-Lisbon Treaties lies in Article 40 TEU that establishes the equal footing of the CFSP and TFEU competences, while ex Article 47 TEU granted as a rule preference to Community (non-CFSP) competences.<sup>29</sup>

For the EP, creating the hierarchy between the CFSP and other external action has much affect. Along the lines of ECOWAS case<sup>30</sup>, the scope of action of the Union changes

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<sup>26</sup> Alan Dashwood, "Article 47 TEU and the relationship between first and second pillar competences", in Alan Dashwood and Marc Maresceau (eds.), *Law and Practice of EU External Relations*, Cambridge: Cambridge University Press, 2008, p. 100-101.

<sup>27</sup> Marise Cremona, "Defining competence in EU external relations: lessons from the Treaty reform process", in Alan Dashwood and Marc Maresceau, *Law and Practice of EU External Relations*, Cambridge: Cambridge University Press, 2008, p. 45-46; Marise Cremona, "The New Treaty Structure of the EU", Kings College London, 2008, p. 7-8.

<sup>28</sup> Marise Cremona, "The New Treaty Structure of the EU", Kings College London, 2008, p. 11.

<sup>29</sup> See also: Authority of the House of Lords, "The Treaty of Lisbon: an impact assessment", London, 2008.

<sup>30</sup> Case C 91/05, *Commission v. Council*.

considerably if the action is taken under the CFSP framework instead of TFEU framework and furthermore, this would result in non-involvement of the EP. In ECOWAS case, the Commission sought the annulment of a Council CFSP Decision taken with a view to the EU contribution of the Moratorium on Small Arms and Light Weapons. EP intervened in the case in support of the Commission, because the judgment had direct consequences on the institutional balance. In its decision, the Court found that since the aim and content of the contested decision came within the scope of development cooperation, the competences of the Treaty establishing the European Community (hereinafter: TEC) should have been used as legal basis<sup>31</sup> and annulled the Council CFSP decision. However, the significance of the ECOWAS case is likely to be short-lived, in view of the changes to the Union structure granting the equal position for the CFSP and TFEU competences.<sup>32</sup>

In conclusion, the author argues that even if the theory of *lex specialis* and *lex generalis* while choosing the legal basis has its merits, new treaty framework has abandoned the hierarchy between the pillars and established the mutual non-affect clause, making that concept problematic to use.

#### **1.2.4 Theory on coherence**

Third theory argues that while the status of the CFSP and TFEU competences is equal, the solution must be based on the principle of coherence on a case-by-case basis. The theory originates from Article 1 TEU, stating that two Treaties shall have the same legal value. This approach certainly complies with Article 40 TEU as analysed above. It takes into account Article 21(3) TFEU, according to which the Union shall ensure consistency between the different areas of its external action and between these and its other policies. Moreover, in conformity with Article 7 TFEU, the Union shall also ensure consistency between its policies and activities, taking all of its objectives into account. The LT shows the will to enforce the cohesion of the external action and even gives the EU economic integration for the sake of EU political ambitions and especially for the great ambition to be a player in international scene. This is possible to conclude from the principles enlisted in Article 21 TEU<sup>33</sup>. As the LT only lists the different objectives without linking them to one another and without offering any hierarchy, prioritising mechanism or general means for resolving (potential) conflicts

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<sup>31</sup> Case C 91/05, *Commission v. Council*, paragraph 109.

<sup>32</sup> See also: Alan Dashwood, "Article 47 TEU and the relationship between first and second pillar competences", in Alan Dashwood and Marc Maresceau (eds.), *Law and Practice of EU External Relations*, Cambridge: Cambridge University Press, 2008, p. 99.

<sup>33</sup> See also: Francois-Xavier Priollaud and David Siritzky, "Le traité de Lisbonne", Paris, 2008, p. 108.

between the different objectives, the aspirational coherence or consistency of the EU's action occupies a central place.<sup>34</sup>

Coherence is a necessary precondition for the efficacy of external action. In line of that principle, Article 21(3) TEU refers to the level of internal coordination of the EU policies and implies that the various external policies of the EU should converge or at least not contradict one another. At the same time, the High Representative within his capacity as a Vice-President of the Commission has to ensure the consistency of the Union's external action (Article 18(4) TEU). According to Article 26(2) TEU, the Council and the High Representative shall also ensure the unity, consistency and effectiveness of action by the Union. Coherence, thus, should be ensured not only between measures adopted in different pillars, but also between the various CFSP activities.<sup>35</sup> Article 26(2) TEU should be interpreted as consistency within different CFSP policies, but not consistency between the CFSP and other external action.

The negative aspects of that theory are reflected in the pillar structure of the EU and the differences in the institutional involvement and procedures between those pillars. This has already constituted a big challenge to the coherence of the EU's foreign policy in the past and the LT does not merge the pillars, nor does it influence the legal nature of the principle of coherence.<sup>36</sup> Secondly, the author admits that there are many overlaps, ambiguities and inconsistency in legal framework. The "consistency" as the central principle characterising the Union's coherent external action seem to be used in different contexts and meanings and must be ensured by different actors, if one compares Articles 18(4), 21(3) and 26(2) TEU, as referred above.<sup>37</sup>

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<sup>34</sup> See also: Marianne Dony, "The EU's External relations and Their Evolving Legal Framework", in Mario Telò (eds.), *The European Union and Global Governance*, Abingdon, New York: Routledge, 2009, p. 150.

<sup>35</sup> See also: Esther Barbé, "The Evolution of CFSP Institutions: Where does Democratic Accountability Stand?", *The International Spectator*, Rome, 2004, p. 50.

<sup>36</sup> See also: Kateryna Koehler, "European Foreign Policy after Lisbon: Strengthening the EU as an International Actor", in Nasimi Aghayev (eds.), *Caucasian Review of International Affairs*, Frankfurt am Main, 2010, p. 57-72.

<sup>37</sup> It is interesting to note that even the term „consistency“ or „la cohérence“ in French used in those three provisions is translated into Estonian as „järjepidevus“ in Article 18(4), as „kooskõla“ in Article 21(3) and as „järjekindlus“ in Article 26(2) TEU. About the ambiguity of the term "coherence", see also: Marise Cremona, "Developments in EU external relations law", Oxford University Press, 2008, p. 12-13.

## **PART TWO**

### **EUROPEAN PARLIAMENT IN THE COMMON FOREIGN AND SECURITY POLICY**

#### **2.1 Prerogatives of the European Parliament**

Article 36 TEU holds:

"The High Representative shall regularly consult the EP on the main aspects and the basic choices of the CFSP and the CSDP and inform it of how those policies evolve. He shall ensure that the views of the EP are duly taken into consideration. Special representatives may be involved in briefing the EP.

The EP may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the CFSP, including the CSDP."

The EP has set up a Committee on Foreign Affairs (hereinafter: AFET) and AFET's Subcommittee on Security and Defence (hereinafter: SEDE) that together form main forum for parliamentary debates on the CFSP. Those committees prepare the reports on large range of "hot" foreign policy topics that will be subsequently voted in plenary to become EP official resolutions. According to Annex VII of the EP RoP (hereinafter: RoP), AFET is responsible for the CFSP and the CSDP<sup>38</sup> and is assisted by SEDE in this context. AFET is also responsible for the relations of the Parliament with other EU institutions and bodies, the UN and other international organisations and inter-parliamentary assemblies for CFSP matters.

Before the LT, the demands for increased parliamentary participation in the CFSP were not met by the legal framework, especially as regards pre-Lisbon Article 21 TEU. This article has been reinforced into Article 36 TEU, the essential modifications will be analysed afterwards in this thesis. The Parliament's main criticism was channelled to the Council's practice of merely informing the Parliament and submitting a descriptive list of CFSP activities carried out in the previous year, instead of really consulting Parliament at the beginning of each year on the main aspects and basic choices to be made for that year and subsequently reporting to

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<sup>38</sup> Union's security and defence policy was called "European Security and Defence Policy" abbreviated ESDP before, but the LT uses the term "Common Security and Defence Policy", abbreviated CSDP. Throughout the current thesis, term CSDP will be used.

Parliament whether – and, if so, how – Parliament’s contribution had been taken into account. The Parliament considered that practice to constitute a *de facto* infringement of the very substance of Article 21 TEU.<sup>39</sup> However, the EP has over the years developed a number of activities to strengthen its role and position in the CFSP. But a closer look at the constitutional role of the EP in the CFSP reveals that the EP lagged even further behind its already limited involvement in international treaty-making. The MEPs were not totally powerless, but their channels of influence were much more indirect, centred on their influence on the relevant executive actors, the tentative projection of a genuine parliamentary diplomacy and budgetary control powers.<sup>40</sup>

The LT has reinforced the Parliament’s consultative role, but the custom of almost exclusive deliberation and decision-making in the Council (as regards the CFSP matters) without direct EP participation has been retained. Rather surprisingly, not even the Convention’s working group on external action, with its primarily parliamentary composition, proposed substantial changes and concluded that the present rules were satisfactory.<sup>41</sup> According to Article 24(1) TEU, the specific role of the EP in the CFSP is defined by the Treaties. That harmonises with the Declaration No 14, stating that the provisions covering the CFSP do not increase the role of the EP. However, there are still several improvements for the Parliament introduced by the LT, legal implications of which the thesis will study in current chapter.

The first important innovation of Article 36 TEU is that the obligation to consult the EP regularly on the main aspects and the basic choices of the CFSP and the CSDP, to inform the Parliament regularly of how those policies evolve and to ensure that the views of the EP are duly taken into consideration, will be performed by the High Representative and not by the Presidency and the Commission any more. Those tasks include the reciprocal flow of information – in addition to the consulting and informing duties, the High Representative must also take the views of the Parliament into account while elaborating and conducting the CFSP.

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<sup>39</sup> Dirk Peters, Wolfgang Wagner and Nicole Deitelhoff (eds.), “The Parliamentary Control of European Security Policy”, Oslo, 2008; EP resolution of 23 May 2007 on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP, including the financial implications for the general budget of the European Union.

<sup>40</sup> See also: Udo Diedrichs, “The EP in CFSP: more than a marginal player?”, *The International Spectator*, Rome, 2004, p. 32; Daniel Thym, “Parliamentary Involvement in European International Relations”, in Marise Cremona and Bruno de Witte (eds.), “*EU Foreign Relations Law – Constitutional Fundamentals*”, Oxford and Oregon, 2008, p. 219-220.

<sup>41</sup> Daniel Thym, “Parliamentary Involvement in European International Relations”, in Marise Cremona and Bruno de Witte (eds.), “*EU Foreign Relations Law – Constitutional Fundamentals*”, Oxford and Oregon, 2008, p. 221.

In its activities, the EP seeks not only to obtain information from the Council or the Commission, but also to provide a forum for debate on the CFSP and to offer opportunities for discussing political alternatives and options. This function has not been fully exploited so far, as public attention is still mostly centred on national Parliaments, but the situation could change if the EU acquires more visibility as an actor in international affairs.<sup>42</sup> As Chair of SEDE Arnaud Danjean has put it — the Parliament should have a competitive approach with the Council on defence issues. It is simply that the Council respects the Parliament as a key player and contributor to that sensitive sector that guarantees the democratic legitimacy for the CSDP.<sup>43</sup> The author agrees with those ideas and emphasises that the Parliament's functions in the democratic scrutiny of the CFSP should contribute to the reinforcement of the Union's activities at the global stage. In parallel with the theoretical reasoning along the Treaty lines, also practical legal questions for the EP will be analysed below.

Under new treaty framework, the High Representative is obliged to consult the Parliament and, according to Article 36 TEU, he must ensure that the views of the EP are duly taken into consideration. It is arguable to what extent and under what procedures the High Representative must take the Parliament's views into consideration. For some years now, dialogue with the Council has also included the standard practice that the Ambassador of the country holding the Council Presidency informs the SEDE on its program and developments in CSDP. The author is of the opinion that the transmission of this task from the Council to the High Representative may pose legal problems, as despite the broad powers of the High Representative, his main task is to conduct the CFSP by his proposals to the Council and carry that policy out as mandated by the Council. The decision-making powers lie in the Council and as far the strategic interests and objectives are concerned even in the European Council. Hence, even if the High Representative takes Parliament's views under utmost consideration, the real impact and the legal competence to take decisions lies still within the Union institutions that are not committed by Article 36 TEU. At the same time, the High Representative might evade its responsibility under Article 36 TEU by referring to the mandate of the Council. It remains to be seen whether and how those legal considerations will evolve in practice.

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<sup>42</sup> Udo Diedrichs, "The European Parliament in CFSP: More than a Marginal Player?", *The International Spectator*, Rome, 2004, p. 37.

<sup>43</sup> Arnaud Danjean, "L'implication du PE est un gage de légitimité, d'efficacité et de visibilité", in the General Secretariat of the Council of the EU (eds.), *European Security and Defence Policy 1999-2009*, Brussels, 2009, p. 50.

### **2.1.1 Democratic scrutiny over civilian and military missions**

The main area of application for Article 36 TEU is the civilian and/or military missions that the Union runs in the CSDP framework. CSDP missions are established by a decision taken under Articles 28 and 43(2) TEU (formerly a joint action under ex-Article 14 TEU) by the Council on a proposal of the High Representative or any Member State. Articles 42(1) and 43 TEU provide the list of tasks in the course of which the Union may launch civilian and military missions outside the Union. Those tasks include 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.

TEU sets objectives for the Union's external action, enlists the tasks of CSDP missions and elaborates on the general decision-making procedures and legal instruments. Legislative oversight by the parliament of executive decisions to deploy military and other missions abroad is a traditional tool to provide those operations with democratic legitimacy. The author would like to emphasise a couple of characteristics specific to the CSDP that one has to take account while studying the CFSP process and the Parliament's competences in the CSDP from a lawyer's perspective.

Firstly, there are very few legally formalised steps with the bulk of the CSDP decision-making framework resting mainly on non-legal documents, such as Presidency Conclusions from the European Council meetings and similar documents.<sup>44</sup> This is due to the high number of political compromises necessary, including also the level outside the EU. Besides, the CSDP needs and decisions are of urgent nature and much flexibility is indispensable because the crises and environment of planned operations are constantly changing. Probably the fact that the Court of Justice lacks jurisdiction over the II pillar has also favoured the modest use of legalised mechanisms in that context. It seems that professor Piet Eeckhout was not very far from the truth, while stating that the CFSP is in a "legal no-man's land"<sup>45</sup>.

The second characteristic is the intergovernmental nature of the whole CSDP, including each Member State's right to veto the process at any time.<sup>46</sup> Apart from the Council, other Union

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<sup>44</sup> See also: Annika Björkdahl, Maria Strömviik, "EU Crisis Management Operations. ESDP Bodies and Decision-making Procedures", Danish Institute for International Studies, DIIS Report, Copenhagen, 2008, p. 21.

<sup>45</sup> Piet Eeckhout, "The Lisbon Treaty and External Relations", Centre of European Law, London, 2009, p. 3.

<sup>46</sup> According to Article 31(1) and (4) TEU "the CFSP decisions having military or defence implications are taken by the Council unanimously".

institutions play relatively little role in the mission establishment procedure with main consultations to be done among the Member States and with the UN (on the mandate), NATO (on using NATO-assets under the framework of Berlin Plus agreements<sup>47</sup>), third states (that participate in the CSDP operations), host state and other key-actors. The author finds it important to examine which are the stages of that process where the Parliament could make use of its legitimate rights under Article 36 TEU and let its views to be taken duly into consideration in most efficient way. The positions of the Parliament must be reinforced as the Parliament is the only supranational institution with a legitimate claim to exercise democratic supervision over the Union's security and defence policy and that this role has been strengthened by the entry into force of the LT.<sup>48</sup>

Under Article 30(1) TEU, any Member State and the High Representative are entitled to come up with new initiatives in the CSDP. In practice, the High Representative and the Council Secretariat are usually initial architects behind the missions, but the initiative may come also from outside the EU system, especially when within the UN framework or during peace negotiations, it appears that the EU mission would be the best option to cope with the crisis. Non-formalised and usually undisclosed agreements between the High Representative and actors outside the Union are tools used in that stage. The author admits that the Parliament has no legal possibilities to have much impact here, despite its desire to be included as early as possible.

The first formalised body to decide over a new initiative is a Political and Security Committee (hereinafter: PSC) acting under Article 38 TEU and Article 240 TFEU<sup>49</sup> that approves the Crisis Management Concept for the planned mission and forwards it for the final adoption to the Council. The considerations taken into account at this level are political feasibility, strategic desirability and suitability as regards to the capacities of the mission.<sup>50</sup> Usually during this phase, the small fact-finding mission is sent to the host state to gather more information.

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<sup>47</sup> The Berlin Plus agreement is the short title of a comprehensive package of agreements made between NATO and the EU on 16 December 2002, allowing the EU to draw on some of NATO's military assets in its own peacekeeping operations.

<sup>48</sup> EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the CSDP, paragraph 91.

<sup>49</sup> PSC consists of the ambassadors of Member States and acts as a preparatory body for the Council in the CSDP questions. It is a common practice that the Council delegates to the PSC most of its powers as regards the political control and strategic direction over the CSDP operations.

<sup>50</sup> Annika Björkdahl, Maria Strömvik, "EU Crisis Management Operations. ESDP Bodies and Decision-making Procedures", Danish Institute for International Studies, DIIS Report, Copenhagen, 2008, p. 26-27.

The role of the Parliament in those stages is not formalised by the Treaties. The Chair of the PSC briefs AFET and SEDE about missions under preparation on a regular basis. In principle, the fact-finding missions on ground and the PSC may take into consideration also the EP resolutions on the country or region where the mission will be set up, but they are not legally obliged to do so. Instruments the Parliament may use in that stage include prior authorisation of the mission, issuing of non-binding resolutions or recommendations about an upcoming mission<sup>51</sup>, budgetary control and the organisation of public hearings. Under Article 36 TEU, the EP is not excluded from being informed and consulted *ex ante* during preliminary phases of the crisis management procedures. However, these procedures do not associate the Parliament to the decision-making process. Thus, the Parliament's *ex ante* role in overseeing CSDP missions is largely based on access to information and dialogue with the Union's executive institutions.

The basic legal act (besides the UN Security Council Resolution in the case of a military operation) for every CSDP mission is a Council Decision on the establishment of the mission. The Council correctly refers to Articles 28 and 43(2) TEU as legal basis for this decision that defines the objective of the mission, establishes the exact mandate of troops, determines the chain of command, decides on the budget and the duration of the mission and regulates on other most essential issues. That decision is drafted in close cooperation with the Commission that is responsible for the implementation of the CFSP budget.<sup>52</sup> This is the most important role of the Commission in the CSDP where the role of the Commission has been substantially reduced, as shown above in Chapter 1.1.4. During this process, all consultations and practical arrangements among the Member States are done. Necessary legal agreements with external actors should also be finalised in that stage.

The Parliament does not have the formal power to authorise the establishment or launch of a CSDP mission. Article 36 TEU refers to dialogue and information exchange, granting no direct prior authorisation powers to the EP. The author finds that such powers would infringe the inter-institutional balance and would neither accord with Article 24 TEU requiring the role of the Parliament in that area to be defined at treaty level. However, the democratic legitimacy of a Council decision establishing a CSDP mission would be enhanced by making reference to the non-binding resolutions of the EP. It would demonstrate that CSDP is not excluded from prior parliamentary scrutiny. The idea was raised by Dr Hans Born of Geneva Centre for

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<sup>51</sup> Some examples are the Althea resolution of 10 November 2004 or the resolution on the criteria for EU peace-keeping operations in the Democratic Republic of Congo of 23 March 2006.

<sup>52</sup> In military operations, only administrative expenditure is charged to the EU budget, as set in Art 41 TEU.

the Democratic Control of the Armed Forces at a debate in SEDE on 22 February 2008 and developed further in the Parliament. However, the Council has so far not taken it on board.

### **2.1.2 Efficiency *versus* parliamentary control**

One publicised argument against the Parliamentary involvement at initial and decision-making stages of the CSDP is that it could damage the efficiency of foreign policy. This somehow reproduces the traditional realist belief that the need for secrecy, speed and efficiency in foreign policy contrasts with parliamentary involvement. Member States representatives insist that the involvement of the Parliament should not lead to any delay in the decision-making process.<sup>53</sup> The author does not agree that the security decisions are unsuited for parliamentary control. This argument seems to ignore the variety of forms that parliamentary control can take and the degree to which they can be adapted to any need for speed and secrecy in security matters. Thus, for example, parliamentary control can put a heavy emphasis on *ex ante*, as opposed to *ex post*, accountability. The objection that security decisions need to be made speedily in an emergency has much less force if it can be demonstrated that some useful measure of public control could be secured through representative bodies exploring with governments the conditions under which force might be used ahead of time.<sup>54</sup>

In the Parliament, the ideas of creating special and urgent procedures for approving the missions have been under discussion during recent years without any remarkable outcome. Apart from political finesses, the legal problem raised here is that under urgent procedure, the decision on behalf of the EP should be made by AFET or SEDE or even a smaller body of the Parliament (like SEDE coordinators) that could convene urgently and in the time between plenary sessions. But if the decision to approve missions is taken by only a small group of MEPs, one could hardly argue that it adds the democratic legitimacy to a CSDP mission. Neither does it strengthen considerably the parliamentary control. In practice, the Parliament has once showed that it can react in time to take a stance before the launch of a CSDP operation. When the Parliament scrutinised EUFOR Chad/CAR mission, the resolution was tabled through the political group of the SEDE Chair and not through AFET/SEDE lengthy

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<sup>53</sup> See: Esther Barbé, “The Evolution of CFSP Institutions: Where does Democratic Accountability Stand?”, *The International Spectator*, Rome, 2004, p. 54.

<sup>54</sup> Dirk Peters, Wolfgang Wagner and Nicole Deitelhoff (eds.), “The Parliamentary Control of European Security Policy”, Oslo, 2008.

procedures in order to get the resolution approved under urgent circumstances, before the Council's Joint Action could be taken.<sup>55</sup>

Another legal question is the content and scope of EP resolutions accompanying Council decisions. The wording of the resolution tends to reflect the ambition, stating that the EP approves the mission, while also establishing the conditions to be met for the Parliament to maintain this approval. However, the author thinks that such steps to strengthen the Parliament's power to scrutinise the CSDP could be at best implemented through revised treaty provisions, so as not to rely solely on the goodwill of each actor involved in CSDP decision-making. So far, TEU provisions document the marginal legal powers for the EP as regards CSDP missions, which remains restricted to acting as a forum in this policy field. It also fosters the special characteristics of this policy field which generally requires fast, discreet and discretionary decisions. Similarly restricted is often the role of national Parliaments in national foreign policy.<sup>56</sup>

### **2.1.3 European Parliament's impact through budgetary powers**

While its formal competence under Article 36 TEU remains restricted, the EP might still enhance its indirect impact on CSDP missions through its budgetary powers. The improved and systematic evaluation of CSDP missions in terms of both effectiveness and cost effectiveness is also greatly needed in order to improve the transparency and accountability of the CSDP. The Parliament should conduct also financial auditing of past expenditures related to CSDP missions, possibly in cooperation with the European Court of Auditors.<sup>57</sup>

It is true that the launch of a mission may be established under reserves or transfers between the CFSP budget lines or even initially charged to Member States budgets (as was the case when EUMM Georgia was set up urgently in the autumn of 2008). As a consequence, the Parliament is often sidelined on approving budgets for individual operations. Moreover, in case no consensus on additional Union funds can be reached, the Council may unanimously

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<sup>55</sup> EP resolution of 27 September 2007 on the ESDP operation in Chad and the Central African Republic.

<sup>56</sup> See also: Antonio Missiroli, "The Impact of the Lisbon Treaty on ESDP", Brussels, 2008, p. 4; Wolfgang Wessels and Franziska Bopp, "The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?", Research Paper No 10, Brussels, 2008, p. 14-15.

<sup>57</sup> See also: Hans Born, Alex Dowling, Teodora Fuior and Suzana Gavrilescu, "Parliamentary Oversight of Civilian and Military ESDP Missions: the European and National Levels", Brussels, 2007, p. 56-57.

opt for financing certain actions outside the Union budget.<sup>58</sup> Thus, the Parliament's budgetary powers have been equally limited.

But from the other hand, the Parliament has to approve the appropriations for following years in the annual budgetary procedure and thus it is indirectly involved in the decision-making process of a CSDP mission when additional resources are required from the CFSP lines of the Union budget. According to Point 42 of the Inter-Institutional Agreement between the EP, the Council and the Commission on budgetary discipline and sound financial management of 17 May 2006 (hereinafter: IIA-2006)<sup>59</sup>, the Council, the Commission and the Parliament have to reach agreement on both the overall amount of the operating expenditure and on its distribution between various articles of the CFSP budget chapter such as “non-proliferation and disarmament”, “emergency measures” or “EU Special Representatives”.<sup>60</sup>

Different elements of EU external policy are difficult to separate. The combination of civil and military instruments makes the use of Union resources and the parliamentary control necessary.<sup>61</sup> The Parliament has no influence over expenditure arising from military operations which are not charged to the Union budget, but are covered by Member States. From Parliament's perspective, military expenditure appears as a shadow budget which increases the Council's discretion in financial matters<sup>62</sup> and the Parliament's desire to expand its budgetary authority over all military operational expenditure occurred in CSDP missions is well known. The Parliament has suggested that the Council, out of a concern for transparency, should keep it regularly informed on financing instruments for military operations. The Parliament has considered that in the interests of budgetary clarity first all non-military expenditure should be indicated in the Union budget and that, as an additional step, after a necessary Treaty amendment, military expenditure should also be shown in the EU budget.<sup>63</sup> From legal perspective, such amendment would be inevitable, as current Article 41(2) TEU excludes the operational military expenditure from Union budget and thus evades the

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<sup>58</sup> See also: Dirk Peters, Wolfgang Wagner and Nicole Deitelhoff (eds.), “The Parliamentary Control of European Security Policy”, Oslo, 2008.

<sup>59</sup> OJ C 139, 14.6.2006, p. 1.

<sup>60</sup> About the implementation of the IIA-2006, see also Chapter 2.2.3.

<sup>61</sup> See also: Udo Diedrichs, “The European Parliament in CFSP: More than a Marginal Player?”, *The International Spectator*, Rome, 2004, p. 41-42.

<sup>62</sup> See also: Dirk Peters, Wolfgang Wagner and Nicole Deitelhoff (eds.), “The Parliamentary Control of European Security Policy”, Oslo, 2008.

<sup>63</sup> EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the CSDP, paragraph 93.

effective Parliamentary control and diminishes the value of Parliament's legal calls for enhanced supervision.<sup>64</sup>

The author does not agree with those who believe that the EP has to have a formal role in the oversight of the CSDP and EU-led military operations. Such opinions argue that the EP should be responsible for approving the mandate and objectives of any crisis management operation under the CSDP, because it would be responsible for the costs incurred by Council decisions. In sum, there is a split balance for the EP as concerns the CSDP: while it has no formal influence in matters related to military decisions, it can play a role in the area of civilian aspects of crisis management, mostly via its budgetary competencies. It will be important in the future to bring both threads together more closely for the purpose of a coherent CSDP.<sup>65</sup> Budgetary powers are the EP's strongest powers in the CFSP. It is not surprising that the EP has tried to use its budgetary prerogatives for increasing its influence on CFSP decision-making.<sup>66</sup>

#### **2.1.4 European Parliament's impact through the ordinary legislative procedure**

Besides the competences under Article 36 TEU and limited budgetary powers, the Parliament has its indirect and legitimate impact on CSDP missions also by means of its TFEU co-decisions competences. A CSDP mission forms usually the part of EU other external action in the country or region. A CSDP mission should synchronise with other Union instruments, including non-CFSP policies, such as development cooperation (as was the case with EUFOR Chad/Central African Republic, EUPOL Afghanistan or most recently in EUTM Somalia) or neighbourhood policy (EUBAM Rafah Palestina, EUPOL Cops Palestina, EUMM Georgia) or even enlargement policy (EUPM Bosnia, EUFOR Althea Bosnia, EULEX Kosovo). Thus there may be circumstances in which the Union's security objectives require legislation that has to be co-decided by the Parliament.<sup>67</sup>

In spite of the intergovernmental character of European security policies, the pressure for a higher involvement of the Parliament has derived from the fact that there are aspects of these

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<sup>64</sup> About Parliament's new budgetary powers on as regards CSDP missions, see also Chapter 2.3.

<sup>65</sup> Udo Diedrichs, "The European Parliament in CFSP: More than a Marginal Player?", *The International Spectator*, Rome, 2004, p. 43.

<sup>66</sup> Daniel Thym, "Parliamentary Involvement in European International Relations", in Marise Cremona and Bruno de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford and Oregon, 2008, p. 223.

<sup>67</sup> See also: Dirk Peters, Wolfgang Wagner and Nicole Deitelhoff (eds.), "The Parliamentary Control of European Security Policy", Oslo, 2008.

activities which are hardly divisible into the sum of its parts. This is most salient in CSDP missions, where the mix of instruments from different pillars and sources of financing is the order of the day. Therefore, the right of the Parliament to be informed on those developments and that its views to be taken duly into consideration cannot be overridden.

Parliament's oversight of EU arms control or intelligence activities has also offered interesting insights in this respect. In the case of arms control, the EP has become concerned about compliance with the EU Code of Conduct by the EU itself and not only by its Member States, for example by calling for responsible arms brokering in the framework of CSDP missions. As regards the case of intelligence, the Parliament has maintained that even if national security agencies' involvement in illegal detention should be treated as matters of national concern, the practical consequence that EU policies may rely on threat assessments based on unlawful information confers on the Parliament the moral obligation to demand explanations from EU institutions and Member States. In sum, as a matter of congruence, the development of mechanisms of supranational input legitimacy appears to be a justified development.<sup>68</sup> Although this practice is not based upon a legally binding commitment, it is part of the Parliament's effort to enhance its role and position in the CFSP by establishing links and responsibilities even where the Treaties do not explicitly foresee them.<sup>69</sup>

Those links have lead the author to argue that despite the lack of formal role, the EP has its clear impact on the questions decided by the Council while establishing a CSDP mission because of the budgetary and legislative powers the EP enjoys. The Parliament has strongly welcomed the fact that the LT fully recognises the EP as one of the two branches of the legislative and budgetary authorities of the Union, while its role in the adoption of many political decisions of importance for the life of the Union is also recognised, and its functions in relation to political control are reinforced and even extended, albeit to a lesser extent, to the area of CFSP.<sup>70</sup> The EP may well have general consultative jurisdiction, but it can only be exercised without prejudice to the Council's right to reach binding decisions.

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<sup>68</sup> See also: Dirk Peters, Wolfgang Wagner and Nicole Deitelhoff (eds.), "The Parliamentary Control of European Security Policy", Oslo, 2008.

<sup>69</sup> Udo Diedrichs, "The European Parliament in CFSP: More than a Marginal Player?", *The International Spectator*, Rome, 2004, p. 38.

<sup>70</sup> EP resolution of 7 May 2009 on the impact of the Treaty of Lisbon on the development of the institutional balance of the European Union, paragraph 7.

### **2.1.5 Other major innovations**

In addition to the Council, the EP may ask questions or make recommendations also to the High Representative under new Article 36 TEU. While questioning the Council Presidency on the CFSP issues in plenary and AFET/SEDE meetings has been a long habit of the Parliament, then the form of official recommendations in the field of the CFSP has gained its popularity in recent years.

The reason why the EP has started making use of its right to make recommendations is a simple one — according to Rule 121 in conjunction with Rule 48 of the RoP, when AFET wants to draw up a report on an important question and submit it to the plenary to be adopted as a motion for a resolution, it has to obtain a prior authorisation from the Conference of Presidents of the Parliament. Moreover, AFET is entitled to proceed with no more than six own initiative reports simultaneously. In the case of a recommendation under Article 36 TEU, inversely, those requirements do not apply, making that option much more flexible and attractive for AFET. One could also see that the recommendations are usually aimed to provide parliamentary contribution for the Council and Member States to take into account in international conferences or as regards negotiations of international conventions in the areas relating exclusively to the CFSP. New Article 36 TEU broadens that scope even more and should lead to reinforced role of the Parliament, as the latter may from now on address its recommendations directly to the CFSP key-player, the High Representative.

Secondly, the explicit mentioning of the CSDP besides the CFSP in Article 36 TEU is also a novelty as compared to pre-Lisbon Article 21 TEU. In legal terms this addition is not relevant, as the CSDP is an integral part of the CFSP anyway, as enacted in Article 42(1) TEU. However, this emphasis shows that no separate policy area has been created which could exclude the Parliament from using its legal rights of consultation and information.<sup>71</sup> It might be important while building upon the legal arguments to support the enhanced role of the Parliament in democratic supervision over EU military activities.

Thirdly, special representatives may be involved in briefing the EP. As foreseen in Article 33 TEU, special representatives are appointed by the Council on a proposal from the High Representative. They are accorded with a mandate in relation to particular CFSP issues which they will carry out under the authority of the High Representative. Although the participation

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<sup>71</sup> See also: Udo Diedrichs, “The European Parliament in CFSP: More than a Marginal Player?”, *The International Spectator*, Rome, 2004, p. 44.

of special representatives (and personal representatives) has been also the practice so far in AFET and SEDE, such commitment on treaty level is a novelty. That shows the importance of the Parliamentary input in the CFSP debates.

But the Parliament has in recent months urged for making more use of Article 33 and 36 TEU powers, demanding the political deputies of the High Representative to be appointed under the same procedure. Those deputies could come to brief the Parliament in the times when High Representative is not available and take political commitments on behalf of the latter. The author considers such interpretation possible and even advisable under the Treaty rules. Such system would however undermine seriously the Council and rotating Presidency's powers. This is probably the reason why the Council that used to play the leading role in the CFSP as lately as only 6 months ago, might be reluctant in extending the activities of the High Representative and special representatives vis-à-vis the Parliament. The Council seems not to agree with the wide interpretation of treaty rules in that context.

Finally, the annual debate in the Parliament on progress in implementing the CFSP, including the CSDP, is replaced by a twice-a-year-debate. Such debate is held in plenary. Before the debate, the Parliament receives a written report from the Council on CFSP/CSDP developments, providing an overview of all actions taken in the CFSP, including civilian and military missions. The legal basis for this report is vested in Point 43 of IIA-2006, according to which, each year, the Council Presidency will consult the EP on a forward-looking Council document, which will be transmitted by June 15 for the year in question, setting out the main aspects and basic choices of the CFSP, including the financial implications for the general budget of the EU and an evaluation of the measures launched in the year n-1.

The parliament responds to that document by issuing its own annual reports, separately on CFSP and CSDP issues, reflecting on the conclusions of the Council. Although the obligation for debates was already in TEU before the LT, the implementation of this provision has not been satisfactory to the Parliament as the Council's annual report on CFSP has remained a point of controversy. The Parliament feels that the Councils report too closely resembles a bureaucratic exercise reduced to a minimum and does not provide adequate and timely information on CFSP decisions bearing financial implications.<sup>72</sup>

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<sup>72</sup> See also: Udo Diedrichs, "The European Parliament in CFSP: More than a Marginal Player?", *The International Spectator*, Rome, 2004, p. 45-46.

It remains to be seen how the possible transformation of Council's annual report to High Representative's bi-annual reports will materialise and whether it will pose any practical or legal problems for the Parliament. The Parliament has already adapted its RoP to a new treaty framework. Under Rule 96 RoP, a twice-a-year debate shall be held on the consultative document drawn up by the High Representative on the main aspects and basic choices of the CFSP, including the CSDP and the financial implications for the Union budget. In addition, the Council, the Commission and the High Representative shall be invited to every plenary debate that involves either foreign, security or defence policy.

## **2.2 European Parliament's access to restricted information**

According to the practice under former Article 21 TEU, it has been the Council that selects and decides which information should be forwarded to the Parliament. The Council has justified such action with the wording of the Treaty, requiring the EP only to be consulted on the main aspects and the basis choices of the CFSP and to be informed about the development of the Union's foreign and security policy. These provisions have not changed in substance with new Article 36 TEU.

The author agrees that under Article 36 TEU, the High Representative is entitled to the power to exercise "information selection". Indeed, Article 36 TEU and former Article 21 TEU are far from being as extensive as for example Article 218 TFEU that requires the EP to be immediately and fully informed at all stages. The EP has so far lacked substantial information before the CSDP operations and also has too little information about military activities that are not financed from the EU budget. That has made parliamentary supervision fragmented and the conclusions of the EP not always based on exhaustive data. From another side, the Parliament has also been critical to the Council as the latter has taken the Parliament's views into consideration only occasionally.

It needs to be seen if there will be major improvements now when the High Representative has taken over the task from the Council Presidency. Under this Chapter, the thesis will evaluate the additional mechanisms in the implementation of Article 36 TEU. These mechanisms are created under inter-institutional arrangements that have been formalised in the RoP or in inter-institutional agreements. These additional legal guarantees have been established on the initiative of the Parliament, in order to take account of the restricted nature of the vast amount of information that the Council and the Commission handle in the CFSP.

As the LT has evoked the major change in the subject of the Parliament's counterpart to perform its obligations under Article 36 TEU, then it will be analysed whether the mechanisms created before will now be legally binding also for the High Representative and which adjustments are necessary. It is also interesting to compare the mechanisms for restricted information flow under the CFSP with the similar mechanisms created between the Parliament and the Commission for the flow of restricted information under TFEU competences, the latter will be analysed below in Chapter 3.2.1.

### **2.2.1 Justification and legal framework**

The introduction of the principle of transparency regarding the EU documents in the Amsterdam Treaty (Article 255 TEC) together with the development of the CFSP (and especially the CSDP) in late 1990s paved the way for the rules on sensitive information in the field of the II pillar. On 12 January 1999, the EP adopted a resolution on openness within the EU, considering that privileged access to certain documents might be established for MEPs and their staff, subject to the introduction or adaptation of rules on the handling of confidential texts.<sup>73</sup> Although the general right of access to documents together with the grounds of limitation to that right is regulated in Article 15(3) TFEU, the question of exchange of information between the Union institutions does not fall under that article. The objective of Article 15 TFEU (ex Article 255 TEC) is to guarantee the transparency of the Union to its citizens and to give the general public the right against the institutions in that context.<sup>74</sup> It does not regulate mutual inter-institutional rights and obligations as regards the right of information. Hence, the legal basis of the procedure for exchange of sensitive information in the field of the CFSP from the High Representative and the Council to the EP is solely Article 36 TEU.

Article 36 TEU is not a passive right of the Parliament to gather information about the CFSP without having further impact on shaping that policy. The EP is entitled to express its views (that should be taken duly into consideration), address questions (that must be answered by the High Representative or the Council) and make recommendations to the High Representative or to the Council in the field of the CFSP, including CSDP. These powers that

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<sup>73</sup> EP Resolution of 12 January 1999 on openness within the European Union, paragraph 9.

<sup>74</sup> Case C-41/00 P *Interporc v. Commission*, paragraph 39 and Case C-266/05P, *Sison v. Council*, paragraph 43 and 44.

the EP enjoys under Article 36 TEU may be summarised as the function of democratic scrutiny over the CFSP.<sup>75</sup>

In order to exercise the function of democratic scrutiny, the flow of consultation and information from the High Representative and the Council side is a basic guarantee for the EP. It is clear that consulting on the main aspects and the basic choices and informing about how those policies evolve includes also the exchange of the background information that the High Representative and the Council have considered while shaping the CFSP. Otherwise it is very difficult to talk about effective democratic scrutiny over the field as the knowledge of the MEPs will be very limited. Hence, the information exchanged under Article 36 TEU is in fact much broader than just formal Council decisions on the CFSP (including the CSDP).

Article 36 TEU does not mention a difference between sensitive and non-sensitive information. The documents may be classified as sensitive ('TOP SECRET', 'SECRET' or 'CONFIDENTIAL') while they protect essential interests of the Union or of one or more of its Member States, notably in the areas of public security, defence and military matters.<sup>76</sup> There are no common standards to what must be considered as "the protection of essential interests" – so the classification and the level of protection chosen depends very much of the originator's will. It is clear that the execution of Parliament's scrutiny rights may not depend on the discretion of the obliged institutions. However, the author recognises that the need to protect the essential interests of the Union or those of Member States in the sensitive field of security and defence makes it inevitable to limit even the MEPs access to some sort of information.

It is important to emphasise in that context that the EP can not reserve from its exclusive right to implement democratic and public monitoring of the CSDP, nor can the High Representative or the Council abstain from its obligations under Article 36 TEU, as regards sensitive information. Democracy through parliamentary involvement remains important, even when a lot of the information and documents involved in the CFSP are of a confidential and sensitive nature.<sup>77</sup> While sensitive information is essential to conduct the CSDP, it is also

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<sup>75</sup> See also: Esther Barbé and Anna Herranz Surrallés, "The power and practice of the European Parliament in security policies", in D. Peters, W. Wagner and N. Deitelhoff (eds.), *"The Parliamentary Control of European Security Policy"*, Oslo, 2008, p. 77-108; Esther Barbé and Anna Herranz Surrallés, "The role of parliaments in European foreign policy: debating on accountability and legitimacy", Barcelona, 2005, p. 52.

<sup>76</sup> Article 9(1) of Regulation (EC) 1049/2001 regarding public access to EP, Council and Commission documents.

<sup>77</sup> Jürgen Mittag, "The Parliamentary Dimension of CFSP/ESDP. Options for the European Convention", European Parliament, Brussels, 2002.

equally essential for democratic control mechanisms to be aware of such information. The more sensitive and restricted the information is, the more important is to ensure the possibilities and guarantees of democratic scrutiny.

To conclude what has been analysed above, it is clear that the flow of sensitive information from the Council to the EP may not be treated as the prerogative or the gesture from the Council to deliver that information, but as the prerogative of the Parliament to receive the information it is entirely entitled to receive under Article 36 TEU in order to fulfil its democratic scrutiny function. It is important to emphasise that the High Representative and the Council cannot ignore their obligations under Article 36 TEU, also as regards sensitive information. While sensitive information is essential for conducting the CFSP, it is also equally essential for democratic control mechanisms to be aware of such information. Hence, the flow of sensitive information from the High Representative and the Council to the EP is included in the functions under Article 36 TEU.

On 30 May 2001, Regulation (EC) No 1049/2001<sup>78</sup> regarding public access to EP, Council and Commission documents, was adopted by the EP and the Council. Recital 9 of the Regulation holds that on account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the EP of the content of such documents should be made through inter-institutional agreement. Article 9(7) of the Regulation reads that the Commission and the Council shall inform the EP regarding sensitive documents in accordance with arrangements agreed between the institutions.

Legally binding inter-institutional agreements, supplemented by additional arrangements between the institutions concerned must be considered as the appropriate level to define those rules and limitations. At the same time, the inter-institutional agreements may not amend the substance of the Treaties and must be in accordance with them. Article 36 TEU must be implemented in full compliance with the principle of proportionality (the flow of information may be restricted only as long as it is essential for the sake of protection) and without harming the objectives of democratic scrutiny.

There are three forms for the exchange of restricted information in the CFSP field between the Parliament and other institutions:

1. In camera meetings of AFET and SEDE, held under Rule 96 of the RoP;

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<sup>78</sup> OJ L 145, 31.5.2001, p. 43.

2. Joint CFSP consultation meetings, held under Point 43 of IIA-2006;
3. Special Committee meetings, held under Sections 2 and 3 of Inter-institutional Agreement of 20 November 2002 between the EP and the Council concerning access by the EP to sensitive information of the Council in the field of security and defence policy (hereinafter IIA-2002)<sup>79</sup>.

### **2.2.2 In camera meetings of the European Parliament**

In camera meetings in the Parliament are the lightest and most non-formalised form of exchange of restricted information between the institutions. In order to improve the quality of information, AFET and SEDE frequently decide to deal with certain issues behind closed doors in order to enable the High Representative, the Council or the Commission to share with MEPs sensitive information on topical issues, especially as regards the CSDP missions.

Legal basis for in camera meetings is Rule 96 of the RoP. AFET and SEDE seek to ensure that the High Representative, the Council and the Commission provide them with regular and timely information on the development and implementation of the CFSP, on the costs envisaged each time that a decision entailing expenditure is adopted under that policy and on any other financial considerations relating to the implementation of actions under that policy. The attendance of in camera meetings has not been determined by formal rules, but by in-house practice that varies much between parliamentary committees. In AFET and SEDE, the restrictions have surprisingly been not very strict, generally all officials and sometimes also assistants to MEPs of the Parliament have been allowed to participate alongside with officials of the Council and the Commission. Media representatives and lobbyists have been expelled from those meetings.

Such debates do not imply that MEPs are given information about particularly sensitive issues, as for example on policy scenarios for CSDP operations. Many MEPs have even urged for discontinuation of the practice of in camera meetings as it runs contrary to the parliamentary transparency principle, being at the same time not very productive either. The author agrees with those views and considers that in camera meetings should cease to exist in the new treaty framework, especially while taking into account the need to reinforce two other formats of arrangements for exchange of restricted information that will be discussed below.

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<sup>79</sup> OJ C 298, 30.11.2002, p. 1.

### **2.2.3 Joint consultation meetings on the CFSP**

The function of democratic scrutiny is further reflected in the IIA-2006. According to Point 43 of IIA-2006, the Council Presidency will keep the EP informed by holding joint consultation meetings at least five times a year, in the framework of the regular political dialogue on the CFSP. The main idea behind that format is the view that in order to keep MEPs informed, the Council should provide the Parliament with situation reports about all current CSDP deployments. Under Point 43 of IIA-2006, whenever it adopts a decision in the field of the CFSP entailing expenditure, the Council will immediately, and in any event no later than five working days following the final decision, send the EP an estimate of the costs envisaged, in particular those regarding time-frame, staff employed, use of premises and other infrastructure, transport facilities, training requirements and security arrangements. The EP has encouraged both the Council and the Member States to further strengthen parliamentary scrutiny of the CSDP, by ensuring that the EP plays a major role by using the structured dialogue mechanism provided for in that IIA and by closer cooperation between the EP and national Parliaments.<sup>80</sup>

Participation in those meetings is very restricted, including limited number of MEPs and officials from AFET, SEDE and Committee on Budgets of the Parliament. From the Council side, it has included the Chairman of the Political and Security Committee (Ambassador of the Presidency) and limited number of officials. The representatives of the Commission (but not at commissioner level) are also associated and participate at these meetings. All parties have been especially keen to observe that format of the meetings remains a very closed one, in order to retain the productivity and the quality of the information exchanged.

Those meetings have become the most fruitful forum for the exchange of information and views on ongoing and planned CSDP missions. Although, in principle, the main topic in those meetings as stipulated in Point 43 of IIA-2006 should be budgetary items, the meetings have so far concentrated also in all kind of political and legal aspects in the conduct of the missions. These meetings are definitely one of best examples to show the direct impact that Parliament's budgetary authority has on its democratic scrutiny function.

The effect of IIA-2006 under the framework of LT needs re-evaluation, because the majority of the tasks vested in the Council Presidency and the Commission will now be managed by

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<sup>80</sup> EP resolution of 23 May 2007 on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP, including the financial implications for the general budget of the European Union, paragraph 52.

the High Representative and the EEAS. In the author's view, all three institutions are interested in the continuation of the format of the joint consultation meetings on the CFSP. The High Representative has already confirmed to MEPs that the practice under IIA-2006 will be continued and enhanced, taking into account new parliamentary scrutiny mechanisms under the LT.<sup>81</sup>

#### **2.2.4 CSDP special committee meetings**

Third and most secret mechanism of the exchange of CFSP restricted information is special committee meetings under the IIA-2002. IIA-2002 draws its legal basis from Article 36 TEU (as referred in the IIA-2002, pre-Lisbon Article 21 TEU) and Article 9(7) of Regulation (EC) No 1049/2001. The objective of the IIA-2002 is to ensure appropriate access to sensitive information in order to guarantee the parliamentary scrutiny over the CSDP.<sup>82</sup> Under Point 1.1 of the IIA-2002, the agreement covers the sensitive information in the CSDP held by the Council and classified as 'TOP SECRET', 'SECRET' or 'CONFIDENTIAL'. That classification corresponds to the classification under Article 9 of Regulation (EC) No 1049/2001.

There are two main mechanisms for transmission of sensitive information from the Council to the EP in the framework of the IIA-2002: oral briefings with no sensitive documents shown and sessions of access for consulting sensitive documents where sensitive documents are shown. The IIA-ESDP explicitly enables access (both at briefings and sessions for consultation) to sensitive information only to a limited group of MEPs consisting of the President, the Chair of AFET and four MEPs appointed by the Parliament, constituting the Special Committee.

Two main requirements have to be met before the access to classified information is granted to a MEP: the principle of "need-to-know" must be fulfilled and a MEP must pass the security clearance.

The principle of "need-to-know" is covered by the condition that the sensitive information is necessary for the exercise of the powers conferred on the EP by TEU in the field of the

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<sup>81</sup> See also: Chapter 4.6.

<sup>82</sup> As explained in the explanatory statement to the IIA-2002 "it is essential that the EP, in accordance with tried and tested practice in the Member States, should also have access to certain highly confidential information in the field of security and defence policy".

CSDP<sup>83</sup>. It is the powers under Article 36 TEU which are mainly considered here. The evaluation and the decision whether the possible attendance of the EP officials to assist MEPs meets the "need-to-know" requirement should be made by the Parliament, as the Parliament is empowered to determine its own organisation and manner of operation.<sup>84</sup>

The requirement for security clearance is justified by the nature of the information exchanged, but is in principle very restrictive to MEPs. A MEP must be security cleared beforehand by its national authorities the process is time-consuming and seems not to comply with the independent status of MEPs. Furthermore, in countries like Estonia, the requirements foreseen in IIA-2002 for the security clearance of MEPs is also much more restrictive as compared to the access for classified documents for members of national Parliaments, who need not to be security cleared in order to gain that access. The author considers such requirements to reduce the effectiveness of the EP democratic scrutiny and to imbalance the positions of the Parliament vis-à-vis Member States.

Although security-cleared MEPs cannot share with other MEPs the confidential information briefed or consulted to under IIA-2002, it can be useful for them while giving general advice for the Parliament's positioning on numerous CFSP issues. However, with regard to the mechanism of the Special Committee, some complaints have been voiced also about the classification by the Council of sensitive information which is sometimes considered by MEPs of this Special Committee to be only of general nature. This was the case, for example, with the document entitled "Generic standards of behaviour for CSDP operations", in relation to which the Chairman of SEDE demanded to be removed from the classification of sensitive information. It is thus also a productive indirect mechanism to fight for transparency and against over-classification.

SEDE has debated several times on the implementation of IIA-2002 and concluded that while supporting to the restricted nature of those meeting together with the non-disclosure obligations from the side of MEP, at least all SEDE members should have access to those meetings.<sup>85</sup> With a view to determine those arrangements, the Parliament has proposed that measures be taken to strengthen, in particular, the scrutiny by Parliament of intelligence and

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<sup>83</sup> Recital 1, Article 2.2 and 3.3 of the IIA-2002.

<sup>84</sup> About the power of internal organisation: Koen Lenaerts; Piet Van Nuffel; Robert Bray, "Constitutional Law of the European Union", London, 2004, p. 560-562. Case C-149/85, Roger Wybot v. Edgar Faure and others; Case C-58/94, The Netherlands v. Council.

<sup>85</sup> This corresponds to Dr Hans Born, Geneva Centre for the Democratic Control of the Armed Forces, recommendations delivered on 11 February 2008 at SEDE meeting.

security services by enhancing in particular the role of the Special Committee.<sup>86</sup> MEPs have also asked for similar arrangements on classified information to cover other areas of the CFSP (besides the CSDP). Following those lines, the EP called for the revision of IIA-2002, so that the all MEPs responsible can obtain the necessary information to exercise their prerogatives in an informed manner.<sup>87</sup> The author finds that such calls are truly legitimate under Article 36 TEU and should be taken on board when the institutions will proceed with the renewal of the IIA-2002. So far, the framework does not include the whole range of secret information in other fields apart from the CSDP.

The LT has brought about a vital change to the system, as in most cases, it will not be the Council, but the High Representative, who holds the classified information and is obliged to share it with the Parliament. The legal question whether and how the IIA-2002 will be applied to the High Representative and the EEAS has been raised several times. The author is on the opinion that the Parliament should endeavour for new arrangements based directly on High Representative's obligations coming from Art 36 TEU. As IIA-2002 was based on and sought to specify ex-Article 21 TEU, then similar arrangements are now necessary under Article 36 TEU, where High Representative has taken over the consulting tasks from the Council.

If there will be no favourable agreement with the High Representative, the Parliament could still try to apply IIA-2002 procedures under new treaty framework, but it does not stand on strong legal grounds because the High Representative is not replacing or legally succeeding former Secretary-General of the Council/High Representative for the CFSP post to take over the Council commitments under IIA-2002. Article 18 TEU is new and ex-Article 26 TEU was repealed by the LT. It is also quite difficult to argue that bilateral IIA between the Council and the Parliament may entail obligations to the High Representative. High Representative Catherine Ashton has been positive on further agreements and the legal possibilities to take over the obligations of the Council under IIA-2002. She has confirmed that the present system will be continued and the number of MEPs allowed the information could be increased, though the requirement of security clearance should remain.

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<sup>86</sup> EP resolution of 23 May 2007 on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP, including the financial implications for the general budget of the European Union, paragraph 54b.

<sup>87</sup> EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the CSDP, paragraph 94.

For the Parliament, following important legal implications should be underlined. Firstly, the Parliament should have access to all kind of confidential information, comprising of oral information and written documents, the latter ones in all forms (classified as ‘TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIAL’). That would go along the lines of Annex VIII, XIV and XV of RoP.

Secondly, existing provisions of IIA-2002 must continue to apply on the information held by the EEAS and to the High Representative until the adoption of specific arrangements between the High Representative and the EP. The EEAS and the High Representative can be bound by 2002-IIA procedures as far as the CFSP-hat of the High Representative is involved.

And finally, as regards the IIA itself, it will not become fully obsolete. It is still valid for Parliament-Council relations and binds the Council for all information held by the Council itself. That might include also information transferred from the EEAS to the Council for the Council decision-making in the CFSP. Such interpretation would be in conformity with Recital 9 and Article 9(7) of Regulation No 1049/2001. It is interesting to see which arrangements between the Council and the EEAS will be made in that context. But if the Council will be entitled to full info from the EEAS, then the Parliament might try to ask that info from the Council under the IIA-2002, using the legal arguments explained above.

### **2.3 European Parliament’s role in urgent financing**

Parliament's existing budgetary powers are an important tool for enhancing its influence and have been used to obtain greater access to information and increase its role as an effective political interlocutor to the Council in the CFSP.<sup>88</sup> With the LT, the Parliament gets one further legal tool in its hands for performing that role. In response to criticism about the lack of flexibility in the CFSP budget, a new procedure for rapid access to the Union's budget is established in Article 41(3) TEU.

In general, the CFSP remains to be funded by both national and Union resources also under new treaty framework. Article 41(2) TEU still prohibits expenditure arising from operations having military or defence implications to be charged from the Union budget. However, Article 41(3) TEU introduces an important derogation to that rule, as it reads:

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<sup>88</sup> See also: Udo Diedrichs, “The European Parliament in CFSP: More than a Marginal Player?”, *The International Spectator*, Rome, 2004, p. 45-46.

"The Council shall adopt a decision establishing the specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the CFSP, and in particular for preparatory activities for the tasks referred to in Article 42(1) and Article 43. It shall act after consulting the EP.

Preparatory activities for the tasks referred to in Article 42(1) and Article 43 which are not charged to the Union budget shall be financed by a start-up fund made up of Member States' contributions.

The Council shall adopt by a qualified majority, on a proposal from the High Representative, decisions establishing:

- (a) the procedures for setting up and financing the start-up fund, in particular the amounts allocated to the fund;
- (b) the procedures for administering the start-up fund;
- (c) the financial control procedures.

When the task planned in accordance with Article 42(1) and Article 43 cannot be charged to the Union budget, the Council shall authorise the High Representative to use the fund. The High Representative shall report to the Council on the implementation of this remit."

The tasks referred to in Article 42(1) and 43 are so-called expanded Petersberg tasks, forming the core of the CSDP.<sup>89</sup> Article 41(3) TEU creates therefore a supplementary financing scheme that allows urgent financing of preparatory activities for CSDP operations to be charged from Union budget. The Council will establish the procedures for this scheme, after consulting the Parliament.

A new start up fund for tasks not charged to the Union's budget will be made up of Member States' contributions. Its purpose is to finance preparatory activities for CSDP missions which, because of legal obstacles or due to lack of political will of Member States cannot be covered by the Union budget. The added-value of this fund coming from the LT is that it enables the High Representative to prepare effectively and rapidly for action in the context of the CSDP.<sup>90</sup> While the start-up fund is the add-up from current Athena-mechanism, then the rapid-access procedure is a modification by the LT, though already foreseen in Article 313(3) of the Treaty establishing a Constitution for Europe. Start-up fund and rapid-access mechanism must be

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<sup>89</sup> Those tasks are enlisted in Chapter 2.1.1 of current thesis.

<sup>90</sup> See also: EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the CSDP, paragraph 95.

examined in conjunction of course, as the fund should be used only in the cases when the Union budgeting through the rapid-access instrument is not possible.

So far no official proposals have been made neither by the High Representative nor by any Member State to the Council in order to adopt the decision under Article 41(3) TEU. The ideas about the content of that decision have not yet left the Council lobby, neither has SEDE held any in-depth debate on those issues. So one can only analyse the situation from the theoretical point of view without any established practice or proposed legal texts at the moment.

The author sees two main legal questions on the possible interpretation and application of Article 41(3) TEU. At first, is the rapid-access procedure applicable to preparatory activities for tasks having military and defence implications (this is mainly military missions) or may the procedure be used only for CSDP civilian missions? The second question linked to the content of that decision is the level of parliamentary engagement — should the EP be also consulted on the decisions on concrete financial allocations from that mechanism in accordance with the principle of democratic supervision over CSDP activities in conjunction with Parliament's budgetary authority over all Union expenditure? These questions are of practical relevance and the answers should be reflected in the decision establishing the specific procedures for guaranteeing rapid access when the Parliament is consulted. Unfortunately, legal analyses that concentrate on the adaptation of the CSDP with a new treaty framework have touched that specific issue quite superficially, without presenting thorough legal arguments apart from political reasoning.

The authors who presume that rapid-access procedure shall not include financing military operations base their argumentation on the incentives for the new procedures. These are primarily the lack of budgetary flexibility and the financial resources available to support EU crisis management operations. As funds had proven too slow to mobilise due to cumbersome decision-making procedures, more room for manoeuvre to use new mechanism to finance on an urgent basis the preparatory steps of an CSDP operation was needed. Here the clear divergence is made: as rapid-access procedure is charged from Union budget, it could only cover non-military costs, while for the military missions, the Athena Mechanism has been introduced at Treaty level, to become a start-up fund.<sup>91</sup>

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<sup>91</sup> These argumentation lines are supported by Giovanni Grevi, “The institutional framework of External Action” and “Common Foreign, Security and Defence Policy”, in Giuliano Amato, Hervé Bribosia, Bruno De Witte

Some authors unfortunately mess the things up. They tend to believe that rapid-access procedure should lead to the establishing of a start-up fund, admitting that those two mechanisms should be similar or even merged somehow. It has been falsely argued that while Article 41(3) TEU allows for the rapid financing of activities in this area and in particular for the preparatory phases of a crisis management operation through a start-up fund based on Member States' contributions, then the decisions on the financing of the fund, and in particular the scale of contributions by Member States, will be taken by the Council after consulting the EP.<sup>92</sup> Unfortunately, the Parliament itself has also fostered that confusion by reiterating its concerns about the lack of transparency and information as regards the financing of the common costs of EU operations having military or defence implications. Since the Athena mechanism clearly does not afford an overview of all the financial implications of missions conducted under the CFSP, the Parliament has therefore welcomed the setting-up of the start-up fund under Article 41(3) TEU and asked to be consulted on its management, in line with the EP's general prerogatives in relation to the CFSP and the CSDP as defined in Article 36 TEU.<sup>93</sup> The author finds these positions very questionable, as Article 41(3) TEU clearly foresees the rapid-access mechanism for "appropriations in the Union budget" and the start-up fund for "activities not charged to the Union budget", providing two different procedures and financing principles.

The author admits that most of the analysts have taken as granted that the rapid-access procedure (and the Union budget) must not be used for preparatory activities of "operations having military and defence implications". This is of course in line with the first subparagraph of Article 41(2) TEU, holding that operating expenditure to which the implementation of this Chapter gives rise shall also be charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise.

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(eds.), *Genèse et destinée de la Constitution européenne*, European University Institute, Florence, 2007, p. 831; Jean-Claude Pirié, "The Constitution for Europe. A Legal Analysis", Cambridge, 2006, p. 164; Gerard Quille, "The Lisbon Treaty and its implications for CFSP/ESDP", Brussels, 2008, p. 3; Wolfgang Wessels and Franziska Bopp, "The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?", Research Paper No 10, Brussels, 2008, p. 12.

<sup>92</sup> These argumentation lines are supported by Hans Born, Alex Dowling, Teodora Fuior, Suzana Gavrilescu, "Parliamentary oversight of civilian and military ESDP missions: the European and national levels", Brussels, 2007, p. 21; Vaughne Miller and Claire Taylor, "The Treaty of Lisbon: amendments to the Treaty on European Union", House of Commons, London, 2008, p. 64-65.

<sup>93</sup> EP resolution of 10 March 2010 on the annual report from the Council to the EP on the main aspects and basic choices of CFSP in 2008, presented to the EP in application of Part II, Section G, paragraph 43 of the Interinstitutional Agreement of 17 May 2006, paragraph 12.

Still, Article 41(3) TEU does not make the same reference as Article 41(2) TEU – that could be for example the reference to "excluding operations having military or defence implications". But in fact Article 41(3) TEU makes a reverse reference to "tasks in Articles 42(1) and 43 TEU". Those tasks are mainly military or joint civil-military tasks.<sup>94</sup> Article 42(1) TEU stipulates that the performance of these tasks shall be undertaken using capabilities provided by the Member States. Could it be argued that this includes also financial capabilities? If this was not the case, then the rapid-mechanism might be used for urgent financing of preparatory activities for military tasks, too. The language of the LT does not use the word "capabilities" in a broad meaning, for example in Article 42(3) TEU, as compared to "resources". According to Article 26(3) TEU, the CFSP shall be put into effect by the High Representative and the Member States, using national and Union resources. It is also quite difficult to argue that Article 26(3) TEU enables military operations to be charged to the Union budget, as Article 41(2) makes clear distinction/exception and though opposes such interpretation. Hence, the capabilities provided by Member States for the CSDP tasks, should not include *per se* financial resources.

In that context it should be noted that Article 41 (3) TEU itself uses different types of wording for expenditure that should be charged from start-up fund. In the first subparagraph it refers to "preparatory activities for the tasks referred to in Article 42(1) and 43 TEU". While in the last subparagraph, it refers to the "tasks planned in accordance with Articles 42(1) and 43 TEU". For the author, it is still unreasonable to assume that the second wording could allow to finance from the start-up fund the tasks themselves in addition to preparatory activities, as for that purpose, Article 41 (2) foresees different mechanisms.

In addition to new mechanisms to be established under Article 41(3) TEU, Points 42 and 43 of IIA-2006 establish the mechanism for the Parliament's special involvement in financing CFSP. These provisions do not foresee parliamentary involvement for expenditure of military missions no more than in form of the exchange of information in the joint consultation meetings on the CFSP. The question of the EP getting information and exercising scrutiny over the expenditure of CSDP military missions that is not charged to EU budget, remains actual also after the LT has come into force. While the lack of parliamentary scrutiny possibilities in that field has been criticised, it needs to be analysed whether the LT indeed does not foresee any big improvement or that improvement could still be interpreted out from

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<sup>94</sup> Those tasks are enlisted in Chapter 2.1.1 of current thesis.

Article 41(3) TEU as the objective of that interpretation would be in coherence with the principle of democratic supervision over military operations.

Hence the question must be analysed in line with possibilities to charge the CSDP military costs to the Union budget, as that would justify the Parliament's enhanced involvement. One possibility could be to interpret Article 41(3) TEU in wide terms and to state that the preparatory activities of the operations having military or defence implication (military missions) may be also charged to the Union budget by the rapid-access mechanism. That would not correspond to Article 41(2) TEU, but it is possible to take a position that while Article 41(3) TEU refers to all Petersberg tasks, then it may be read as an exception to the rule under Article 41(2) TEU. Article 41(2) TEU forms *lex generali* that is overridden by *lex speciali* Article 41(3) TEU in current case. But to oppose those lines, one could argue that preparatory activities may encompass not only operational, but also administrative expenditure (hence to be charged to the Union budget) and that is why the wording of Article 41(3) TEU differs from the one of Article 41(2) TEU.

In conclusion, the question seems to be quite open. There are valid arguments for different implementations, as shown above. The author admits that the uniform interpretation should be found while proceeding with the decision under Article 41(3) TEU. For the Parliament, the solution is relevant as regards the principle of democratic supervision over the CSDP and also whilst considering its consultation powers in that procedure. So far, the Parliament has not committed itself to either of interpretation lines in those legal questions. It has underlined the need to equip the Union with the necessary financial means for a consistent and adequate response to unforeseen global challenges and, in this regard, looked forward to being consulted on and fully involved in the procedures for granting rapid access to appropriations in the Union budget for urgent financing of CFSP initiatives. The Parliament has also reiterated its long-term wish that also military expenditure should be charged to the Union budget, stressing that all external actions of the Union should as a rule be financed from Union appropriations, and only exceptionally – in the event of an emergency – on the basis of contributions outside the Union budget.<sup>95</sup>

A closer look at Article 41(3) TEU reveals that it may even delimit the EP's budgetary powers by granting the Council a right of unilateral resource to the EU budget without parliamentary veto rights for urgent financing of CFSP initiatives. Indeed, the EP is only involved in the

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<sup>95</sup> EP resolution of 7 May 2009 on the financial aspects of the Lisbon Treaty, paragraph 56.

procedure on a decision establishing the procedures, but not on decisions on specific budgetary allocations. The decisions on financial allocations will be taken by the Council on the proposal of the High Representative without consulting the EP.<sup>96</sup> Secondly, the EP involvement under consultation procedure is much weaker anyway than its budgetary co-decision powers.

However, the legal scholars and practitioners seem not to agree even on this aspect. It has been even admitted that the Parliament has gained a right to be consulted before the Council adopts decisions providing for guaranteeing rapid access to appropriations in the EU budget for urgent financing of initiatives relating to the CFSP tasks. With those lines, at first sight favourable to Parliament's interests, not only the decision on the system, but also all budgetary allocations could be deliberated beforehand with the EP. Although that would be in conformity with the principles of democratic supervision, the author finds the practical possibilities of such consultation being doubtful. Despite the long-term wish of the Parliament to receive enhanced involvement, the decisions over the rapid access are usually too urgent and cannot be brought before any formal decision-making mechanism of the EP.

## **2.4 The European Parliament and national Parliaments**

### **2.4.1 Rivalry with the Western European Union**

The Parliamentary Assembly of the Western European Union (hereinafter: WEU) has been the only active body of that organisation during last decade. The only function of the Assembly has been to scrutinise the CSDP, the task which it has conducted in parallel and in conflict with the EP.

Ex-Article 17(4) TEU held that Member States are not prevented from the development of closer cooperation in the framework of the WEU, provided such cooperation does not run counter to or impede the CFSP of the Union. The LT deleted the reference to the WEU from the text of TEU. Instead, the LT provides legal basis for inter-parliamentary cooperation and cooperation between the EPs and national Parliaments for scrutinising the CFSP and in particular the CSDP within EU framework, as foreseen in Article 12(f) TEU and Title II “Interparliamentary cooperation” of Protocol No 1 annexed to the LT. Thirdly, the LT

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<sup>96</sup> See also: Francois-Xavier Priollaud and David Siritzky, “Le traité de Lisbonne”, Paris, 2008, p. 117.

introduced to EU law a collective self-defence (mutual assistance) clause in Article 42(7) TEU that resembles the same of the WEU Treaty.

However, the Protocol on cooperation between the EU and the WEU that is the heritage of the Treaty of Amsterdam was not repealed by some unknown and illogical reason and has retained its legal value also after the entry into force of the LT. It forms now Protocol No 11 on Article 42 TEU, annexed to the LT, holding that while bearing in mind the need to implement fully the provisions of Article 42(2) TEU, the EU shall draw up, together with the WEU, arrangements for enhanced cooperation between them. Hence, despite the fact that TEU does not make a reference to the WEU any more, with the help of the referred protocol, the mechanisms of the WEU are still in force in legal terms. Legal status of a protocol is at the same level with a treaty. While the protocol is still in force, it should have been accordingly interpreted and implemented. The EP has not emphasised that fact and other arguments that were clearly disadvantageous to its ambitions.

Vica versa, the EP has repetitively argued that the WEU Parliamentary Assembly should be discontinued and all of its tasks should be taken over by the EP. To author's mind, this would be in full compliance with the objectives of the LT in conjunction with the developments so far in the field of democratic scrutiny over the CSDP, along with the conclusions made by WEU ministers on 13 November 2000 in Marseille declaration.<sup>97</sup> It seems that the retention of the protocol does not harmonise with the other amendments of the LT as regards the CSDP. In the interests of coherence and efficiency and to avoid duplication of effort, the Parliamentary Assembly of the WEU should have been dissolved as soon as the WEU absorbed fully and finally into the EU with the entry into force of the LT<sup>98</sup>

The Parliament's demands were based on numerous legal arguments. Article 42(2) and (7) TEU together with Article 10 of Protocol No 1 on the role of national Parliaments in the EU rendered the residual functions of the WEU obsolete. At the same time, the EP did not envisage itself as the monopoly supervisor, but quite reasonably stressed on the cooperation within national Parliaments, holding that the right of parliamentary scrutiny over CFSP and CSDP activities lies with the EP and the national Parliaments of the EU Member States.<sup>99</sup>

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<sup>97</sup> Ministers agreed to begin transferring the WEU's capabilities and functions to the EU, under its developing CFSP and ESDP.

<sup>98</sup> See also: EP resolution of 7 May 2009 on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon, paragraph 20.

<sup>99</sup> EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the CSDP, paragraph 20.

Main difference being thus that the legal framework used should be the EU Treaties after the LT and not the WEU Treaty.

Another strong argument in Parliament's favour was the fact that the Modified Brussels Treaty (hereinafter: MBT) that created the WEU Parliamentary Assembly had been signed only by 10 EU Member States<sup>100</sup> out of 26<sup>101</sup> that participate in the CSDP. Hence, it should not be legally entitled to exercise parliamentary supervision over the CSDP.<sup>102</sup>

The author agrees with those arguments and claims that Protocol No 11 indeed missed the logic of the reinforced procedures and clauses introduced to EU legal order by the LT.

That legal reasoning was taken on board by High Contracting Parties to the MBT that decided collectively to terminate the Treaty and thus cease the activities of the WEU on 31 March 2010. In line with Article XII of the MBT, the denunciation process will now be accomplished in accordance with national procedures of each State. A State ceases to be a party to the Treaty after one year from the date when the notice of denunciation has been given to the Belgian Government. The final termination of the Treaty is foreseen by the end of June 2011. Article 42(7) TEU and Protocol No 1 of the LT were brought out as main legal reasons leading the High Contracting Parties to agree that the WEU had accomplished its historical role and should be dissolved. Final cessation of WEU activities in accordance with timelines prescribed in the MBT is foreseen by June 2011. Remarkably the Parties held that: "In accordance with the specific nature of CSDP, we encourage as appropriate the enhancement of inter-parliamentary dialogue in this field including with candidates for EU accession and other interested states. Protocol No 1 on the role of national Parliaments in the EU, annexed to the LT may provide a basis for it."<sup>103</sup>

With the termination of the MBT, Protocol No 11 annexed to the consolidated version of the TEU and TFEU holding that "the EU shall draw up, together with the WEU, arrangements for enhanced cooperation between them" has become obsolete and legally void. There is no more

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<sup>100</sup> Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and The United Kingdom.

<sup>101</sup> According to Article 5 of Protocol No 22, Denmark does not participate in the elaboration and the implementation of decisions and actions of the EU, which have defence implications.

<sup>102</sup> See also: EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the CSDP, paragraph 91.

<sup>103</sup> Statement of the Presidency of the Permanent Council of WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty – Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom; Closure of the Western European Union, Brussels, 31.3.2010.

such international organisation as the WEU. Moreover, the States that decided to dissolve the organisation gave their clear preference to the choice of a new legal framework that could replace the WEU Parliamentary Assembly. That framework should be the one of the EU with the format of cooperation between national parliaments and the EP as the theatre for conducting democratic supervision over the CSDP from now on.

#### **2.4.2 Organisation of inter-parliamentary cooperation**

With Protocol No 11 having no more legal effect, the democratic supervision over the CSDP should be arranged on the basis of the LT between national Parliaments and the EP. The legal framework for future mechanisms is the following.

The role of the EP is described in Article 36 TEU, the EP has the right to express its views on the CFSP and CSDP that should be taken duly into consideration by the High Representative. It may also address questions and make recommendations on those issues to both High Representative and the Council. Thirdly, there are open debates held twice a year before the plenary of the Parliament with all relevant stakeholders present.

Prerogatives of national Parliaments come from Article 12 TEU and Article 10 of Protocol No 1. National Parliaments have to contribute actively to the good functioning of the Union by taking part in the inter-parliamentary cooperation between national Parliaments. A conference of Parliamentary Committees for Union Affairs (hereinafter: COSAC) may organise inter-parliamentary conferences on specific topics, in particular to debate matters of the CFSP, including the CSDP. Contributions from the conference shall not bind national Parliaments and shall not prejudice their positions.

Cooperation between the EP and national Parliaments is envisaged in Article 12(f) TEU, the national Parliaments take part in the inter-parliamentary cooperation with the EP. Under Article 10 of Protocol No 1, COSAC shall in addition promote the exchange of information and best practice between national Parliaments and the EP, including their special committees. Finally, Article 9 of Protocol No 1 states that the EP and national Parliaments shall together determine the organisation and promotion of effective and regular inter-parliamentary cooperation within the Union.

Bearing in mind those options available under the LT, the cooperation between national Parliaments and the EP in relation to the CFSP and the CSDP should be enforced. The

method for that is to develop closer, more structured working relationships between respective competent committees vis-à-vis security and defence matters.<sup>104</sup>

Protocol No 1 seems to indirectly lead towards the broadening of the EP powers in the CSDP. This is a significant and very interesting aspect from the point of view of the institutional equilibrium. Inter-parliamentary conferences on those topics with the specialised committees of national Parliaments actually confer to the EP a potential right to scrutinise areas that the Treaties still consider to be the exclusive prerogative of national Parliaments.<sup>105</sup> Having said that, it seems that Articles 9 and 10 of Protocol No 1 grant the EP extended role as compared to Article 36 TEU. Such conclusion would be paradoxical, as the objective of Protocol No 1 is to safeguard the prerogatives of national Parliaments vis-à-vis Union institutions and it should, as a rule, not be interpreted as granting the EP the power at the expense of national Parliaments.

However, as shown above, the innovations along with the existing role and experience of the EP and national Parliaments entail fresh opportunities for the extension of parliamentary legitimacy and oversight in the further development of EU foreign, security and defence matters. The new institutional setting envisaged by the LT will represent a major challenge to the EP. Relations with national Parliaments might grow in importance, leading to increasing inter-parliamentary contacts and perhaps to new coalitions for enhancing the legitimacy and accountability of the CFSP.<sup>106</sup> Furthermore, as the CSDP includes both civilian and military and modern synergetic civilian-military aspects, then fragmented national control mechanisms must be replaced by the comprehensive supervision exercised by the EP. Additional argument on behalf of the latter could be built on the budgetary authority of the Parliament. Along the lines of Article 41 TEU, all CSDP civilian missions plus administrative expenditure and preparatory tasks for the military missions are charged to the Union budget.

Furthermore, for the author it is clear that new legal framework grants neither the EP nor the national Parliaments the monopoly or the leading role in shaping supervision over the CSDP. Following the logic of Article 9 of Protocol No 1, the decision of future cooperation must be based on wide consensus where arguments and interests of both MEPs and their national

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<sup>104</sup> See also: EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the CSDP, paragraph 92.

<sup>105</sup> Stefano Micossi and Gian Luigi Tosato (eds), "Europe in the 21st century: perspectives from the Lisbon Treaty", Centre for European Policy Studies, Brussels, 2009, p. 259-260.

<sup>106</sup> Udo Diedrichs, "The European Parliament in CFSP: More than a Marginal Player?", *The International Spectator*, Rome, 2004, p. 44-45.

counterparts have to be taken into account. There are three main legal formats for cooperation between the EP and national Parliaments. All these options are also discussed among MEPs and officials of the Parliament at the moment.

First option under consideration would foresee informal inter-parliamentary meetings, essentially run by the EP with representatives of national Parliaments invited. AFET/SEDE has held two such meetings in 2008 and the EP has commented the progress made in recent years in developing cooperation between the EP and the national parliaments in the field of foreign affairs, security and defence.<sup>107</sup>

However, this option is unlikely to satisfy national parliamentarians. It favours the EP and was proposed already as early as on 11 February 2008 in SEDE, long before the cessation of the WEU became a realistic opportunity.<sup>108</sup> Under those lines, regular meetings under the auspices of the EP could focus on concrete CSDP missions, where parliamentarians from all contributing states, including third states, would have legitimacy to participate. The idea plays also on the fact that the EP is best placed to specialise in accumulating information and expertise on Union policies. Hence, it should be included in any inter-parliamentary network for the control of the CSDP.<sup>109</sup>

The second option is the opposite to the first one, insisting on the extension of a COSAC-like mechanism. A new specialised COSAC devoted to CFSP matters could be run by national Parliaments with limited EP participation, chaired by Presidency in its capital. This would unlikely satisfy the EP, not least because of the very small size of its delegation: 6 members from every Member State, making it 162 in total, plus only 6 from the EP.

From the side of national Parliaments, military deployment is traditionally sanctioned by national governments and national Parliaments, it's paid for by national budgets, and when there are casualties, it is members of the national Parliaments who are answerable for that. Hence, the request for some kind of structure that brings together the national parliamentarians makes sense also according to the principle that the use of military has been considered the part of sovereign powers of the state. Making the CFSP democratically

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<sup>107</sup> EP resolution of 7 May 2009 on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon, paragraph 17.

<sup>108</sup> Dr Hans Born (Geneva Centre for the Democratic Control of the Armed Forces) while presenting a survey about parliamentary scrutiny of the CSDP following the LT.

<sup>109</sup> See also: Dirk Peters, Wolfgang Wagner and Nicole Deitelhoff (eds.), "The Parliamentary Control of European Security Policy", Oslo, 2008.

accountable does not necessarily mean giving the EP more powers, because, given the primarily intergovernmental nature of the CSDP, its source of legitimacy still resides at national level.

So, this seems to be a viable option, as the Member States have always emphasised the need to reinforce national Parliaments' capacity to debate and control their respective governments' decisions in the CFSP.<sup>110</sup> At the same time it represents strong preference for an intergovernmental character of the CFSP, holding that the LT does not see the EP as a source of legitimacy for this central part of coordinating national action. Governments and diplomats remain the only legitimised actors who have to resort to their national basis for acceptance of their activities.<sup>111</sup> Declarations No 13 and 14 of the LT, holding that "the Conference also recalls that the provisions governing the CSDP do not prejudice the specific character of the security and defence policy of the Member States" seem also to support that viewpoint.

The author recognises the legal arguments discussed above that call for the upgraded role to be given to national Parliaments. However, he finds that this option would not respect the logic of the LT that does not foresee the role for the rotating Presidency in the CFSP and would not achieve that essential continuity is established at the level of democratic supervision. Probably under the format of Article 9 of Protocol No 1, the EP will never agree to the second option. The worst outcome here would be the continuation of the ill-related rivalry that had characterized the relations between the WEU and the EP throughout last 5 years (after SEDE committee was established in the EP).

The third option would be somewhere in the middle of two former ones. It would entail Joint Committee Meetings, whose organisation and chairmanship are shared equally between the EP and national Parliaments, but the meetings would take place in Brussels (in the EP). The President of the European Council and the High Representative could attend those meetings on a regular basis with a high media profile. The EP could agree on the participation of the High Representative in those meeting within the arrangements set together with the establishment of the EEAS.<sup>112</sup> If there were two meetings per year, one could envisage one on the CFSP and the other on the CSDP. This format is likely to be more popular in the EP, but it also retains some role for the Council Presidency without subverting directly the greater

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<sup>110</sup> See also: Esther Barbé, "The Evolution of CFSP Institutions: Where does Democratic Accountability Stand?", *The International Spectator*, Rome, 2004, p. 54.

<sup>111</sup> Wolfgang Wessels and Franziska Bopp, "The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?", *Research Paper No 10*, Brussels, 2008, p. 14-15.

<sup>112</sup> See also: Chapter 4.6.

continuity achieved at the scrutiny level. The option relies on the concern that there is too little accountability to parliaments for the financial arrangements with regard to the CFSP and the CSDP and that cooperation between the EP and the national parliaments must therefore be improved in order to ensure democratic control over all aspects of these policies.<sup>113</sup>

In conclusion, legal arguments behind the establishment of a new cooperation and choosing between the options described above may be summarised as following.

Legal arguments that favour the enhanced role of the EP are:

- Article 36 TEU provides the EP with explicit supervision powers over the CSDP;
- Article 9 of Protocol No 1 foresees the EP involvement;
- Budgetary supervision, as CSDP operations (except operating expenditure of military missions) are charged to the Union budget;
- Rotating Presidency has no role in the CSDP.

Legal arguments that favour the enhanced role of national Parliaments are:

- Article 10 of Protocol No 1 provides national Parliaments and COSAC with explicit powers to contribute to the CSDP;
- Declaration No 14 holding that the provisions of the LT covering the CFSP do not increase the role of the EP;
- Source of legitimacy for military operations traditionally resides in national sovereignty and the CSDP is a EU policy with strong intergovernmental nature.

The author emphasises that after the entry into force of the LT and the termination of the WEU, the cooperation between the EP and national Parliaments is not any more one of the options available, but the legal commitment that the EP and national Parliaments have to undertake according to the new treaty framework.

## **2.5 Declaration limiting parliamentary scrutiny**

Declaration No 14 concerning the CFSP, attached to the LT reads:

“In addition to the specific rules and procedures referred to in Article 24(1) TEU, the Conference underlines that the provisions covering the CFSP including in relation to the High

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<sup>113</sup> EP resolution of 7 May 2009 on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon, paragraph 19.

Representative and the EEAS will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the UN.

The Conference also notes that the provisions covering the CFSP do not give new powers to the Commission to initiate decisions nor do they increase the role of the EP.

The Conference also recalls that the provisions governing the CSDP do not prejudice the specific character of the security and defence policy of the Member States."

The appended declaration contains a number of caveats in defence of state prerogatives. The emerging picture is contradictory. Which should we give more credence to: the treaty that directs the Union to develop its own foreign policy or to the declaration, which makes this goal very difficult to achieve is the essential question here.<sup>114</sup> This declaration seems not to correspond to new powers of the Parliament, mainly under Articles 27(3), 36 and 41(3) TEU. It also departs from the objectives and principles of the LT with its penultimate aim to provide the Union with united, consistent and effective tools for its external action.

From the point of law, declarations, unlike protocols, are not binding, but they do carry political weight. In this case, there is a risk that the CFSP will continue to be a separate pillar within the Union. A pillar that is rigorously intergovernmental in nature requires the unanimous support of all Member States before any common initiative can be taken and leaves them freedom of action to protect their national interests.<sup>115</sup>

One and probably the simplest solution to that controversy would be to admit that the declaration as a legally non-binding instrument cannot affect the rules established at treaty level. Declaration No 14 could then be treated as just a political instrument to satisfy fears of some Member States against the increased powers of the Union and in particular the Parliament. Declaration No 14 was a necessary political gesture made on the favour of Member States when drafting the LT.

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<sup>114</sup> See also: Stefano Micossi and Gian Luigi Tosato (eds), "Europe in the 21st century: perspectives from the Lisbon Treaty", Centre for European Policy Studies, Brussels, 2009, p. 281.

<sup>115</sup> Stefano Micossi and Gian Luigi Tosato (eds), "Europe in the 21st century: perspectives from the Lisbon Treaty", Centre for European Policy Studies, Brussels, 2009, p. 281.

From another hand, it could be argued that despite the mere political value, Declaration No 14 should still be taken into full consideration while the question of interpretation of the LT rules arises, as it shows the clear will of the High Contracting Parties to the Treaty. That would harmonise with the criticism that the Parliament has itself read out its stronger role from the LT with the pretext of its general right to be informed and consulted. But in conjunction with the Declaration No 14, the solid conclusion would then be that the EP's position in the CFSP must retain the status-quo.<sup>116</sup> The Parliament's power to influence the content of the CFSP should therefore remain as limited as it was before and since the Treaty provisions have failed to upgrade the EP's role, it will probably continue to seek lateral ways to influence CFSP.<sup>117</sup>

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<sup>116</sup> See also: Jan Wouters, Dominic Coppens and Bart De Meester, "External Relations after the Lisbon Treaty", in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, Wien, New York, 2008.

<sup>117</sup> Udo Diedrichs, "The European Parliament in CFSP: More than a Marginal Player?", *The International Spectator*, Rome, 2004, p. 45-46.

## **PART THREE**

### **EUROPEAN PARLIAMENT IN THE UNION'S OTHER EXTERNAL ACTION**

#### **3.1 External action and international agreements**

Part Five of TFEU “External Action by the Union” is divided into eight titles. Special part dedicated to the Union’s external action is a novelty of the LT, as previously the relevant provisions were spread out in different parts of TEC and partially codified under Part Six “General and final provisions” of TEC. Titles II and III of Part Five TFEU cover different policy areas where the power has been conferred from Member States to the Union, such as common commercial policy (international trade), development policy, economic, financial and technical cooperation with third countries and humanitarian aid. In all those policy areas, measures necessary for defining the framework for implementing those policies must be adopted in accordance with the ordinary legislative procedure (co-decision) and this is certainly a great achievement for Parliament’s legislative powers. However, the objective of current thesis is not to study different Union policies in depth, but to provide an analysis of Union institutional law in external action under new treaty framework. The new mechanism for entering into international relations via international agreements will be scrutinised thoroughly hereinafter. The problems within specific policy areas will be tackled in that process, where appropriate, in conjunction with the analysis on institutional law.

This being said, the thesis will concentrate on Title V of Part Five TFEU “International Agreements.” According to Article 216 TFEU, the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

Similarly to its internal competences, the scope and extent of its external competences are also limited by the principle of conferral. According to Article 5(2) TEU, under that principle, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. Within the limits laid down by the

principle of conferral, the Union has been conferred an explicit legal personality in line with Article 47 TEU.

The Union is indeed a subject of international law, but it is not a state. The author argues that the Union may therefore act in international scene only within the limits laid down by the Treaties. The Union concludes international agreements, is legally responsible according to international law and possesses a right of legation. The Union's external competence in the areas of internal exclusive competence is specified in Article 3(2) TFEU, holding that the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. This being said, the procedure of entering into international agreements will be examined below, with a special focus on the role of the EP.

### **3.1.1 Major improvements for the European Parliament**

Article 218 TFEU entails the simplification of the procedure for the conclusion of international agreements. Before, one could count at least 3 different procedures:

- general procedure for the Community agreements under Article 300 TEC;
- procedure for II and III pillar agreements under Article 24 TEU;
- special procedure for agreements as regards monetary policy under Article 111 TEC or international trade under Article 133 TEC.

Under the LT, this diversity comes to an end, as all agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the procedure of Article 218 TFEU. The structural novelty is vested in Article 37 TEU that integrates also the CFSP agreements into a single unified procedure for the conclusion of international agreements.

Second major improvement of the LT is enacted in Article 218(6)(a) TFEU. The role of the Parliament at the moment of the conclusion of an international agreement has been substantially reinforced. Pursuant to Article 218(6)(a) TFEU the Parliament has to give its consent to the Council decision to conclude association agreements, agreements establishing a specific institutional framework by organising co-operation procedures and agreements with important budgetary implications for the Union. Those international agreements were

subjected to the consent<sup>118</sup> procedure also under ex-Article 300(3) TEC. But in addition to those three categories, the consent of the Parliament is now compulsory also for the Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and for agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the EP is required.

It is interesting to note that the Parliament's consent has to be obtained as soon as the international agreement covers a field for which co-decision is also required internally. Under the TEC formula, consent was only required when, by concluding an international agreement, an amendment was made to an act that was passed by means of co-decision. Not only the requirement of a pre-existing act adopted under the co-decision procedure has been suppressed, but also fields covered by the consent procedure are now included.<sup>119</sup>

Thirdly, Article 218(10) TFEU holds that the EP shall be immediately and fully informed at all stages of the procedure (the procedure of negotiating, conclusion and other stages related to international agreements as stipulated in Article 218 TFEU). As will be shown below, this is an essential provision for the Parliament. The Parliament will establish its legal and political arguments for enforcing its role in the whole process described in Article 218 TFEU on the implementation and interpretation of Article 218(10) TFEU. Specific application areas of Article 218(10) TFEU will be analysed below in Chapter 3.2.

### **3.1.2 European Parliament's role in the stage of negotiations**

Article 218(1) TFEU stipulates that agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the procedure described in Article 218 TFEU. The Parliament has to be informed immediately and fully in all stages, starting from the initial stages of agreement-making procedure, such as the recommendations submitted by the Commission or the High Representative to the Council, Council decisions authorising the opening of negotiations and nominating the Union negotiator together with the negotiating directives and designation of a special committee in consultation with which the negotiations must be conducted. The initial or negotiating stage that precedes the conclusion stage covers also the conduction of negotiations until the

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<sup>118</sup> TEC used the term "assent".

<sup>119</sup> See also: Jan Wouters, Dominic Coppens and Bart De Meester, "External Relations after the Lisbon Treaty", in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, Springer, Wien, New York, 2008, p. 184.

initialling of the text by the negotiators. In that stage the Parliament is not formally involved under the LT apart from its prerogatives under Article 218(10) TFEU. These stages are regulated in Article 218(2-5) TFEU and in conjunction with Article 218(10) TFEU, the Council and the Commission are responsible with providing all information to Parliament in their respective roles.

As negotiator, the Commission is obliged to provide all the information about the negotiations and proposals it makes to the Council concerning recommendations for mandate of negotiations and negotiating directives, proposal for signature of the initialled agreement and provisional application. Article 218(10) TFEU that calls for the immediate and full information for the Parliament does not provide for any exception. Full information includes all information throughout the procedures covered by Article 218 TFEU, including a negotiating text, when available. Such information is pertinent, especially since with the coming into force of the LT the consent of the EP will be a general rule with few exceptions for the conclusion of international agreements.

The Council, on the other hand, is responsible for providing all information in the stages of the procedure where it is involved. A new Article 218 TFEU recalls in a horizontal manner the role of the Council as regards the negotiation, signature and conclusion of international agreements.<sup>120</sup> According to Article 218(2) TFEU, the Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

The EP has no formal role during the negotiations on an international agreement. It should be emphasised that even if the EP has to give its consent in the majority of the cases for the conclusion of an international agreement, it does not give consent, neither is it formally consulted, for the decision to open the negotiations or for defining the negotiation mandate for the Union negotiator. However, the author does not agree that the Parliament's role continues to be limited to *ex post* approval/rejection of the whole document, while it has no say during crucial stages when political and financial commitments are negotiated.<sup>121</sup> In practice, the Parliament has projected its role quite strongly in the stage of negotiations. It has underlined its intention to request the Council, where appropriate, not to open negotiations on

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<sup>120</sup> Ricardo Passos and Stephan Marquardt, "International Agreements", in Giuliano Amato, Hervé Bribosia, Bruno De Witte (eds.), *Genèse et destinée de la Constitution européenne*, European University Institute, Florence, 2007, p. 898.

<sup>121</sup> Esther Barbé, "The Evolution of CFSP Institutions: Where does Democratic Accountability Stand?", *The International Spectator*, Rome, 2004, p. 53.

international agreements until Parliament has stated its position, and to allow the Parliament, on the basis of a report from the committee responsible, to adopt at any stage in the negotiations recommendations which are to be taken into account before the conclusion of negotiations<sup>122</sup>.

These quasi-constitutional powers of the Parliament are vested in Rule 90 of the RoP and, as agreed with the Commission, in points 19-25 of the Framework Agreement on relations between the EP and the Commission<sup>123</sup> (hereinafter: IIA-2005). From a legal perspective, the inter-institutional soft law may not change the contents of primary law and the institutions are, at least in principle not obliged to observe, continue or enter into arrangements at secondary level, unless they voluntarily decide to do so. The RoP are in-house rules that are not binding on other institutions of course and should therefore be read as the Parliament's vision of how it should ideally be involved. It has tried, however to put these suggestions into inter-institutional agreements.<sup>124</sup> It is nevertheless clear that the RoP do not commit other institutions. In the opinion of the author, those instruments so far do not exceed the limits of Treaties and do not break the inter-institutional balance.

However, it is also perfectly legitimate from a legal point of view, if the Council recalled after the signature of IIA-2005 that the procedures enabling the EP to be involved in international negotiations were not governed by the Treaties. Since the framework agreement was concluded between only two institutions — the Commission and the EP —, the Council is similarly right to stress that the undertakings entered into by these institutions cannot be enforced against it in any circumstances and that it reserves its right to take appropriate measures, such as the initiation of legal proceedings, should the application of the provisions of the framework agreement impinge upon the Treaties' allocation of powers to the institutions or upon the inter-institutional equilibrium that they create.<sup>125</sup> The opposition of the Council might be understood against the background of the repeated attempts by the EP to

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<sup>122</sup> EP resolution of 7 May 2009 on Parliament's new role and responsibilities in implementing the Treaty of Lisbon, paragraph 46.

<sup>123</sup> Since 1995, the framework agreements concluded between the Parliament and the incoming Commission have included the part on international agreements. Framework Agreement in force was endorsed by Parliament's decision of 26 May 2005. New agreement with Barroso II Commission is in final negotiating phase at the moment and should be concluded in June-July 2010. OJ C 121, 24.4.2001, substantially updated by OJ C 117 E/123, 18.5.2006.

<sup>124</sup> See also: Daniel Thym, "Parliamentary Involvement in European International Relations", in Marise Cremona and Bruno de Witte (eds.), *"EU Foreign Relations Law – Constitutional Fundamentals"*, Oxford and Oregon, 2008, p. 205.

<sup>125</sup> Daniel Thym, "Parliamentary Involvement in European International Relations", in Marise Cremona and Bruno de Witte (eds.), *"EU Foreign Relations Law – Constitutional Fundamentals"*, Oxford and Oregon, 2008, p. 205-206 and OJ C 161, 27.5.98, p.10-11.

use inter-institutional arrangements as an instrument for the incremental change of living constitutional law with a view to permanently enhance EP's role in international relations.<sup>126</sup>

While holding a vote of consent under Article 17(7) TEU on José Manuel Barroso II Commission on 9 February 2010, the Parliament adopted a resolution on a new inter-institutional agreement with the Commission<sup>127</sup>. The new president of the European Commission committed himself to accept the Parliament's requests expressed in that resolution; this was a pre-condition for his appointment. As regards the implementation of Article 218 TFEU, the Parliament received a commitment by the Commission for reinforced association with the EP through the provision of immediate and full information to the Parliament at every stage of negotiations on international agreements (including the definition of the negotiation directives), in particular on trade matters and other negotiations involving the consent procedure, in such a way as to give full effect to Article 218 TFEU, while respecting each institution's role and complying in full with new procedures and rules for the safeguarding of the necessary confidentiality.<sup>128</sup> Another request made in that context by the Parliament and accepted by the President of the Commission was that the Commission has to facilitate the Chair of Parliament's delegation to be granted an observer status in relevant meetings at international conferences, in view of Parliament's extended powers under the LT and in order to guarantee an efficient flow of information.<sup>129</sup> The author finds those arrangements to be in full compliance with new treaty framework, especially taking into account the Parliament's enhanced position under Article 218 TFEU.

### 3.1.3 Nomination of the Union negotiator

Article 218(3) TFEU holds that the Commission, or the High Representative where the agreement envisaged relates exclusively or principally to the CFSP, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of

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<sup>126</sup> Daniel Thym, "Parliamentary Involvement in European International Relations", in Marise Cremona and Bruno de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford and Oregon, 2008, p. 206.

<sup>127</sup> EP resolution of 19 February 2009 on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP in 2007, presented to the European Parliament in application of point G, paragraph 43 of the Interinstitutional Agreement of 17 May 2006.

<sup>128</sup> EP resolution of 19 February 2009 on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP in 2007, presented to the European Parliament in application of point G, paragraph 43 of the Interinstitutional Agreement of 17 May 2006, paragraph 3(h).

<sup>129</sup> EP resolution of 19 February 2009 on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP in 2007, presented to the European Parliament in application of point G, paragraph 43 of the Interinstitutional Agreement of 17 May 2006, paragraph 3(i).

negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

The question who can be nominated to be the negotiator and who constitute the negotiating team, is more complex than could be guessed by an uninformed reader. Pre-Lisbon Article 300(1) TEC provided that explicitly that the Commission was empowered to conduct the negotiations. The LT seems to specify nothing as regards the negotiator or the negotiation team of the Union, leaving the extensive room for manoeuvre to the Council.<sup>130</sup>

However, the author argues that overall treaty framework and other provisions of Article 218 TFEU strongly suggest that the choice must be made between the Commission and the High Representative plus the EEAS.<sup>131</sup> The Commission is entitled to ensure the Union's external representation under Article 17(1) TEU and the High Representative has to ensure the consistency of Union's external action under Article 21(4) TEU. At the same time, the Member States form a special committee under Article 218(4) TFEU and the Parliament enjoys its powers under Article 218(6) TFEU and prerogative under Article 218(10) TFEU. The Member States and the EP are not sidelined from the negotiating process, but have their specific role that does not request them to carry out the competence of the Union negotiator. The author believes that nominating the EP or Presidency Member State to be the Union negotiator would be incompatible with their functions and status under the Treaties and would break the inter-institutional balance.

In principle, this means that the High Representative will negotiate agreements which relate exclusively or principally to the CFSP. The Commission alone will normally negotiate non-CFSP agreements falling exclusively within TFEU competence. For agreements including some CFSP aspects, but where these are not the principal part of the proposed agreement, a representative of the High Representative will be part of the Commission's negotiating team. With the establishment of the EEAS, however the issue will be more complex, as the double-hatted High Representative might carry out also the tasks of the Commission. The issue depends on the question which TFEU competences will be transferred from the Commission to the EEAS. The legal alternatives here will be analysed below in Part IV of the current thesis and the author would not like to speculate on these items further here.

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<sup>130</sup> See also: Francois-Xavier Priollaud and David Siritzky, "Le traité de Lisbonne", Paris, 2008, p. 317.

<sup>131</sup> See also: Ricardo Passos and Stephan Marquardt, "International Agreements", in Giuliano Amato, Hervé Bribozia, Bruno De Witte (eds.), "*Genèse et destinée de la Constitution européenne*", European University Institute, Florence, 2007, p. 897-898.

The question is vital for the Parliament's prerogatives, too. The important information lies in the hands of a negotiator who is best placed to carry out the obligations vis-à-vis the EP under Article 218(10) TFEU. Secondly, the Parliament has arrangements of cooperation with the Commission in that stage, stipulated in IIA-2005 that the Parliament does not have with the Council or with the High Representative. The author believes that a bilateral inter-institutional agreement between the Parliament and the Commission may commit the High Representative in his tasks as a Vice-President that are generally linked to TFEU competences of Union's external action. However, as regards (the parts of) agreements envisaged that relate to the CFSP, the Parliament's prerogatives are less safeguarded in legal terms.

### **3.1.4 The European Parliament *versus* a special committee of Member States**

The Parliament has stressed that with a new treaty framework, the Commission will be under a legal obligation to provide the Parliament with the information to the same extent, and at the same time, as it is supplied to a special committee.<sup>132</sup> According to Article 218(4) TFEU, the Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted. Although it is not explicitly mentioned in TFEU, a special committee is comprised of the representatives of Member States and the Union negotiator consults a special committee before, after and during the rounds of negotiations. It is not rare that members of a special committee even sit in the negotiating rooms, although they are not formally part of the Union's negotiating team, nor do the Treaties foresee such a role for Member States in that stage.

Similar competences are not provided for the EP and from the sole point of view of primary law the door of the negotiation room therefore remains closed for MEPs. In practice, the Council and the Commission have conceded limited parliamentary involvement on various occasions at the stage of negotiations. The first option is a plenary debate held before the start of the negotiations. Secondly, permanent contacts between the Union negotiator and MEPs during the negotiations may take place in some cases. Thirdly, information about the outcome of the negotiations may be forwarded to the EP before the signature of the agreement.<sup>133</sup>

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<sup>132</sup> EP resolution of 7 May 2009 on Parliament's new role and responsibilities in implementing the Treaty of Lisbon, paragraph 59.

<sup>133</sup> Daniel Thym, "Parliamentary Involvement in European International Relations", in Marise Cremona and Bruno de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford and Oregon, 2008, p. 204-205.

The author finds the enforced role of a special committee and the reduced role of the Parliament in treaty level not justified from the legal point of view. The Commission and the High Representative being the Union negotiators under Article 218(3) TFEU and their staff forming the Union's negotiating team under Article 218(3) TFEU are participating in negotiations to protect EU's interests and not especially the interests of different Member States. Furthermore, there is also an acceptance, based on decades of experience, that the Union is more likely to achieve its aims in negotiations if it speaks with one voice. The LT with its enhanced role for the EP and reduced role of national parliaments may therefore be seen as consolidating this trend.<sup>134</sup> This being said, the author sees no legitimate reason for the enhanced role of a special committee (Member States) in comparison to the EP.

The author admits that under current treaty framework, a special committee has its very special and often a crucial role in the process of negotiating the international agreements. This role is quite exceptional and noteworthy in the agreements falling under Union competences, where the Member States otherwise play no role. It is important not to mix up the Council, the institution of the Union, and the Member States, here. Both have their functions under the treaty framework and both have normally their say as negotiators and concluders of international agreements.

This being said, it seems that letting a special committee to be the consultant (whose views must be taken into account by the Union negotiator) also to the international agreements falling under the exclusive competence of the Union (for example fisheries agreements or trade agreements) is quite notable derogation from the principle of conferral and an example of hidden inter-governmentalism. To balance those actions and bring the exclusive competence back to where it belongs, the involvement of the EP in the work of a special committee and expanding the obligation under Article 218(10) TFEU to a special committee is the approach perfectly consistent with the objectives of the LT.

Unfortunately, the legal framework to protect the rights of the Parliament and its implementation practice is quite inconsistent and controversial while following the lines analysed above. Under Point 21 of IIA-2005, the Commission has committed itself to facilitate the inclusion of MEPs as observers in Union delegations negotiating multilateral agreements, although MEPs may not take part directly in the negotiating sessions. This

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<sup>134</sup> Stephen Woolcock, "The potential impact of the Lisbon Treaty on European Union External Trade Policy", Swedish Institute for European Policy Studies, Stockholm, 2008.

provision has been used in practice on rare occasions. Thus, it is not surprising that MEPs have asked themselves to be included in Union delegations to follow the negotiations and participating in the meetings between the Union negotiator and a special committee.

The author believes that those desires of the Parliament are reasonable as regards the objectives of the LT, the principle of inter-institutional balance and far-fetched considerations about the Parliament's right to consent. However, current Treaty wording does not support the enhanced involvement of MEPs. If the Council has not nominated MEPs to be the part of Union's negotiating team under Article 218(3) TFEU, they cannot take part in the negotiations. The Parliament's role must therefore remain limited to its prerogatives under Article 218(10) TFEU.

### **3.1.5 European Parliament's role in the stage of conclusion**

According to Article 218(6)(a) TFEU Parliament's involvement in the conclusion of international agreements will be strengthened, as its consent is required for the conclusion of:

- (i) association agreements (as was under Article 300 TEC);
- (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (a novelty);
- (iii) agreements establishing a specific institutional framework by organising cooperation procedures (as was under Article 300 TEC);
- (iv) agreements with important budgetary implications (as was under Article 300 TEC);
- (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent of the Parliament is required (substantial improvement from Article 300 TEC).

The question of characterisation of an international agreement and the legal basis for its conclusion is fundamental in a system based on attributed powers where the existence of an appropriate legal basis is necessary basis for the existence of competence.<sup>135</sup> Article 218(6) TFEU states that except where agreements relate exclusively to the CFSP, the Council shall adopt the decision concluding the agreement either after obtaining the consent of the EP in

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<sup>135</sup> Marise Cremona, "Defining competence in EU external relations: lessons from the Treaty reform process", in Alan Dashwood and Marc Maresceau, *Law and Practice of EU External Relations*, Cambridge: Cambridge University Press, 2008, p. 39.

cases under Article 218(6)(a) or after consulting the EP in other cases. This covers also the cases when the agreement is with the mixed scope of application (inter-pillar agreements) in the sense that it regulates not exclusively CFSP issues, but also issues falling within the Union's other external action competence, even if it relates principally to the CFSP.

As regards the agreements relating exclusively to the CFSP, the Parliament shall be immediately and fully informed at all stages of the procedure, but it will not be officially consulted, nor is its consent necessary. The agreements relating exclusively to the CFSP are mainly the agreements on individual CSDP missions, including status of mission or status of forces agreements with host countries and cooperation agreements with the third countries participating in a CSDP mission or framework agreements with international organisations (such as Berlin-Plus agreements with NATO). Besides the agreements on CSDP operations, international conventions which do not cover the areas enlisted in Articles 3-6 TFEU fall under that category, too.

At first sight one may be disappointed by the exclusion of the Parliament from decisions concluding agreements relating exclusively to the CFSP.<sup>136</sup> But the author agrees that such procedure accords with overall logics of the CFSP that were studied above in Part II of current thesis. From another side, the exclusion of the Parliament from that field is a major victory for Member States that consider the defence and military issues to be the part of States' sovereignty, where the conferral to the Union level must be limited.<sup>137</sup>

Apart from the agreements relating exclusively to the CFSP, Article 218(6)(a) TFEU represents serious improvements from the perspective of the democratic legitimacy of the Union treaty-making practice.<sup>138</sup> Under pre-Lisbon treaty framework, the consent of the Parliament was required in the case where the international agreement being concluded amended an act adopted in co-decision. Giving the increasing scope of the ordinary legislative procedure, which has replaced the co-decision procedure, it represents an important enlargement of the EP's powers.<sup>139</sup> The LT introduced a big number of new fields where the

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<sup>136</sup> See also: Stefan Griller and Jacques Ziller (eds), "The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?", Springer, Wien, New York, 2008.

<sup>137</sup> As regards the competition between the EP and national Parliaments over the supervision of CSDP, see also Chapter 2.4.2.

<sup>138</sup> See also: Stefan Griller and Jacques Ziller (eds), "The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?", Springer, Wien, New York, 2008.

<sup>139</sup> See also: Marianne Dony, "The EU's External relations and Their Evolving Legal Framework", in Mario Telò (eds.), "The European Union and Global Governance", Abingdon, New York: Routledge, 2009, p. 146;

co-decision is a procedure for adopting Union rules, instead of a mere consultation or total non-involvement of the Parliament under TEC. The most prominent example in the context of Union's external action here is common commercial policy.

The wording of the Treaty may reflect that consultation is still *lex generalis* with consent being an *lex specialis*, but this is misleading in substance, when one takes into account the vast coverage of Article 218(6)(a)(v) TFEU. After the LT entered into force, consultation of the Parliament under Article 218(6)(b) TFEU remains applicable to only minority of cases where its consent is not compulsory. Consultation includes the right of the Parliament to be officially informed on the substance of the agreement, debate its pros and cons and state its opinion. Only after that the Council may proceed with its conclusion. If the Council goes ahead without parliamentary consultation, it infringes an essential procedural requirement, but it is not obliged to follow the parliamentary opinion in substance. In practice, the Commission and the Council have gone through the motions of consulting the EP, but were seldom much constrained in their policy options by the Parliament, because the latter had no legally binding tools at disposal. This is the obvious reason why the EP has long demanded an extension of the consent requirement to all areas which fall within its domestic co-decision powers.<sup>140</sup>

In that context, the author would like to emphasise that under the consultation procedure, the Parliament cannot influence the substance or the text of the agreement. But the EP may want its position to be taken into account in the Council decision on the conclusion of the agreement. This decision, taken under Article 218(6) TEU may regulate such questions as the implementation, renewal, review, delegation for modifications under Article 218(7) TFEU, preconditions for suspension and termination, and other legally important questions where the Union may impose unilateral regimes and take initiatives.

As far as the enlarged powers of consent under Article 218(6)(a)(v) TFEU are concerned, there are several legal issues to tackle. Legal consequences of consent (or refusal to give a consent) to international agreement seem quite obvious and compatible with the national parliaments' competence in the ratification process. What the author finds more challenging,

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Ricardo Passos and Stephan Marquardt, "International Agreements", in Giuliano Amato, Hervé Bribosia, Bruno De Witte (eds.), "*Genèse et destinée de la Constitution européenne*", European University Institute, Florence, 2007, p. 899.

<sup>140</sup> See also: Daniel Thym, "Parliamentary Involvement in European International Relations", in Marise Cremona and Bruno de Witte (eds.), "*EU Foreign Relations Law – Constitutional Fundamentals*", Oxford and Oregon, 2008, p. 208; Stephen Woolcock, "The potential impact of the Lisbon Treaty on European Union External Trade Policy", Swedish Institute for European Policy Studies, Stockholm, 2008.

are legal dimensions behind the concept of parliamentary binding opinions on the agreements covering co-decided fields. Secondly, it is worth to examine how widely or restrictively the term “field” itself should be interpreted in that context.

The author holds that if an agreement lays down detailed rules, which bind the Union and preclude the later adoption of a different internal regulatory regime, then the EP must have its substantial influence also on the contents of those international rules. There is no compelling logic for limiting the consent requirement only to the cases where the agreement entails an amendment to the co-decided act, as was the regime under Art 300(3) TEC before the LT.

New system under Art 218(6) TFEU reflects a reasonable balance. The EP's calls for being involved in the negotiating and conclusion stages are legitimate while taking into account its co-decision powers that are influenced by international rules. Parliament's internal powers are aligned while maintaining the structure of the consent requirement which takes place only after the signature of the agreement and does not grant the Parliament the right to amend individual provisions. Indeed, the binary character of the consent requirement leaves the EP with the choice of the consent or rejection and limits its room of manoeuvre. The EP may use the threat of veto inherent in the consent requirement to bring the debate forward and influence the negotiations independently of its presence in the negotiation room. But that cannot replace the regular influence on individual policy choices under the co-decision procedure.<sup>141</sup>

Of course, one could theoretically extend the co-decision procedure to the conclusion of international agreements or grant the EP the right to select, reject or modify individual provisions of agreements. But this would not comply with the customs and laws of international relations which still consider treaty negotiations as inter-state bargaining whose compromises, especially in a multilateral context cannot easily be unravelled.<sup>142</sup>

Second important question is the interpretation of the term “fields” in Article 218(6)(a)(v) TFEU. Twofold interpretation is possible. Firstly, it could be interpreted narrowly as equivalent to the procedure foreseen in a treaty provision establishing legal basis for adoption

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<sup>141</sup> See also: Daniel Thym, “Parliamentary Involvement in European International Relations”, in Marise Cremona and Bruno de Witte (eds.), *“EU Foreign Relations Law – Constitutional Fundamentals”*, Oxford and Oregon, 2008, p. 210.

<sup>142</sup> Daniel Thym, “Parliamentary Involvement in European International Relations”, in Marise Cremona and Bruno de Witte (eds.), *“EU Foreign Relations Law – Constitutional Fundamentals”*, Oxford and Oregon, 2008, p. 210.

of internal rules of that external competence exercised while concluding the agreement. But several authors have supported another interpretation, holding that the concept of “covering a field” is potentially wider than the legal basis of an agreement and its application is likely to be disputed.<sup>143</sup> According to those lines, TFEU allocates certain legislative procedures (usually co-decision) to certain policy areas (fields) and even if treaties provide *lex specialis* derogations from this *lex generalis*, the consent of the Parliament must be obtained anyway, as the agreements fall under that policy field and not under specific treaty provisions.

To illustrate this dilemma, the author would like to examine Article 43 TFEU. In line with Article 43(2) TFEU, provisions necessary for the pursuit of the objectives of the common fisheries policy shall be established under co-decision. Hence, the ordinary legislative procedure applies to the common fisheries policy as a “field”. However, Article 43(3) TFEU makes a derogation to the procedure foreseen in Article 43(2) TFEU, holding that the Council, on a proposal from the Commission, shall adopt measures on allocation of fishing opportunities. Article 43(3) TFEU does not foresee the involvement of the Parliament. Fisheries and Partnership Agreements between the Union and third countries allocate fishing opportunities for the Union and Member States in the waters outside the Union. Following narrow interpretation, the Parliament should only be consulted here. Following wide interpretation, its consent must be obtained. In practice, the Commission and the Council have so far followed the wide interpretation and submitted new fisheries agreements and their protocols to Parliament for its consent. Such implementation is setting a favourable precedence for the EP.

### **3.1.6 Provisional application and *fait accompli***

Under Article 218(5) TFEU, the Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force. The Parliament is not involved in that stage in legal terms, apart from its general prerogatives under Article 218(10) TFEU. The author would like to raise following legal issues here.

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<sup>143</sup> Jan Wouters, Dominic Coppens and Bart De Meester, “External Relations after the Lisbon Treaty”, in Stefan Griller and Jacques Ziller (eds), *“The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?”*, Springer, Wien, New York, 2008, p. 184; Marise Cremona, “The Union’s External Action: Constitutional Perspectives”, in Giuliano Amato, Hervé Bribosia, Bruno De Witte (eds.), *“Genèse et destinée de la Constitution européenne”*, European University Institute, Florence, 2007, p. 1192.

Firstly, the provisional application of international agreements in particular has long been criticised for circumventing the constitutional prerogatives of parliaments. It may be legally terminated at any time and does not in such manner compromise the consent requirement from a legal-dogmatic point of view. However, in practice the provisional application creates a momentum in favour of the continued application of the agreement, thereby rendering parliamentary rejection more difficult.<sup>144</sup>

But the author does not agree with the authors who hold that the Parliament may be left upon the conclusion of the international negotiations with no other choice than to approve an agreement as it emerges from the negotiations.<sup>145</sup> Probably it was right to state that under pre-Lisbon conditions, there was never really any likelihood that the Parliament would not give its assent to an agreement accepted by the Member States and the Commission's negotiating partners. A lack of legal powers and limited ability to provide close scrutiny of the Union's negotiating position has meant that the formal veto power of the Parliament has never been credible.<sup>146</sup>

But with a new treaty framework entering into force, the author argues that the Parliament is not any more faced a *fait accompli* while taking a decision under Article 218(6) TFEU. It is true that the LT does not empower the Parliament to authorise and thus set the objectives and conditions for negotiations. However, The EP is seeking a greater say in shaping the negotiating aims by setting some preconditions for its ultimate consent. This approach should be featured into a new inter-institutional framework agreement with the Commission, too.<sup>147</sup> It seems that the scales have indeed started moving in that theatre. The Parliament has not played a very significant role to date, but despite the restricted legal powers of the Parliament, both the Commission and Council have in recent years indeed increased the degree to which they consult the Parliament. The Parliament's limited formal powers notwithstanding, it has managed to maximise its influence through its budgetary and consent powers. Thanks to its use of the veto threat, the Parliament has even managed to influence the course of the

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<sup>144</sup> Daniel Thym, "Parliamentary Involvement in European International Relations", in Marise Cremona and Bruno de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals*, Oxford and Oregon, 2008, p. 212.

<sup>145</sup> Stefan Griller and Jacques Ziller (eds), "The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?", Springer, Wien, New York, 2008.

<sup>146</sup> Stephen Woolcock, "The Treaty of Lisbon and the European Union as an actor in international trade", ECIPE, Brussels, 2010.

<sup>147</sup> See also: Steve Woolcock, "The Treaty of Lisbon: Implications for EU trade policy", ICTSD, Geneva, 2009.

negotiations and contents of international agreements, acquiring a room for manoeuvre that governments never expected.<sup>148</sup>

The author brings out two recent examples to illustrate the thematic of parliamentary involvement in the processes under Article 218(5) and (6) TFEU and prove those novel tendencies.

First example dates back to October 2009, but shows perfectly how the approaching LT had already started affecting the inter-institutional balance in Parliament's favour. The Parliament proceeded with the Fisheries Partnership Agreement between the Union and the Republic of Guinea under consultation procedure. The agreement had been signed on 28 May 2009 with the provisional application launched.<sup>149</sup> On 1 October 2009, Fisheries Committee of the Parliament voted against the conclusion of the Agreement because the Guinean authorities had opened fire on protesting crowds resulting in over 150 deaths on 28 September 2009. Although the Parliament's position (that was furthermore only the position of a leading committee, but not voted yet in plenary) was not binding on the Council and the Commission that time, it had decisive consequences. The Commission withdrew on 11 November 2009 the proposal of conclusion, followed by the Council Decision of 22 December 2009<sup>150</sup> to terminate the provisional application (based on Articles 218(5) and (8) TFEU) of the agreement. Article 25(2) of the Vienna Convention on the Law of Treaties (hereinafter: Vienna Convention) was applied and a notification was sent to the Republic of Guinea that the Union no longer intended to become a party. Fishing activities of the vessels under the provisionally applied agreement in Guinean waters were terminated and the payments from the Commission to the Government of Guinea were suspended.

Second example dates to 11 February 2010 when the EP refused its consent to an interim Agreement between the EU and the USA on the processing and transfer of Financial Messaging Data from the EU to the United States for purposes of the Terrorist Finance Tracking Program (hereinafter: SWIFT agreement).<sup>151</sup> In a resolution rejecting the conclusion

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<sup>148</sup> See also: Esther Barbé, "The Evolution of CFSP Institutions: Where does Democratic Accountability Stand?", *The International Spectator*, Rome, 2004, p. 55.

<sup>149</sup> OJ L 156, 19.6.2009, p. 31

<sup>150</sup> OJ L 438, 29.12.2009, p. 53

<sup>151</sup> EP legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the EU and the United States of America on the processing and transfer of Financial Messaging Data from the EU to the United States for purposes of the Terrorist Finance Tracking Program.

of the agreement, the Parliament asked the Commission and the Council to initiate work on a long-term agreement with the USA on this issue. MEPs reiterated that any new agreement must comply with requirements of the LT, and in particular the Charter of Fundamental Rights. The Council had taken a decision under Article 218(5) TFEU on the signing and provisional application of SWIFT agreement on 30 November 2009, ignoring the principles and conditions set by the Parliament in its resolution approved on 17 September 2009. The move of the Parliament on 11 February 2010 rendered the agreement legally void. At the same time, the Council had decided on 30 November 2009 to start the provisional application of the agreement as from 1 February 2010, pending its entry into force.<sup>152</sup> The provisional application must now be terminated, after the Parliament's refusal of consent.

This being said, the Council and the Commission should be very prudent in using their formally monopolistic legal power under Article 218(5) TFEU to approve the provisional application of the agreement, without the former involvement of the Parliament or without taking Parliament's recommendations on board. One should also be aware of Article 25(2) of Vienna Convention, holding that unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty. In the context of the conclusion procedure for the Union agreements under Article 218(5) and (6) TFEU, the resolution of the Parliament refusing to give a consent for the agreement commences the procedure under Article 25(2) of Vienna Convention and brings the provisional application to an end.

### **3.1.7 European Parliament's involvement in other stages**

The remaining provisions of Article 218(7), (9) and (10) TFEU regarding a simplified procedure for modifications of agreements, their suspension, establishing of positions to be taken in decision-making bodies set up under agreements and advisory opinions from the Court of Justice have remained unchanged in substance.

The author would like to bring out one legal aspect with the functions of the bodies set up by an agreement that are called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement. The decision-making of those bodies is foreseen in Article 218(9) TFEU with the Council empowered to

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<sup>152</sup> OJ L 8/9, 13.1.2010.

adopt a decision establishing the positions to be adopted on the Union's behalf in those bodies. Under those rules, the bodies adopt legally binding decisions that must be transformed into or are even directly applicable in the legal order of the EU. Those international decisions may have far-reaching legislative effects that affect and limit in substance the co-decision powers of the EP and the Council.

As there is no formal parliamentary involvement foreseen in Article 218(9) TFEU, then it is reasonable to argue that the EP is excluded from defining the European position. Those decisions are taken beyond Parliament's reach and only once the recommendations must be transferred to the Union legislation under co-decision, the EP has no much choice, as the Union has to obey international legal order and its legally binding commitments. Furthermore, as the Council actually unilaterally approves those positions beforehand under the rules of Article 218(9) TFEU, then the whole system harms severely the inter-institutional balance between two co-decidors that should be on equal footing in principle.

According to those lines, the Parliament's mere impact through Article 218(10) TFEU that is informal by nature should be strengthened in legal terms. One possibility is to oblige the Commission (by a new inter-institutional agreement) to keep MEPs systematically informed about and allow them to observe as part of Union delegations meetings of bodies set up by international agreements involving the Union, when such bodies are called upon to take decisions which require the consent of the EP or the implementation of which may require legal acts to be adopted according to the ordinary legislative procedure.

### **3.2 Obligation to inform the European Parliament fully and immediately**

Alongside Article 218(6)(a) TFEU, other essential provision as regards the Parliament's role in the international agreements of the EU is Article 218(10) TFEU. Article 218(10) TFEU states that the European Parliament shall be immediately and fully informed at all stages of the procedure of Article 218 TFEU. In lawyer's perspective, Article 218(10) TFEU comes into play when one has to argue for the greater enhancement of the EP.

As to the extent of the engagement into processes, the Parliament must be informed fully. As to the adequacy of information, it has to be informed immediately. And finally, this applies to all stages, meaning all paragraphs of Article 218 TFEU. The scope of application of Article 218(10) TFEU is not restricted to negotiating and concluding stages of an agreement, as the Commission and the Council sometimes like to see, but also to the stages like pre-negotiating stage where the mandate for negotiations is settled, the application stage, the suspension and termination stage or even to the stage where the decisions are taken on behalf of the Union by the bodies set up by an agreement.

One could argue even further. As Article 218(10) TFEU does not specify the institutions or bodies entitled to inform the Parliament, then all institutions and other actors involved in the stages of Article 218 TFEU are committed by that provision. In addition to the Council and the Commission and the High Representative, this is equally true to a special committee regulated under Article 218(4) TFEU, consisting of the representatives of the Member States. The crucial role of a special committee in the process of negotiating the international agreements together with its legally unjustified strong powers was analysed above in Chapter 3.1.4. To balance the impact of a special committee, the involvement of the EP in the its work and expanding the obligation under Article 218(10) TFEU to a Special Committee is the approach perfectly consistent with LT. Hence, the author argues that even Member States are committed by Article 218(10) TFEU when exercising the competence vested in Article 218 TFEU.

Current part of the thesis will not reiterate different legal possibilities of usage of Article 218(10) TFEU that where analysed above. It will concentrate on two separate legal issues that have occurred while implementing the informing obligations in practice.

### **3.2.1 Consideration of classified documents**

The question of access of the Parliament to restricted information by the Council or the Commission is very relevant. It covers areas outside the CFSP and the CSDP where the mutual mechanisms are in force, as described above in Chapter 2.2. The problem of receiving the information necessary to fulfil its functions under TFEU has occurred during last year several times in the practice of the EP. Some committees of the Parliament have developed here informal cooperation mechanisms by written gentlemen agreements or by well-established practice. Other committees lack those possibilities or the good will of their counterparts in other two institutions.

The author finds that confidentiality cannot be used as a justification for not fulfilling the obligation under Article 218(10) TFEU. If the drafters of the Treaty considered that Council and the Commission could exclude certain information, rather than using the word "full" in that Article, they would have established a general rule but provided a specific exception for confidential information. It is evident that in certain cases, strict confidentiality is required for the sake of successful process of international negotiations. It is for this reason that special provisions on confidentiality of documents sent to the Parliament have been established. The EP has adopted its internal rules for consideration of confidential documents communicated to Parliament, forming Annex VIIIA of the RoP. Rather than using the confidentiality of negotiations as a pretext for not submitting information to the Parliament, the Council and the Commission may request the proper adequate agreed measures on confidentiality to apply to the relevant documents in such cases.

Cases when the Commission or the Council might refuse the information to the Parliament, leaning on the confidential nature of the document, are the implementation of Article 218(9) TFEU or different information at negotiating stage. Those documents are classified as 'EU RESTRICTED' by the Commission or by the Council. The author finds the analysis of that problem very important equally because of problems in practice, but also because of the importance to guarantee the unified interpretation and implementation of Article 218(10) TFEU. In such cases, the Parliament has in general better guarantees vis-à-vis the Commission, while the relations with the Council are more complex in legal terms.

As regard the flow of information from the Council, the legal framework is the following. Parliament's in-house rules fixed in Annex VIIA of the RoP are in force and applicable for the consideration of 'EU RESTRICTED' documents, too. Under Article 9 of Regulation No

1049/2001 and IIA-2002, there are special rules and implementation measures for forwarding sensitive information in the CSDP from the Council to the Parliament in the CSDP field. But apart from these acts, there are no formal arrangements between the Parliament and the Council or rules established in any other way that regulate current situation. Unfortunately it is far from certain that, notwithstanding the LT innovations, there will be a framework inter-institutional agreement between the EP and the Council that would also specify the Council obligations to forward the information to the Parliament.

However, as the Parliament has access to three highest levels (classified as ‘TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIAL’), including highly sensitive CSDP documents according to IIA-2002, it should *a fortiori* have access also to the lowest level, this is ‘EU RESTRICTED’ documents. In the same time, the strict rules that apply under IIA-2002, in particular the requirement for security clearance seem not appropriate and necessary for granting access to lower level ‘EU RESTRICTED’ documents. Usually, security clearance is a requirement when information is at least confidential and above (not for ‘EU RESTRICTED’).<sup>153</sup>

As regards the flow of information from the Commission, then the Parliament is legally better protected than in the case above (Parliament-Council). There are detailed rules for forwarding confidential information to the EP under Annex I of IIA-2005. Moreover, under Paragraph 20 of IIA-2005, the Commission has obliged itself to take necessary steps to ensure that the Parliament is immediately and fully informed of the EU position in a body set up by an agreement and on decisions concerning the provisional application or the suspension of agreements. It is interesting to note that the Commission has not limited its obligations to the information held by itself, but that provision may also be used for information held by the Council or the High Representative. Such interpretation seems to comply with the lines of Article 218(10) TFEU that does not specify the subject of the obligation to inform the Parliament.

In addition to these possibilities, one could also refer to the general principles under new Article 13 TEU, such as the duty of the institutions to practice mutual sincere cooperation. Article 295 TFEU gives effect to this principle by obliging the Parliament, the Council and the Commission to consult each other and by common agreement make arrangements for their cooperation in inter-institutional agreements which may be of a binding nature.

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<sup>153</sup> In that context, see also Chapter 2.2.

Following those legal considerations, the author would like to draw following conclusions as regards the protection of Parliament's prerogatives under Article 218(10) TFEU vis-à-vis the Council and the Commission in the context of the flow of classified documents.

At first, under the LT, the EP is entitled to the full information in all stages of Article 218 TFEU, despite their level of restricted classification. As there are no special arrangements for forwarding 'EU RESTRICTED' from the Council to the Parliament, then general procedure of Article 218(10) TFEU should directly apply: all information should be transmitted to the Parliament fully and immediately. Such application is possible provided that the Parliament will take into account the restricted nature of the documents and handle them according to Annex VIII A of the RoP. As the Parliament has access even to highly sensitive documents (including 'TOP SECRET') in the CSDP, then current legal framework may by now means be interpreted in the way that as the Parliament must not have access to "EU RESTRICTED" documents, despite the fact that the Parliament does not have special arrangement with the Council.

Secondly, the Parliament could also turn to the Commission for obtaining the decisions and documents of the Council. Under Paragraph 20 of IIA-2005, the Commission has committed itself to provide that information, regardless the restrictions imposed by the Council. In that case, the arrangements set in Annex I of IIA-2005 together with Annex VIII A of RoP (Parliament's in-house information security law) would apply, too. However, it would be much easier to argue for access on legal terms, if it had been the Commission who had restricted the access.

### **3.2.2 Applicable regime for the agreements relating to the CFSP**

Which legal regime is applicable to international agreements relating to the CFSP? In general, the international agreements where the Union is the Party may be divided as non-CFSP (or exclusively TFEU), inter-pillar or exclusively CFSP agreements.

The informing obligations in non-CFSP agreements are covered by Article 218(10) TFEU and the question of applicability of Article 36 TEU does not raise here. As regards inter-pillar agreements, it could be argued that different legal framework must be applied to different

parts or even provisions (whether non-CFSP or CFSP parts/provisions) of international agreements. This approach has nevertheless two major drawbacks.

In the first, Article 218 TFEU does not foresee any separation between those parts within one agreement. On the contrary, it argues that inter-pillar agreements should fall under same procedure with non-CFSP agreements. For example, the Parliament has to be involved in the procedure even if the agreement relates principally to the CFSP, but has some minor TFEU competences in it. Furthermore, according to the principle of coherence and in the lines of Article 21(3) TEU, the Union has to ensure consistency between different areas of its external action.

Secondly, it is often very difficult to separate those parts provision-by-provision in legislative practice. The aim of inter-pillar agreements is to obtain greater flexibility and establish inter-pillar reciprocal connections. The Union should make use of TFEU policies for achieving the CFSP aims and vice versa. Such connections between the development policy and the CSDP missions or trade instruments and human rights clauses are most prominent examples here. The informing process within the Union seems to lead the institutions farther from those aims. Let alone the pure fact that the informing obligation itself involves the flow of written and oral information and inter-institutional deliberations, where such separation seems virtually impossible in practice.

This being said, the author holds that in the case of inter-pillar agreements, Article 218(10) TFEU should fully apply.

For the author, the legal question is the most challenging as it comes to agreements relating exclusively to the CFSP. Article 218(10) TFEU and 36 TEU could both make claims for applicability here. It is worth to see that the Parliament's prerogatives are quite different in scope. Under Article 218(10) TFEU, the Parliament is entitled to full information at all stages that has to be transmitted to it immediately. Alas, under Article 36 TEU, it has to be only consulted on main aspects and basic choices and informed of how the policies evolve. Majority of non-CFSP agreements deal with arrangements within the CSDP (like status of mission agreements with host countries or cooperation agreements with third states participating in CSDP operations) and have only a very distant link to the overall policy aspects. Information about negotiations and other stages on those agreements does not fall under "main aspects and basic choices" of the CFSP.

Of course, while the obliged party is defined under Article 36 TEU (the High Representative) and Article 218(10) TFEU leaves it open, then one could in theory argue that the former favours the Parliament more. The author does not agree here, as it is clear from Article 218(3) TFEU and overall concept of Union's external agreement making that the obliged party in Article 218(10) TFEU would be also the High Representative, as regards the agreements that relate exclusively to the CFSP.

Following this, it is clear for the author that the Parliament would receive more information using Article 218(10) TFEU as a legal basis than following Article 36 TEU prerogatives. This would confirm the viewpoint that the Parliament's role in the CFSP can be enhanced using its TFEU powers. However, this finding automatically does not prove that the application of Article 218(10) TFEU corresponds to the correct Treaty interpretation. The question deserves some further scrutiny.

Main arguments in favour of Article 218(10) TFEU are following.

According to Article 37 TEU, the Union may conclude agreements with one or more States or international organisations in the CFSP areas. However, pre-Lisbon Article 24 TEU provided detailed rules on the negotiations, conclusion, application and legal effect of CFSP agreements. LT repealed those provisions at the presumption that Article 218 TFEU will be applied also to agreements relating exclusively to the CFSP. Hence, the application of Article 218(10) TFEU seems to follow the LT logic.

Besides, Article 218 TFEU already regulates on the opening of negotiations stage (in Paragraph 3) and conclusion stage (in Paragraph 6) of the agreement relating exclusively to the CFSP: if this is the case, the High Representative shall submit recommendations to the Council and the latter does not have to consult the Parliament, neither obtain its consent. Those are the stages that should be covered also by Article 218(10) TFEU if one sticks to treaty wording.

However, the Parliament has so far only modestly supported those argumentation lines, linking the provisions of Article 218(10) TFEU with the CFSP, but not explicitly demanding itself to be fully and immediately informed on agreements relating exclusively to the CFSP.<sup>154</sup>

In the same time, the theory on *lex specialis* and *lex generalis*<sup>155</sup> strongly suggests that Article 36 TEU must be applied, as the rules of information flow to the Parliament in the CFSP are explicitly described there. This corresponds to Article 24(1) TEU, holding that the specific role of the EP in the CFSP is defined by the Treaties. However, as one could of course counter-argue that as such role may be defined also by TFEU, not only TEU (Article 24(1) TEU reads “the Treaties”), then the application of Article 218(10) TFEU is not excluded.

Another argumentation line against the Parliament’s greater engagement may be developed from the objective of Article 218(10) TFEU itself. If the Parliament has to be informed fully and immediately in order to base its consultation and consent decisions on most updated and exhaustive information available, then as regards the agreements relating exclusively to the CFSP, where the Parliament lacks competence, such intense information flow is not justified.

Both viewpoints have their pros and cons with strong theoretical and practical merits. No decisive interpretation will be given at present moment by the author. In parliamentary practice since December 2010, Article 218(10) TFEU has not been used for exclusive CFSP agreements. However, as the application of the LT is in its very initial phase, then the author will not draw any far-reaching conclusions from that practice. There is no well-established and unified practice on Article 218 TFEU so far. In addition, one should wait until the EEAS starts functioning and come back to those legal questions then — as in both cases, whether the flow will be restricted with Article 36 TEU or comprehensive under Article 218(10) TFEU, the Parliament’s counterparts are the High Representative and the EEAS.

Catherine Ashton has stated in her declaration on political accountability that the Parliament will be, in accordance with Article 218(10) TFEU, immediately and fully informed at all stages of the procedure, including for agreements concluded in the area of CFSP.<sup>156</sup> That political commitment should make things clear in practice. The Parliament’s own standpoint here is in conformity with the Treaty, reading that the Parliament will have the right to be

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<sup>154</sup> EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the CSDP, paragraph 18.

<sup>155</sup> About the theory, see Chapter 1.2.3.

<sup>156</sup> OJ C 210, 3.8.2010, p. 1, OJ C 217, 11.8.2010, p. 12

consulted, except where the agreement relates exclusively to the CFSP,<sup>157</sup> but still not touching the question of informing obligations.

### **3.3 European Parliament's role in external financing instruments**

#### **3.3.1 Alignment of the instruments with the Treaty of Lisbon**

Under the framework of the LT, the regulations on following external financing instruments will be adopted in accordance with the ordinary legislative procedure (co-decision)<sup>158</sup>:

- the Development Cooperation Instrument (DCI);
- the European Neighbourhood and Partnership Instrument (ENPI);
- the European Instrument for Democracy and Human Rights (EIDHR);
- the Instrument for Cooperation with Industrialised Countries (ICI);
- the Instrument for Stability (IfS);
- the Instrument for Pre-Accession Assistance (IPA).

These instruments were established in 2006 for the multiannual financial period from 2007 to 2013 and drew legal bases from Articles 179 and 181a TEC. After the LT has entered into force, new legal bases for the external financing instruments will be Articles 209 and 212 TFEU, both foreseeing co-decision powers for the EP. Article 209(1) TFEU stipulates that the EP and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of development cooperation policy, which may relate to multiannual cooperation programmes with developing countries or programmes with a thematic approach. Under Article 212(2) TFEU, the EP and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the economic, financial and technical cooperation with third countries (so-called industrialised countries, countries other than developing countries). Such measures must be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its external action. Indeed, most of those instruments are founded on double legal basis, providing the financing both for the developing and industrialised countries.

Regulations establishing external financing instruments (basic regulations) call *inter alia* for measures necessary for the implementation of those instruments. These measures are to be

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<sup>157</sup> EP resolution of 7 May 2009 on Parliament's new role and responsibilities in implementing the Treaty of Lisbon, paragraph 47.

<sup>158</sup> On the possible changes in legislation as regards external financing instruments, see also Chapter 4.5.

adopted under the management procedure in accordance with Council decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (hereinafter: Comitology decision).<sup>159</sup> As set in Article 4 of the Comitology decision, the Member States can deliver opinions to draft implementing measures and the Council has the power to decide differently from the implementing decisions of the Commission.

At the same time, the Parliament will only be informed about implementing measures plus it has the right to adopt non-binding resolutions on the issue. It is easy to see that the Parliament, despite being a co-decider in a legislative level and a budgetary authority to decide on overall allocations for each instrument, has been set aside by the system introduced above, with no legally binding powers on programming, management and implementation of those financial instruments. Multi-country and thematic strategy papers (hereinafter: SPs), multi-annual indicative programmes (hereinafter: MIPs) and other legislation are adopted without the Parliament's involvement or supervision. But SPs and MIPs constitute the general basis for the implementation of the Union's financial assistance to third countries. SPs set out Union's strategy for the countries or themes concerned, having regard to the needs of the countries concerned, the Union priorities, the international situation and the activities of the main partners. MIPs shall primarily determine the financial allocations for each programme.

In 2010, there are two good reasons to make substantial amendments to that system and bring it into conformity with legitimate prerogatives of the EP and LT framework. Form one side, the instruments pervade compulsory mid-point review to evaluate the implementation of the basic regulations in the first three years and, if appropriate, to make modifications to the system. But moreover, the LT has introduced new system of implementation for the Union law. The implementing measures of pre-Lisbon area are now divided into two categories: delegated acts (Article 290 TFEU) and implementing acts (Article 291 TFEU). Current thesis will not dig more into the complex legal questions around the new comitology system. This is undergoing thorough legal and political debates at the moment in all three institutions.

However, in the context of the Union's external action and parliamentary prerogatives, it is important to know that conditions and scope of those two categories are essentially different for the EP. Its decision-making and control powers over the delegated acts are much stronger than in the case of implementing acts. In line with Article 290(2) TFEU, the Parliament has

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<sup>159</sup> OJ L 184, 17.7.1999, p. 23.

the right to revoke the delegation to the Commission, as well as the right to object (veto) the delegated act before it enters into force.

Following the considerations expressed above, it has been suggested to EP committees that are responsible for mid-point review of those instruments to adopt substantial amendments to basic regulations. Those amendments are to introduce the system of delegated acts to replace the management system of the Comitology decision that is used now.

The author considers the Parliament's general call for greater impact on the management of external financing programmes to be legitimate and consistent with its all three powers. It would strengthen the democratic supervision over the Union's external action. It would be in conformity with Parliament's powers to decide over budgetary allocations. It would also comply with the basic idea of co-decision procedure where the Parliament and the Council should be on equal footing. One must also take into account that with the new treaty perspective, the effectiveness of the Union's policy coordination has the potential to be compromised by the *de facto* split between the Union's conflict management controlled by the High Representative, and other aspects of policy, which fall under the control of other Commissioners.<sup>160</sup> This division is less than ideal, particularly when the programming and implementation of financial instruments is considered. The EP should scrutinise this area carefully to ensure that the Union's financial resources are deployed effectively.<sup>161</sup>

Legal arguments that favour the application of Article 290 TFEU on SPs and MIPs are explained below.

### **3.3.2 Conditions for delegated acts**

The first set of legal arguments stems from the wording of the LT. When deciding on whether a measure should be adopted as a delegated act or as an implementing act, the only applicable considerations are those based on the provisions of Articles 290 and 291 TFEU. Article 290(1) TFEU holds that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act. If these criteria are fulfilled, then delegated acts, rather than

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<sup>160</sup> In that context, see also Part IV of current thesis.

<sup>161</sup> Richard G. Whitman, "Strengthening the EU's External Representation: the Role of the European External Action Service", European Parliament, Brussels, 2010.

implementing acts should apply. It must be analysed therefore whether SPs and MIPs on external financing instruments fulfil these criteria.

The first treaty requirement is that an act has to be of general application. In relation to the region, country or theme concerned, SPs and MIPs have a broad scope: they establish the priority areas selected for financing by the Union, the objectives, the expected results, performance indicators and an indicative financial allocation. Moreover, SPs are adopted for the whole duration of the multiannual financial framework — 7 years with mid-term or ad-hoc review possible and MIPs for a period of 3 or 4 years. This can be contrasted with the annual action programmes which are more limited in time. The long coverage period is a further indication of the general scope of SPs and MIPs.

Secondly, the legal question arises whether SPs and MIPs supplement the non-essential elements of the instrument. The author argues that the aim of SPs and MIPs is to supplement what is in the regulation by establishing the priority areas and the objectives of external financial assistance. While basic regulations establish all essential elements, SPs and MIPs supplement those essential elements by providing the more targeted elements in relation to the country, region or theme. The essential elements are those provisions which express the fundamental political orientations of the act. In a similar way, it could be argued that the elements that can be supplemented in a delegated act are those provisions that express some kind of secondary political orientation. Implementing acts cannot add any further political orientation. Delegated acts have to be used for this. SPs and MIPs express this kind of secondary political orientation in that they establish the framework, in particular including the objectives and priorities for the countries, regions or themes.

The above reasoning may be opposed by holding that SPs and MIPs are not measures of general application because they are not justiciable — they do not concern the legal situation of individuals. It can also be considered that the SPs and MIPs rather implement and do not supplement the basic regulations, as financial and policy programming is the management measure of implementation. One could refer to Article 17(1) TEU here that empowers the Commission with a function to manage programmes that must be exercised as laid down in the Treaties.

The author agrees that Article 17(1) TEU is applicable in the present context, but Article 290 and 291 TFEU specify the procedures for that management function. Under both procedures, it is the Commission that adopts the measures, so Article 17(1) will not be infringed if Article 290 TFEU is chosen as a legal basis for adopting SPs and MIPs. The important legal difference comes not with the decision-making powers of the Commission, but with the degree of parliamentary involvement.

The author wants to draw attention to one further legal-linguistic trap here: the reluctance to apply Article 290 TFEU might be explained, because the basic instruments explicitly define SPs and MIPs to be part of implementing measures. Thereby the usage of Article 291 TFEU providing for implementing measures should be automatic, in line with the text of the LT. The author could not agree less here. In reality, basic regulations were adopted in 2006 and could not take into account new treaty linguistics. In pre-Lisbon era, all delegation of legislation was done through implementing measures, as the Comitology decision did not distinguish delegated acts from implementing acts. Even under regulatory procedure with scrutiny<sup>162</sup>, all acts were defined as implementing acts. Alas now, since the LT draws a clear distinction, the legislation in force must reflect that distinction.

### **3.3.3 Legally binding nature of delegated acts**

The argument connected with the question of justiciability is the possible legally binding nature of SPs and MIPs. One could argue that SPs and MIPs are not legally binding and therefore cannot be adopted as delegated acts, insisting that these are mere guidelines or programming documents with indicative nature. Then the programming and management of basic instruments is part of mere implementation, with the aim of SPs and MIPs being to give more predictability for actors concerned, but not to create additional legally binding provisions.

The author considers that this argumentation disregards the fact that the external instruments are financing instruments, in which the main role of the legislator is to regulate how the relevant funds are spent. SPs and MIPs are instruments that determine the orientation of how the financial allocations will be utilised in relation to the specific country or theme and therefore all funding must fit into that strategy. If this were not the case, the relevance of having SPs and MIPs would be undermined. According to basic instruments, annual action

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<sup>162</sup> The regulatory procedure with scrutiny is a predecessor of Article 290 TFEU, established under Article 7-1 of Comitology decision to increase the powers of the Parliament over the implementation of Community legislation. After the LT came into force, the regulatory procedure of scrutiny is aligned with Article 290 TFEU.

programs and financing decisions must be based on SPs and MIPs, so they are binding for the Commission and for the third parties applying for the EU financing. In fact, the Parliament and the Council have already used the regulatory procedure of scrutiny for similar measures.<sup>163</sup>

The legal significance of SPs and MIPs is made evident also from the fact that basic instruments call for special measures, which are not covered by SPs and MIPs, in the event of unforeseen and duly justified needs or circumstances. SPs and MIPs are thus clearly the legal framework in which the Commission can act and if it should go beyond this framework, it must use the procedure for special measures.

Moreover, and should one accept that SPs and MIPs are not legally binding measures, the legally binding nature of the measure is not a determining factor when deciding whether that measure should be adopted under Article 290 or 291 TFEU. Although, the disputes over that question are well under way at the moment, the LT does not explicitly establish the legally binding nature as a pre-condition for usage of Article 290 TFEU.

### **3.3.4 Hierarchy of norms under the Treaty of Lisbon**

The third set of arguments takes account the hierarchy of legal norms. To argue that SPs and MIPs should be adopted as delegated acts makes sense considering the hierarchy among the different legal acts. The basic instrument itself is adopted by co-decision since it establishes the essential elements. SPs and MIPs should be adopted by the Commission, but with Parliament's right to veto their adoption since they have general scope and supplement the main instrument. And finally, the annual action programmes and management decisions are adopted by the Commission under Article 291 TFEU, since their scope is more limited. At the same time, SPs and MIPs must be in conformity with basic regulations; annual action programmes and management decisions must be in conformity with SPs and MIPs. Of course, the objections have been raised to this, holding that the mere fact that there are different types of measures does not necessarily mean that some of those measures must be adopted as delegated acts. The author agrees that the hierarchy is not automatic, but this is a strong additional argument, considering that the criteria for delegated acts are fulfilled as explained above. Considering the political orientation given by them, SPs and MIPs cannot be adopted in the same way as other measures.

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<sup>163</sup> This has been used in Decision 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 and Regulation 614/2007/EC concerning the Financial Instrument for the Environment (LIFE+).

In conclusion, the author finds that arguments for applying Article 290 TFEU on SPs and MIPs of external financing instruments are convincing. That would be in conformity with the wording of the LT. This would also comply with overall logic of new treaty framework and especially with the hierarchy of norms. Besides that, the Parliament must have the powers comparable with those of the Council in the areas falling under co-decision. This is even more relevant in current case, where the external financing is concerned, as one of the major functions of the Parliament is a decision-maker and supervisor over the Union budget.

## **PART FOUR EUROPEAN PARLIAMENT AND EUROPEAN EXTERNAL ACTION SERVICE**

### **4.1 Legal basis for the establishment**

The establishment of the EEAS is regulated in Article 27(3) TEU that reads: "In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the EP and after obtaining the consent of the Commission."

The Council decision (hereinafter: EEAS decision) must be taken under Article 27(3) TEU that forms the legal basis for the EEAS. The EEAS is a novelty in the institutional framework of the Union. Its principal function is to provide assistance to the High Representative. As analysed above, the High Representative is a unique double-hatted post, comprising of:

- the competences under the CFSP, as mandated by the Council;
- the competences of the Union's other external action (TFEU competences), in his capacity as a Vice-President of the Commission.

However, reference in Article 27(3) TEU appears in the Chapter 2 within Title V TEU, relating to specific provisions on the CFSP. From that positioning and the language of Article 27(3) TEU, it seems that on a strict reading of the Treaty, the role of the EEAS is restricted to the CFSP. It is true that the activities under TFEU do not substantially relate to the CFSP, but reside in the realm of "other aspects of the Union's external action" or "external aspects of Union's other policies" for which the High Representative is responsible as a Commissioner. So, it can be argued that the EEAS should have no role outside the CFSP and assist the High Representative only in his capacity under the CFSP.

The author admits that such EEAS would be in conformity with a narrow interpretation of Article 27(3) TEU. However, in that case all responsibilities of the High Representative

outside the CFSP would remain within the Commission. In practical terms, the EEAS would then be something like a directorate-general within the Council structure.

The author agrees that such a narrow concept does not comply with the objectives of the Treaty. The aspirations behind the hybrid High Representative seem not to support the narrow interpretation either. The creation of the doubled-hatted Vice-President of the Commission/High Representative and the EEAS should be a decisive factor in the coherence and effectiveness of the action of the Union in this domain and significantly enhance the visibility of the Union as a global actor.<sup>164</sup> The aim of the EEAS consistent with new institutional structures and objectives under the Treaties is to furnish the Union with a powerful diplomatic corps in order to develop a genuinely European foreign policy. The ultimate objective of the High Representative and the EEAS is to ensure the consistency and coherence of different Union's policy areas. The EEAS should bridge all different components of the Union's external action in order to meet the Treaty objectives, including the tasks of the Vice-President of the Commission.

Even the bridging component itself, the task to ensure the consistency of the Union's external action, is linked to the competence of the Vice-President in Art 18(4) TEU, thus formally outside the CFSP part. This conclusion is supported also by Article 27(3) TEU itself that foresees the EEAS to be comprised of the relevant departments of the Commission. As at the same time, the Commission has no competence in the decision-making or implementation of the CFSP, except for some budgetary responsibilities<sup>165</sup>, then reference to the relevant departments of the Commission to be transferred to the EEAS would be unjustified if the EEAS remains a service operating only within the CFSP, without coordinating and TFEU tasks.

Having said that, it could still be argued that some legal linkage must be established in order to integrate non-CFSP functions with the EEAS. One option to overcome the controversy raising from the positioning of Article 27(3) TEU in the structure of the LT is to use several legal bases for EEAS Decision — the option frequently used in EU law while one instrument is established to meet objectives of different treaty provisions. In present case, a subsidiary legal basis besides Article 27(3) TEU could be Article 18(4) TEU covering the capacity of the

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<sup>164</sup> See also: EP resolution of 19 February 2009 on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP in 2007, presented to the European Parliament in application of point G, paragraph 43 of the Interinstitutional Agreement of 17 May 2006, External relations, paragraph 53.

<sup>165</sup> See also: Chapter 1.1.4.

High Representative as a Vice-President within which capacity he has to ensure the consistency of Union's external action, too.

However, the proposal of the High Representative Catherine Ashton submitted on 25 March 2010 (hereinafter: Ashton Proposal)<sup>166</sup> based the decision only on Article 27(3) TEU. At the same time, it reflected the wide interpretation of Article 27(3) TEU, including also the competences of a Vice-President and those of a chair of the Foreign Affairs Council. Article 2 of the Ashton proposal enlists the tasks of the EEAS supporting the High Representative and divides them between three hats. Unfortunately, the proposal already gives rise to confusion and misinterpretation, as regards the issues of legal basis discussed above. Article 2 places the task to ensure the consistency of the EU's external action under the mandate of the High Representative within the CFSP. Such formation runs counter to Articles 18(4) and 21(3) TEU and might be interpreted as a hidden inter-governmentalisation of TFEU policies.

## **4.2 Status of the European External Action Service**

The important legal question directly linked to the spectrum of competences of the EEAS, is its positioning vis-à-vis other EU institutions and bodies, including the EP. The answer to that question derives from the analysis on which functions and tasks the EEAS will exercise. Legal limitations under the Treaties for the EEAS are limited and inspired by the tasks of the High Representative. The LT commits the High Representative with very large, but simultaneously ambiguous functions that were studied above in Chapter 1.1.2. In sum, it appears that wording of the Treaties is quite general, enabling the EEAS to be filled with a very wide range of functions.

TEU does not prescribe which should the legal status for the EEAS be — whether it should be the part of an EU institution or a separate body with a *sui generis* status. This question has given raise to harsh battles since the agreement on the text of the LT and is reflected in the Declaration No 15 of the LT on Article 27 TEU, holding: “The Conference declares that, as soon as the LT is signed, the Secretary-General of the Council, High Representative for the CFSP, the Commission and the Member States should begin preparatory work on the EEAS”.

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<sup>166</sup> A letter from High Representative, Catherine Ashton of 25 March 2010, transmitting the proposal on the establishment of the organisation and functioning of the EEAS with an explanatory memorandum (PE 439.815/CPG).

The position of the EP has been that the EEAS should be linked to the Commission as much as possible. As that position was quite difficult to protect from a legal point of view, both as regards the principle of inter-institutional equilibrium and the positioning of Article 27(3) inside the Chapter 2 of Title V TEU (the CFSP Chapter), then in its principal resolution on the issue, the EP took a balanced approach, holding that “as a service that is *sui generis* from an organisational and budgetary point of view, the EEAS must be incorporated into the Commission's administrative structure, as this would ensure full transparency”. Furthermore, the EP stressed the importance of that *sui generis* service to be at disposal of both the Commission and the Council, holding that “the decision relating to the establishment of the EEAS should ensure in a legally binding manner, by means of the directorial powers of the Vice-President/High Representative, that the EEAS is subject to the decisions of the Council in the traditional fields of external policy (the CFSP and the CSDP) and subject to the decisions of the College of Commissioners in the field of common external relations”.<sup>167</sup> During the meetings of AFET, MEPs have gone even further, insisting that the EEAS is also a service in the hands of the EP when needed.

Although the EP is only to be consulted on the EEAS decision, MEPs have asked Catherine Ashton in several hearings in the Parliament to accept the demands contained in that resolution. In order to achieve its objectives, the Parliament has linked its consultative opinion on the EEAS decision with decisions on financial and staff arrangements for the EEAS that fall under ordinary legislative procedure and hence request the consent of the EP. This issue will be examined below in Chapter 4.4.

It seems that the Parliament's greatest fear was that the EEAS would not have an institutional link with the Commission and therefore would fall outside the latter's control. Taking account the possible narrow interpretation to Article 27(3) TEU, that fear is not unreasonable. That is also why the Parliament called on the Commission to strive for preserving and further developing the Community model in the field of the Union's external relations.<sup>168</sup>

From legal point of view, the Parliament's call to stand against the inter-governmentalisation of TFEU policies and for the close ties of the EEAS with the Commission is fairly justified, as the EP has legal control powers over the latter. The Parliament should defend the community

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<sup>167</sup> EP resolution of 22 October 2009 on the institutional aspects of setting up the European External Action Service, paragraph 7.

<sup>168</sup> See also: Stefan Griller and Jacques Ziller (eds), “The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?”, Springer, Wien, New York, 2008.

method and ensure that the EEAS represented the Union and not the individual Member States. The establishment of the EEAS could have wider implications in terms of other aspects of implementation of the LT. As a modern diplomatic service and expression of European democratic values, it is crucial that the EEAS will be set up according to accountability aspects. However, a *sui generis* status does not entail that MEPs will not have powers vis-à-vis the EEAS. Those arrangements for parliamentary control should be addressed in the EEAS decision or under other forms of arrangements.<sup>169</sup>

It is also clear that while being a *sui generis* body, the EEAS tasks must not conflict with the areas of Council or Commission competences under the Treaties. This principle will not be followed very strictly, as will be shown below in Chapter 4.5.

### **4.3 Scope of the Council decision: functioning *versus* competences**

Under Article 27(3) TEU, the Council should adopt a decision establishing the organisation and functioning of the EEAS. The term "organisation" covers both the internal organisation and the relationship of the EEAS with other EU bodies. Although the author admits that such interpretation is large, it is justified as the LT says very little on the legal status of the EEAS and the founding decision is the most suitable instrument to regulate on those questions.

On the other hand, numerous legal difficulties emerge while envisaging what should be covered by "the functioning of the EEAS". Should it include the competences of the EEAS? The answer is negative, as the establishment of the competence of the EEAS by the Council decision would entail serious legal problems concerning both the legal basis and decision-making procedure.

As regards the legal basis, the institutional organisation in shaping EU external policies is already regulated in various legal acts adopted under substantive legal bases. For example, common commercial policy draws its legal basis from Article 207(2) TFEU, development cooperation from Article 209(1) TFEU, international fisheries agreements may be concluded under Article 43(2) TFEU etc.

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<sup>169</sup> See also: Chapter 4.6 and Giji Gya, "Enacting the Lisbon Treaty for CSDP: Bright lights or a tunnel?", European Security Review No 47, Brussels, 2009.

The decision under Article 27(3) TEU cannot alter the areas of competence of each institution as defined under the Treaties and secondary substantive legislation. The preference to substantive legal basis is also determined in Article 2(6) TFEU, holding that the scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area. When one analyses the relationship between TEU and TFEU competences, then delimiting the rules adopted under TFEU by the EEAS Decision is not legally possible, as according to the principles set in Article 40(1) TEU, the decisions adopted under the CFSP Chapter should not affect the procedures laid down under TFEU competences.

As regards the procedure, the answer is clear. Inside TFEU competences, the procedure for adopting the measures necessary for the implementation of different external policies (for example common commercial policy or development cooperation) is ordinary legislative procedure where the EP is guaranteed full co-decision powers. As regards the Council decision under Article 27(3) TEU, the EP is only consulted without any legal obligation from the Council's side to take its views into account. Hence, the EEAS Decision must not cover the areas that have direct impact or even fall onto the field that is covered by once co-decided regulations. Such rules fall outside the scope of Art 27(3) TEU.

#### **4.4 *De facto* co-decision of the European Parliament**

For a new service to start functioning, the EEAS needs budgetary and human resources. In legal terms, it concludes that the EEAS decision may not be implemented without respective changes to EU legislation providing those resources. Amendments to the EU Financial regulation and Staff regulations are inevitable. Literally, without those amendments the new service could be indeed legally put in place, but it would remain without money to use and people to work with. Amendments to the Financial regulation applicable to the general budget of the EU are to be adopted under Article 322 TFEU in accordance with the ordinary legislative procedure. Similarly, Staff regulations of officials of the EU and the conditions of employment of other servants of the Union must be amended under Article 336 TFEU in accordance with the ordinary legislative procedure.

Facing this procedural framework, the EP considers three drafts — EEAS decision plus amendments to Financial regulation and amendments to Staff regulations — as a "legislative

package". All parts of the package should be adopted simultaneously, granting the Parliament *de facto* co-decision powers for the EEAS decision. Indeed, the EP has indicated that it will not approve the necessary changes in Financial regulation and Staff regulations if its calls for political accountability are not taken into account in the EEAS Decision. The Parliament has reiterated that its intention is to exercise its budgetary powers in full vis-à-vis the EEAS and emphasised that all aspects of the funding arrangements for that service must remain under the supervision of the budgetary authority.<sup>170</sup> The EP has made very clear that it was determined to use its budgetary powers to influence the setting-up and development of the EEAS.

Is there legitimate reasoning behind the strategy of the EP to oppose any agreement reached on the EEAS that is not close enough to its preferences, even though it is only to be consulted rather than having formal powers, according to the LT?<sup>171</sup> Apart from political aspects, the author brings out following legal arguments.

At first, from the procedural point of view, if the EEAS Decision entails the inevitable amendments to the acts adopted under the ordinary legislative procedure, then the whole package has to be agreed beforehand. This comes from the principle of mutual sincere cooperation of the EU institutions, vested in Article 13(2) TEU. The EP's procedural position – consultation under Article 27(3) – fits perfectly into that logic.

Secondly, if all Member States agree that the EEAS should be financed from the EU budget, then it should be budgetary accountable to the EP and subjected to the procedure of budgetary discharge under the rules laid down in Chapter 4 of Title II Part Six TFEU, no matter what the exact legal status of the EEAS will be.<sup>172</sup>

Thirdly, the Parliament has to obtain guarantees as regards its rights to exercise political supervision over both the CFSP and other external action, especially the right for regular and exhaustive information stemming from Article 36 TEU and Article 218(10) TFEU.

Hence, the concept of *de-facto* co-decision has its certain legal merits. However, the author agrees that one should use such quasi-constitutional concepts only under exceptional and duly

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<sup>170</sup> EP resolution of 7 May 2009 on the financial aspects of the Lisbon Treaty, paragraph 55.

<sup>171</sup> See also: Kirsty Hughes, "Shaping Lisbon's legacy: the EU's very discreet debate on who will make foreign policy", *Les Amis de l'Europe*, Brussels, 2008.

<sup>172</sup> See also: Giji Gya, "Enacting the Lisbon Treaty for CSDP: Bright lights or a tunnel?", *European Security Review* No 47, Brussels, 2009.

justified circumstances, as there the risk to mix up political and legal argumentation is too high.

For sure, the opponents might state that any *de facto* procedures (including the one the EP is insisting in the present case) derogate the procedural rules under the Treaties and should not be allowed. That is correct in legal terms. The present thesis does not insist that there should be used other legal procedure than that of Article 27(3) TEU, but only shows the close linkage between three proposals that might otherwise delimit the parliamentary prerogatives under ordinary legislative procedures and subsequently in budgetary and political supervision procedures. The latter outcome would run contrary to inter-institutional equilibrium as set by the Treaties.

#### **4.5 Impact on external financing instruments**

According to Ashton proposal, the EEAS will be granted an influential role within the EU activities in external financing instruments<sup>173</sup>. Although the precise balance of powers between the Commission and the EEAS is not very clear, the executorial initiative will be placed in the EEAS.

Article 8 of Ashton proposal calls for the following procedures:

- The EEAS shall contribute to the programming and management cycle for the instruments.
- Throughout the whole cycle of programming, planning and implementation of the instruments, the EEAS shall work with the relevant services of the Commission.
- The EEAS shall in particular have the responsibility for preparing the Commission decisions on the strategic and multiannual steps within the programming cycle, such as decisions on country allocations, strategic papers and multiannual indicative programmes.

From another side, the proposal also reaffirms that the formal decisions concerning those instruments will be prepared through Commission procedures and submitted to the Commission for (final) decision.

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<sup>173</sup> List of instruments is provided in Chapter 3.3.1.

Apart from political will to transfer some tasks within those instruments to the EEAS, the legal question arises whether and to which extent Ashton proposal affects the scope of basic regulations on those instruments that are decided under the ordinary legislative procedure. Furthermore, Ashton proposal might even evoke inevitable amendments to basic regulations.

The first argumentation line would be to say that there is no controversy as the EEAS competence under Article 8 will only be to assist the Commission in its activities without any decision-making powers. All the tasks remain and will be formally carried out by the Commission itself. That would be a reasonable approach, if the basic regulations on instruments described only the decision-making stage without the indication of other stages of the procedure or at least did not specify the role of the Commission in that regard.

But this seems not to be the case, as the basic regulations regulate on the whole process, including the tasks of the Commission that are to be transferred to the EEAS if Ashton proposal will be adopted in proposed wording. Even if the decision-making competence remains in the Commission, Article 8 supplements and alters the structures foreseen in basic regulations. It grants the EEAS tasks that should be carried out by the Commission under once co-decided rules. For example as set by the Regulation (EC) No 1717/2006 of the EP and the Council of 15 November 2006 establishing an Instrument for Stability<sup>174</sup>, it is the task of the Commission to plan Community assistance and implement the measures, report and inform about those tasks the Council and the EP (Article 5 (5,6)). The Commission has to carry out joint consultations on strategy papers (Article 7(4)), evaluate regularly the results and efficiencies (Article 21) and examine the progress achieved (Article 23). In other instruments, the regulations are similar.

The second option would be to acknowledge that the EEAS will carry out the tasks so far exercised by the Commission and to build interpretation lines around the Vice-President hat of the High Representative. The legal construction to overcome possible conflicts between Article 8 and basic regulations is then based on the responsibilities of the High Representative within the Commission. This is the format used both in Article 18(4) TEU and Article 1 of Ashton Proposal. Following those lines, it should be possible to delegate the High Representative some tasks of the Commission, as the High Representative is a Vice-President of the Commission. These might be the tasks related to management, planning, informing, coordinating, preparing of decisions, but not the Commission's decision-making powers.

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<sup>174</sup> OJ L 327, 24.11.2006, p. 1.

At the same time, the EEAS is the service to support the High Representative in all his tasks. As regards the tasks as a Commissioner, the EEAS is quite similar to General Directorates of the Commission that are the supporting services of other Commissioners and carry out the variety of tasks delegated to the Commission under once co-decided regulations. Hence, the problem of mandating the EEAS with the tasks of the Commission might be solved, as long as it does not prejudice the tasks of the CFSP hat of the High Representative.

This construction would be favourable to the EP with IIA-2005 in force, covering wide range of cooperation fields and including also the part for external relations. If the EP could claim that the High Representative in his capacity under TFEU may be bound by IIA-2005 and other EP-Commission inter-institutional agreements, then the prerogatives of the Parliament are protected in a much stronger level than the unofficial arrangements or memorandums of understanding agreed by the exchange of letters.<sup>175</sup>

The third option is to acknowledge that Article 8 is incompatible with basic regulations and thus the basic regulations should be amended. The problem of legality to regulate the area covered by regulations adopted in accordance with the ordinary legislative procedure in the EEAS decision was analysed above under Chapter 4.3. As regards Article 8, the proposal has direct impact into the field that is covered by basic regulations and regulates on the questions that fall outside the scope of Art 27(3).

Having the prerogatives of the EP in mind, one further legal argument arises. External financing instruments enlisted in Article 8 of Ashton proposal are established under co-decision procedure. Hence, if the Commission intends to come out with the amendments to basic regulations after the EEAS decision will have been adopted, then the EP will be faced by *de facto fait accompli* as the amendments to basic regulations to adapt the instruments with the new structures set up by the EEAS decision will become legally inevitable. In that case, the legally correct way to proceed is not to face the EP with *de facto fait accompli*, but include the basic regulations in a *de facto* co-decision package in the same way as it deals at the moment with amendments to Financial regulation and Staff regulations, as was shown above in Chapter 4.4. This has not been the case so far. However, the EP must be aware not to delimit formally or informally its own prerogatives as a co-decider to those instruments. It

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<sup>175</sup> In Article 295 TFEU, The High Representative is not listed as an institution and thus he cannot enter into legally binding inter-institutional agreements with the EP.

should also avoid amendments to Article 8 that make the subsequent amendments to co-decided regulations legally inevitable.

#### **4.6 Democratic supervision over the European External Action Service**

The idea of democratic supervision is based on the principle that the EEAS should be financially and politically accountable to the EP. The EEAS has to support the High Representative in his political relationship with the Parliament in order to ensure the political and budgetary accountability of his action. Therefore the EEAS Decision should explicitly refer to the principle of democratic supervision and advisably also establish necessary arrangements.

In particular, the EEAS will consolidate the consultation and reporting duties before the EP that were so far accomplished by the Commission, Council and rotating Presidency. Within those tasks, the Parliament must be consulted on all draft proposals for Council decisions with regard to Parliament's rights concerning international agreements and budgetary implications of EU external action, including mandates for CSDP operations and mandates for negotiations of international treaties. The Parliament has also insisted that the appointees for senior EEAS posts, including Heads of Union's delegations and special representatives of the Union need to appear in front of it (probably AFET or SEDE) before taking up their duties, in order to provide them with political legitimacy and authority. The prerogatives of the budgetary authority, including explicit right of discharge, are to be fully safeguarded, too. Those requests from EP are based on its upgraded role under Article 218 TFEU in conjunction with Article 36 TEU and were formalised in the EP resolutions.<sup>176</sup>

Ashton proposal lacks those guarantees. The requests of the Parliament are not met by legally binding instruments despite the fact that the EP had made its lawful wishes clear from the very beginning. Already as early as on 11 December 2007 right after the signing of the LT, the EP raised the issue of the budgetary consequences of the organisation and functioning of the EEAS and asked to be fully associated with the preparatory work on the EEAS. The EP made use of Declaration No 15 of the LT on Article 27 TEU, reading: "The Conference declares that, as soon as the LT is signed, the Secretary-General of the Council, High

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<sup>176</sup> EP resolution of 22 October 2009 on the institutional aspects of setting up the EEAS; EP resolution of 10 March 2010 on the annual report from the Council to the EP on the main aspects and basic choices of CFSP in 2008, presented to the European Parliament in application of Part II, Section G, paragraph 43 of the Interinstitutional Agreement of 17 May 2006, paragraphs 13-17.

Representative for the CFSP, the Commission and the Member States should begin preparatory work on the EEAS”.<sup>177</sup> As a modern diplomatic service and expression of European democratic values, it is crucial that the EEAS will be set up according to accountability aspects.<sup>178</sup> However, the intentions of the EP could not be based on Declaration No 15 and the author agrees that the argument of democratic accountability was not sufficient for key-players listed in that declaration to engage the Parliament.

Preparatory works were carried out without the EP sufficiently associated. On 25 March 2010, just a couple of hours after Ashton proposal had arrived in Rue Wirtz 60<sup>179</sup>, the leading political parties of the EP, including the parliamentary rapporteurs on the EEAS, released a press-statement<sup>180</sup>, calling the proposal unacceptable to the Parliament, as not sufficiently taking into account the Parliament’s views. They held that “the proposal needs decisive changes, otherwise the EP will not be able to carry forward the required modifications of the Staff and Financial regulation”, threatening thus with *de facto* co-decision powers. There were several reasons behind such a firm obstruction. The political and budgetary accountability of the EEAS to the Parliament was not addressed in Ashton proposal. Essential aspects of external policy under TFEU were not included in the EEAS and the legal linkage remained too ambiguous as regards the responsibilities between the High Representative and Commissioners. Finally, politically-legitimised deputies to the High Representative who could engage on his behalf with both Parliament and partners in third countries were not foreseen in Ashton proposal.

The Parliament also insisted that the future special representatives and ambassadors to key countries would pass parliamentary hearings before taking up their posts.<sup>181</sup> Such procedure is not envisaged by the LT and has been rejected by other institutions in the context of the EEAS decision. However, the EU representatives outside the Union (special representatives of the Council or heads of Commission delegations) have so far frequented AFET and SEDE to discuss important political aspects of their mandates. The author states that under EU legal

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<sup>177</sup> Letter No 206814 of President Pötering to the President of the Council, 11.12.2007, subject: Participation in the preparatory work concerning the creation of the European External Action Service, Council of the European Union, Brussels, 20.12.2007, Document No 16801/07.

<sup>178</sup> Giji Gya, “Enacting the Lisbon Treaty for CSDP: Bright lights or a tunnel?”, European Security Review No 47, Brussels, 2009.

<sup>179</sup> The official address of the EP in Brussels: Rue Wirtz 60, Brussels 1047, Belgium.

<sup>180</sup> Lasse Boehm, “Joint Statement on External Action Service”, Brussels, 25.3.2010, available at: [www.eppgroup.eu](http://www.eppgroup.eu).

<sup>181</sup> EurActiv, “Ashton puts French “spider” at centre of EEAS web”, Brussels, 26.3.2010, available at: [www.EurActiv.com](http://www.EurActiv.com).

rules, such commitment may be also agreed upon the institutions, it does not have to be regulated at treaty level.

It seems that the lawmakers were quite disappointed that Ashton proposal paid too little attention to their legitimate calls in terms of both political accountability and prevention of the inter-governmentalisation of EU foreign policy.<sup>182</sup> There was also no reference to the long-standing Parliamentary diplomacy conducted by the EP and the function of the Parliament's members and delegations as strands of the Union's relationships with third countries. If the Parliament wishes to be closely involved in the future development of the Union's foreign policy it does need to ensure that appropriate liaison and oversight arrangements are in place. The Parliament needs to consider what arrangements it wishes to enable so that it is able to convey its views to the EEAS at the earliest stages of policy formation.<sup>183</sup>

Despite the legal basis determined by Article 27(3) TEU, the EEAS decision is not the only legal act where the guarantees for EP guarantees could be fixed. It must be noted that the creation of the post of the High Representative has several legal consequences for the EP. The post unites in one person the different tasks of the former High Representative, the former Commissioner for external relations and the Chair of the Foreign Affairs Council, with each of which the EP had established practices and informal or codified rules in their mutual interaction. Parliament's current rights concerning external policy are safeguarded on the basis of acquired rights via precedents, practices, different kinds of arrangements and agreements. After the LT, the EP has to make sure that this *acquis* is continued and updated to take into account the impact of the LT. Besides the EEAS decision, detailed functioning of the relationship between the EEAS and the Parliament may be set out also by mutual arrangements agreed before the EEAS decision is adopted. Both, the content and the format of such arrangements for the EP deserve some further legal scrutiny.

As regards the content, the majority of guarantees fall under the regulations of the IIA-2005. This includes the participation of MEPs in election observation missions, presence and question hours of the High Representative in plenary and committees in his capacity as a Vice-President of the Commission, the information flow to the EP under Article 218(10) TFEU when the High Representative and the EEAS are entrusted to lead negotiations on

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<sup>182</sup> See also: Lisbeth Aggestam, Francesco Anesi, Geoffrey Edwards, Christopher Hill and David Rijks, "Institutional Competences in the EU External Action: Actors and Boundaries in CFSP and ESDP", Swedish Institute for European Policy Studies, Stockholm, 2008, p. 53.

<sup>183</sup> Richard G. Whitman, "Strengthening the EU's External Representation: the Role of the European External Action Service", European Parliament, Brussels, 2010.

behalf of the Union and former information duties and practices from the Commissioner for external relations.

Second set of guarantees were agreed under cooperation arrangements between High Representative Javier Solana and the EP, including the presence of the Council experts in parliamentary bodies, access to confidential information and the implementation of IIA-2002 and IIA-2006.

Besides that, a couple of further arrangements are also necessary because of the new institutional situation and other modifications of the LT. Those arrangements should tackle the question of participation of the High Representative and his deputies in parliamentary proceedings, procedures on written questions and inclusion of MEPs in delegations at international conferences and bilateral negotiations, access of the EP to the EEAS documents and briefings and the issue of security arrangements for parliamentary delegations to third countries.

New arrangements must provide guarantees for the EP, as regards both democratic supervision and budgetary rights over the High Representative and the EEAS. The EP has invited the High Representative to build on the experience of the periodic appearances by the outgoing High Representative and External Relations Commissioners before Parliament in plenary and before AFET, and on the practice of informal meetings, in order to step up and develop regular, systematic and substantive consultations with the Parliament and its competent bodies.<sup>184</sup>

Other important legal question is the format of such agreement.

As the High Representative (and the EEAS) is not an EU institution, then the format of an inter-institutional agreement that could be binding under Art 295 TFEU is excluded. The arrangements or memorandum of understanding agreed by the exchange of letters between the High Representative and the chairs of AFET and other relevant parliamentary committees would be an advisable option. The discussions on those arrangements could be conducted in parallel with the deliberations on the legislative/budgetary package on the establishment of

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<sup>184</sup> EP Resolution of 10 March 2010 on the implementation of the European Security Strategy and the CSDP, paragraph 8.

the EEAS and could result in the adoption of a resolution in plenary, which would include principles to which High Representative Catherine Ashton should subscribe.

The alternative legal possibility would be to include the EP guarantees in the:

- revision of the IIA-2005 as far as the responsibilities of the Vice-President are concerned;
- revision of the IIA-2002 while both changing the actors and extending the scope of the agreement as far as the responsibilities under the CFSP are concerned and
- revision of the IIA-2006 as regards both the budgetary control and the joint consultation meetings on the CFSP.

And finally, another interesting idea is to conclude the binding inter-institutional agreement on the EEAS between the Parliament, the Council and the Commission. The clear advantage for the EP would be of course that such agreement concluded under Article 295 TFEU needs its consent, as compared to a pure consultative role under Article 27(3) TEU. However, in that case, two further legal questions arise.

Firstly, the inter-institutional agreement could not determine the organisation and functioning of the EEAS, but could only specify the rules and principles set in that decision and regulate on issues outside the organisation and functioning. As regards the Parliament's prerogatives vis-à-vis the EEAS, this legal obstacle could be overcome, as it is hard to argue that those prerogatives should better fall under the EEAS decision than under the inter-institutional agreement. It is not up to the Council to decide on the mechanisms how and to what extent the EP wants to use its treaty powers.

Question whether three institutions may by their inter-institutional agreement commit the High Representative and the EEAS is more problematic. The author holds that the Commission may make arrangements in the inter-institutional agreement concerning the High Representative in his capacity as the Vice-President. In the CFSP, the High Representative is mandated by the Council under Article 18(2) TEU and the Council should have similar capacity to commit him by the inter-institutional agreement. But besides formally supporting or executing tasks within the Commission or tasks mandated from the Council, there is also wide margin of High Representative's "own" elaborating, decision-making and implementing competence coming directly from the LT, both in Art 218 TFEU stages and in the CFSP part. It could be argued that the EEAS is only a supporting service, but at first place it is a

supporting service to the High Representative. So the difficult part seems to determine the High Representative status under the Treaties, not so much the EEAS status.

It is important to emphasise that all those formats could be combined with one another – this is to get the guarantees both via informal arrangements with the High Representative and via inter-institutional agreements with the Commission and the Council. Having the comprehensive set of binding mechanisms in order to exercise democratic supervision over the EEAS might be the goal for the EP in that process.

#### **4.7 Judicial challenge**

Article 27(3) TEU falls under the CFSP Chapter where the Court of Justice does not have jurisdiction. However, as set in Article 24(1) TEU, the Court has jurisdiction to monitor compliance with Article 40 TEU. Article 40(1) TEU holds that the implementation of the CFSP 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 TFEU.

If one is successful to prove that the EEAS decision affects the application of the procedures and the extent of the powers the Union has under TFEU, then the decision might even have a chance to get to the hearing before the Court. Provisions that have direct impact or even fall into the field that is covered by regulations adopted under TFEU, might provide necessary linkage.

It is possible that the demands for political accountability of the EP are not taken into account and the TFEU external action will be subjected to the CFSP rules in substance. If the democratic supervision will be guaranteed and the Commission will not be expropriated from its tasks in the TFEU policies, then there is not a good reason to go the Court. Otherwise, in a very improbable and undesirable case, one could try to find some arguments to challenge the decision legally.

#### **4.8 EEAS decision adopted**

On 21 June 2010, a so-called Madrid Compromise on the EEAS decision was reached between all key actors: the High Representative, the Council, the Commission and the

Parliament. They agreed on both the principles and the final text of the decision establishing the organisation and functioning of the service. On 8 July 2010, the European Parliament approved the compromise<sup>185</sup>, followed by the Council final decision on 26 July 2010<sup>186</sup>. The decision was accompanied, but not annexed, by the Declaration by the High Representative on political accountability that established the framework and the commitments for the relations between the High Representative and the EP<sup>187</sup>. Hence, the exact legal status of the declaration might need some further scrutiny in future.

However, most of the Parliament's demands and prerogatives described above were taken on board by those two documents. According to Recital 6 of the Decision, the EP will fully play its role in the external action of the Union, including its functions of political control as provided for in Article 14(1) TEU, as well as in legislative and budgetary matters as laid down in the Treaties. Furthermore, in accordance with Article 36 TEU, the High Representative will regularly consult the EP on the main aspects and the basic choices of the CFSP and will ensure that the views of the European Parliament are duly taken into consideration. The EEAS will assist the High Representative in this regard. Specific arrangements should be made with regard to access for MEPs to classified documents and information in the area of CFSP. Until the adoption of such arrangements, existing provisions under the IIA-2002 will apply. Under Article 4(3), the EEAS shall extend appropriate support and cooperation to the other institutions and bodies of the Union, in particular to the EP.

It is far too early to judge how the mechanisms established will work out in practice. The other two parts of the *de facto* co-decision package will be adopted in autumn 2010. The first review of the decision is foreseen by mid-2013.

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<sup>185</sup> EP legislative resolution of 8 July 2010 on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service.

<sup>186</sup> OJ L 201, 3.8.2010, p. 30.

<sup>187</sup> OJ C 210, 3.8.2010, p. 1, OJ C 217, 11.8.2010, p. 12

## Conclusion

One of the principal aims behind the LT was to provide the EU with new legal mechanisms in order to transform it into an efficient global actor. This required a stronger institutional framework for the Union's external action. At the same time, the LT has significantly increased the powers of the European Parliament, both in its functions as a co-legislator and in a role of democratic supervisor. The main purpose of current research is to explore and interpret the legal framework of the LT with a view to combine those two objectives.

The author seeks an answer to the question how the Parliament's competences under the LT should be implemented in order to improve the coherence of the Union's external action. The institutional coherence in that field can be achieved in the combination of the competences of different key-actors, including the legislative, executive and political control levels. Within the competences of the EP, the policy coherence between the CFSP and the Union's other external action is improved through the mutual integration of different functions of the Parliament. The author develops legal conceptions on the interpretation and implementation of the rules of the LT that make use of the synergy and comprehensiveness between the Parliament's different competences, with a special focus on the enforcement of the democratic scrutiny mechanisms over the Union's external action.

Main conclusions of the thesis are following:

1. The inter-institutional architecture under the LT has been subject to major innovations. However, the functions of the President of the European Council, the High Representative, the Council and the Commission in ensuring the consistency between different areas of the Union's external action are ambiguous and overlap one another. Hence, a range of different readings reducing the efficiency of a new inter-institutional architecture are possible.
2. In contrary to advertised unification of the Union's external policy and theories around the abolishment of the pillars, the LT indeed did not change the exceptional position of the CFSP. The latter enjoys the special status as compared to TFEU competences, different decision-making procedures apply, the jurisdiction of the Court of Justice with a few exceptions is excluded and the role of the EP is restricted. The distinction between

different parts of the Union's external action is of vital importance in order to decide on applicable legal basis and procedure.

3. Three separate, but mutually supplementing theories are developed in order to distinguish between the CFSP and the Union's other external action (TFEU competences). The theory on principles and objectives runs short as the principles and objectives are not separated between the CFSP and the TFEU at treaty level and are left for the European Council to specify. The theory on the hierarchy of norms would have been perfect in the pre-Lisbon era, but the mutual non-affect clause raises severe theoretical problems in that context. Finally, the theory on coherence is in conformity with the objectives of the LT and takes into account the equal value of the TEU and the TFEU as well, but unfortunately the Treaties are inconsistent and controversial while using this principle and establish ways for inter-institutional conflicts. All three theories have their merits, but face true challenges when the new treaty framework and possibilities for practical usage are considered.
4. Parliament's prerogatives in the CFSP under Article 36 TEU are improved, but the Parliament does not have a decision-making competence and its impact remains indirect. However, the views of the European Parliament must be taken duly into account by the High Representative. Moreover, the Parliament should make use of its budgetary and co-decision powers in order to ensure the consistency and democratic legitimacy of the CFSP. These legal constructions are in conformity with objectives and principles of the LT.
5. In order to fulfil its functions under Article 36 TEU, the Parliament must be guaranteed sufficient access to restricted information. The mechanisms established under pre-Lisbon framework must be continued and reinforced within the new rules: the scope of inter-institutional arrangements on the access of restricted information must be extended and the number of MEPs in a special committee increased.
6. Urgent financing procedure for CSDP missions is a novelty of the LT that increases the Parliament's power. The legal constructions should take into account that the Parliament's supervision must cover all expenditure charged to the Union budget. However, the EP cannot call for enhanced control over the expenditure arising from operations having military or defence implications under the LT framework.
7. Cessation of the WEU has made Protocol No 11 of the LT obsolete. LT provides decent legal arguments both for the EP, as well as for national Parliaments to take a leading position in the new system of democratic scrutiny over the CSDP. New organisation of

- supervision should be established in coordination between the EP and national Parliaments within the LT framework with three legally sound options at stake.
8. Declaration No 14 of the LT does not correspond to new powers of the Parliament under Articles 27(3), 36 and 41(3) TEU. It also departs from the democratic supervision principles of the LT and from its penultimate aim to provide the Union with united, consistent and effective tools for its external action. However, Declaration No 14 could provide some guidance for the interpretation of TEU.
  9. Under the LT, all agreements between the Union and third countries or international organisations shall be negotiated and concluded according to the unified procedure of Article 218 TFEU. As measures necessary for defining the framework for implementing the Union's external policies must be adopted in accordance with the ordinary legislative procedure and the Parliament's consent is mandatory for the conclusion of international agreements covering those fields, then Parliament's legislative powers are significantly increased.
  10. Article 218(10) TFEU, providing that the EP shall be immediately and fully informed includes all stages: negotiations, conclusion and implementation of international agreements. Article 218(10) TFEU is the central provision that calls for the greater enhancement of the EP.
  11. The Parliament is not formally involved in the stage of negotiations, but in conformity with Article 218(10) TFEU and inspired by the principles of democratic supervision, it exercises quasi-constitutional powers under RoP and IIA-2005. Those arrangements are in compliance with a new treaty framework and should be reinforced in order to combine the coherent external policy and democratic supervision objectives. A bilateral inter-institutional agreement between the Parliament and the Commission may commit the High Representative in his tasks as a Vice-President of the Commission that are linked to TFEU competences. However, as regards the international agreements relating to the CFSP, the Parliament's prerogatives should be safeguarded better.
  12. The upgraded role of a special committee of Member States and the reduced role of the Parliament at the stage of negotiations is a hidden derogation from the principle of conferral and not justified from legal point of view, as running against the objective of coherent external action. The involvement of the EP in the work of a special committee and expanding the obligations under Article 218(10) TFEU to a special committee is preferable and complies with the principle of inter-institutional balance and far-fetched considerations about the Parliament's right to consent. However, current Treaty wording does not support the enhanced competence to the Parliament in that regard.

13. Legal dimensions behind the requirement of parliamentary consent on the agreements covering co-decided fields are noteworthy. If an agreement lays down detailed rules, which bind the Union and preclude the later adoption of a different internal regulatory regime, then the EP must have its substantial influence also on the contents of those international rules. The interpretation of the term “fields” in Article 218(6)(a)(v) TFEU may be twofold. It could be interpreted narrowly as equivalent to the procedure foreseen in a Treaty provision establishing legal basis for adoption of internal rules of that external competence. But the "field" may be also wider than the legal basis, covering all agreements that fall under that policy field and not under a specific treaty provision. The latter interpretation has been taken on board by the Council and the Commission in a few cases and may set a favourable precedence for the EP.
14. Under the LT framework, the Parliament should be no more faced by a *fait accompli* while taking a decision under Article 218(6) TFEU. It is true that the LT does not empower the Parliament to authorise and thus set the objectives and conditions for negotiations, but the Council and the Commission should be very prudent in using their formally monopolistic legal power under Article 218(5) TFEU to approve the provisional application of the agreement without the former involvement of the Parliament or without taking Parliament’s recommendations on board if the EU is not interested in using the mechanisms of Article 25(2) of Vienna Convention.
15. Under Article 218(9), the bodies set up by international agreements adopt legally binding decisions that must be transformed into or are even directly applicable in the legal order of the EU, affecting significantly the co-decision powers of the EP and the Council. As the Council is mandated to unilaterally approve those positions beforehand then the Parliament's prerogatives as a co-legislator should be equally enforced. Current system damages the inter-institutional balance and runs counter to the principle of democratic legitimacy.
16. The EP is entitled to full information under Article 218(10) TFEU, despite the level of confidentiality. As there are no special arrangements for forwarding restricted information from the Council to the Parliament, then general procedure of Article 218(10) TFEU should directly apply. Such application is possible provided that the Parliament will take into account the restricted nature of the documents and handle them in accordance with its in-house rules on confidentiality.
17. The legal regime applicable to the information on international agreements relating exclusively to the CFSP must be determined. Articles 218(10) TFEU and 36 TEU could both make legitimate claims for applicability here, but the Parliament’s prerogatives are

quite different in scope. No decisive interpretation will be given at present moment by the author and there is no well-established practice between the Parliament and the High Representative.

18. Parliament's control over the management of external financing instruments must be executed under Article 290 TFEU with a right to revoke the delegation, as well as the right to object the delegated act adopted by the Commission before it enters into force. The substantial amendments in the legislation in order to align the existing financing mechanisms with the LT rules are inevitable.
19. The establishment of the EEAS together with a new High Representative should be the basic guarantee for coherent external policy of the Union. However, the legal basis, scope and the status of the EEAS have raised several problems from the point of law. The EEAS decision may only regulate the functioning of a new service without giving it the competences that are once established in the regulations adopted in accordance with the ordinary legislative procedure.
20. The Parliament exercises *de facto* co-decision powers on the establishment of the EEAS through its budgetary and legislative functions. The Parliament's prerogatives vis-à-vis the EEAS and the High Representative should be established apart from the Council decision.

The author has analysed and developed many options how the European Parliament's competences under the Treaties should be implemented in order to improve the coherence of the Union's external action. The legal framework of the Treaty of Lisbon enables the implementation and interpretations that ensure the united, consistent and effective external action and are at the same time based on the principles of democratic supervision, while making use of the comprehensive synergy of Parliament's different roles.

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## **Abbreviations**

Aston proposal: Proposal from High Representative Catherine Ashton for a Council decision on the organisation and functioning of the EEAS

CFSP: Common Foreign and Security Policy

Comitology decision: Council decision laying down the procedures for the exercise of implementing powers conferred on the Commission

COSAC: Conference of Parliamentary Committees for Union Affairs

CSDP: Common Security and Defence Policy

EEAS decision: Council decision on the organisation and functioning of the EEAS

EEAS: European External Action Service

EP: European Parliament

EU: European Union

High Representative: High Representative of the Union for Foreign Affairs and Security Policy

IIA-2002: Inter-Institutional Agreement between the EP and the Council concerning access by the EP to sensitive information of the Council in the field of security and defence policy

IIA-2005: Framework Agreement on relations between the EP and the Commission

IIA-2006: Inter-Institutional Agreement between the EP, the Council and the Commission on budgetary discipline and sound financial management

LT: Treaty of Lisbon

MBT: Modified Brussels Treaty

MIPs: Multi-annual indicative programmes of external financing instruments

NATO: North Atlantic Treaty Organisation

PSC: Political and Security Committee

RoP: Rules of Procedure of the EP.

SPs: Strategy papers of external financing instruments

SWIFT agreement: Agreement between the EU and the USA on the processing and transfer of Financial Messaging Data from the EU to the United States for purposes of the Terrorist Finance Tracking Program

TEC: Treaty establishing the European Community

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

UN: United Nations

WEU: Western European Union

Vienna Convention: the Vienna Convention on the Law of Treaties

## Resümee

### **Euroopa Liidu välistegevus Lissaboni lepingu järgi: institutsionaalne aspekt ja Euroopa Parlamendi pädevus**

1. detsembril 2009 jõustunud Lissaboni lepinguga muudeti oluliselt Euroopa Liidu välistegevuse institutsionaalset raamistikku. Üks lepingu peaesmärke oli tagada ühise välis- ja julgeolekupoliitika ning liidu muu välistegevuse kooskõla ning sidusus, tugevdades seeläbi Euroopa Liidu rahvusvahelist mõju. Samal ajal suurenes Lissaboni Lepinguga oluliselt ka Euroopa Parlamendi pädevus nii liidu kaasseadusandjana kui ka poliitilise kontrolli ja konsulteerimise funktsioonide teostajana.

Käesoleva magistritöö ülesandeks on analüüsida Lissaboni lepinguga kaasnenud õiguslikke võimalusi nende kahe eesmärgi saavutamisel. Autor otsib vastust küsimusele, kuidas tuleks Euroopa Parlamendi aluslepingutest tulenevaid pädevusi tõlgendada ja rakendada nii, et see aitaks kaasa liidu välistegevuse järjepidevusele ja tõhususele. Töö keskseks uurimisteenaks on Euroopa Parlamendi roll liidu välistegevuse üle demokraatliku järelevalve teostajana Lissaboni lepinguga seatud õiguslikes raamides. Kuid autor analüüsib ka võimalusi, kuidas rakendada Euroopa Parlamendi seadusandja ja eelarve kinnitaja pädevusi liidu välistegevuses demokraatliku järelevalve funktsiooni täitmisel.

Töö autor töötab alates 2007. aastast Euroopa Parlamendi õigusteenistuses ja on seeläbi igapäevaselt uurimisvaldkonnaga seotud. Nii on liidu välistegevust käsitlevad teoreetilised lähtekohad ühendatud õiguspraktikaga. Töö teema on asjakohane just käesoleval hetkel, kui aluslepingute uute sätete rakendamine on algstaadiumis. Just praegu peetavate õigusvaidluste ning erinevate juriidiliste argumentide pinnalt tehtud otsustuste tulemused on ühelt poolt pretsedentloova tähtsusega, kuid teisalt ka oluliseks allikaks tulevases kohtupraktikas.

Töö eesmärgiks ei ole anda ammendavat ülevaadet liidu välistegevuse kõikidest institutsionaalsetest aspektidest. Töö keskendub aktuaalsetele õiguslikele probleemidele Euroopa Liidu ning Euroopa Parlamendi Lissaboni lepingu järgse pädevuse määratlemisel, kus mitmed erinevad õiguslikud tõlgendused on võimalikud või pooleaastase kohaldamispraktika käigus on tõusetunud keerulised õiguslikud probleemid, mis vajavad õigusteoreetilist käsitlust, tagamaks kooskõla lepingu teksti, eesmärkide ja põhimõtetega.

Magistritöö esimene osa analüüsib Lissaboni lepingu järgset institutsionaalset raamistikku liidu välistegevuse kujundamisel. Töö autor võrdleb Euroopa Ülemkogu, nõukogu, komisjoni, liidu välisasjade ja julgeolekupoliitika kõrge esindaja ning Euroopa Parlamendi pädevusi ning vastastikkuseid seoseid. Selgub, et eri institutsioonide ja ametikandjate pädevused on liiga segaselt sõnastatud või koguni kattuvad, mis muudab Lissaboni lepingu reeglistiku tõlgendamise juristidele vägagi keeruliseks ülesandeks.

Autor arendab välja kolm teooriat ühise välis- ja julgeolekupoliitika ning liidu muu välispädevuse eristamiseks. See küsimus on edasisel Euroopa Parlamendi õiguspädevuse käsitlemisel otsustava tähtsusega, kuna nii sisulised õiguslikud alused kui ka menetlusreeglid ning parlamendi pädevused on eri juhtudel erinevad. Esimene teooria põhineb liidu välistegevuse eesmärkide ja põhimõtete võrdlusel, kuid selgub, et kuigi aluslepingud pakuvad siin välja laia kataloogi, on see ühine kogu liidu välistegevusele ega võta arvesse kahe valdkonna erisusi. Teine võimalik lähenemine on käsitleda välis- ja julgeolekupoliitika norme kui üldnorme ning Euroopa Liidu toimimise lepingu alusel läbiviidava välistegevuse norme kui erinorme. See käsitus sobinuks Lissaboni lepingu eelsesse õigusraamistikku, kuid läheb vastuollu Euroopa Liidu lepingu artiklis 40 sätestatud vastastikkuse mittemõjutamise klausliga. Kolmas teooria põhineb liidu välistegevuse kooskõla ja sidususe põhimõttel, kuid kahjuks on leping selle põhimõtte kasutamisel ise ebajärjekindel, võimaldades mitmetähenduslikke tõlgendusi. Kokkuvõtteks võib järeldada, et kõik teooriad on kasutatavad vaid teatud juhtudel ning välis- ja julgeolekupoliitika eristamine muust välistegevusest jääb tulevikuski Euroopa Parlamendi, Nõukogu ja komisjoni juristide vaheliste vaidluste pärusmaaks, kus kompromisside mittersaavutamisel ütleb lõpliku sõna Euroopa Liidu Kohus.

Töö teine osa käsitleb Euroopa Parlamendi pädevust ühise välis- ja julgeolekupoliitika kujundamisel Euroopa liidu lepingu alusel. Euroopa Parlamendil puudub siin kaasotsustuspädevus, kuid lepingu artikli 36 kohaselt peab liidu välisasjade ja julgeolekupoliitika kõrge esindaja poliitika põhiaspektide ja põhivalikute suhtes parlamendiga regulaarselt konsulteerima ning tagama, et parlamendi arvamusi võetakse asjakohaselt arvesse.

Autor pakub siinkohal välja õiguslikud võimalused, kuidas parlament saab kasutada oma seadusandlikku ning eelarve kinnitaja pädevusi välis- ja julgeolekupoliitika üle demokraatliku järelevalve teostamisel. Selleks on tarvis tagada kooskõla liidu välistegevuse eri valdkondade

vahel. Eelarvemehhanismide kaudu on võimalik mõjutada välismissioonide ettevalmistamist ja läbiviimist. Selles kontekstis analüüsib töö, millised on lepingust tulenevad piirid parlamendi pädevusele uudses menetluses eelarvevahendite kiireks eraldamiseks missioonide algatamisel, kus Nõukogu peab konsulteerima parlamendiga. Ka pakub autor välja tõlgendused Euroopa Parlamendi ja liikmesriikide parlamentide vahelisele koostööraamistikule Lissaboni lepingu ning Lääne-Euroopa Liidu laialisaatmise valguses. Eraldi käsitleb autor problemaatikat seoses parlamendi ligipääsuga salastatud ja piiratud juurdepääsuga informatsioonile, kus kehtivaid institutsioonidevahelisi kokkuleppeid tuleb Lissaboni lepingu eesmärkide täitmiseks ning demokraatliku järelevalve tagamiseks tõhustada.

Töö kolmas osa uurib Euroopa Parlamendi Euroopa Liidu toimimise lepinguga sätestatud pädevusi, mis on oluliselt suurenenud. Keskkel kohal on siin lepingu artikkel 218, mis sätestab liidu välislepingute läbirääkimise ja sõlmimise menetluse. Esiteks on suurenenud valdkondade hulk, kus parlament teostab koos nõukoguga kaasotsuspädevust, sisaldades ka välispoliitika valdkondi. Teiseks on nõutav parlamendi nõusolek, et sõlmida liidu välislepinguid, mis hõlmavad valdkondi, mille suhtes kohaldatakse kas seadusandlikku tavamenetlust või seadusandlikku erimenetlust, mille puhul on nõutav Euroopa Parlamendi nõusolek. Kolmandaks teavitatakse Euroopa Parlamenti viivitamata ja täielikult kõigil menetluse etappidel, alates läbirääkimisjuhiste ettevalmistamisest kuni lepingute rakendamiseni.

Töö pakub välja mitmeid tõlgendusi, tõhustamaks parlamendi järelevalvet liidu välistegevuse üle. Parlamendi esindajad tuleb kaasata vaatlejatena lepingute üle peetavatele läbirääkimistele. Parlamendi eelisõigused liikmesriikide erikomitee suhtes peavad olema kooskõlas lepingu eesmärkidega. Parlamendi nõusolekumenetluse legitiimsus põhineb siseriiklikul kaasotsustusmenetlusel ning on kohaldatav valdkonniti, mitte õiguslikke aluseid pidi. Välislepingute ajutine kohaldamine ilma parlamendi seisukohta ärakuulamata toob kaasa sisulise vastuolu lepingu eesmärkidega. Parlamendi mittekaasamine menetlusse, millega kehtestatakse lepingus sätestatud organis liidu nimel võetavad seisukohad, kui asjaomasel organil tuleb vastu võtta õigusliku toimega akte, ei ole aluslepingute loogikat arvestades põhjendatud. Eraldi õiguslikku analüüsi väärivad liidu väliskoostöö rahastamisinstrumendid, mis tuleb kooskõlla viia Lissaboni lepinguga juurutatud delegeeritud õigusaktide süsteemiga, tagamaks Euroopa Parlamendi seadusandlike, eelarvealaste ja demokraatliku kontrolli pädevuste järgimise.

Parlamendi täieliku teavitamiskohustuse kontekstis vajab läbivaatamist ka piiratud juurdepääsuga informatsiooni edastamine Nõukogust ja komisjonist. Väga huvitav on küsimus, millise õigusliku režiimi alusel rakendub teavitamiskohustus välislepingute puhul, mis on seotud eranditult ühise välis- ja julgeolekupoliitikaga. Euroopa Liidu lepingu Artikkel 36 ja Euroopa Liidu toimimise lepingu Artikli 218 lõige 10 on konkureerivad sätted, mille mõlema kasuks on Lissaboni lepingus mitmeid kaalukaid argumente. Liidu välisasjade ja julgeolekupoliitika kõrge esindaja, kes on siin kohustatud pooleks, ei ole seni ühtset praktikat kujundanud.

Töö viimane osa keskendub Euroopa välisteenistuse loomisel tõusetunud õiguslikele probleemidele. Autor seab kahtluse alla õigusliku aluse ning nõukogu otsuse eelnõu reguleerimisala vastavuse Lissaboni lepingu nõuetele. Selgub, et Euroopa Parlamendi *de-facto* kaasotsustusmenetlus selles küsimuses pole ainult poliitiline konstruktsioon, vaid ka õiguslikult põhjendatud nõue. Ühelt poolt Euroopa Parlamendi ning teiselt poolt liidu välisasjade ja julgeolekupoliitika kõrge esindaja ning välisteenistuse vahelised suhted tuleb reguleerida täiendavalt, tagamaks parlamendi järelevalve liidu välistegevuse üle ning selleks on võimalikud erinevad õiguslikud vormid.

Lõppjärelalusena leiab autor, et Lissaboni lepinguga nõutav sidusus liidu välistegevuses on võimalik saavutada institutsioonide pädevusi vastastikku koostoimes tõlgendades ja rakendades, seda nii seadusandlikul, täidesaatval kui ka poliitilise kontrolli tasandil. Euroopa Parlamendi erinevaid funktsioone ühitades tuleb tagada välis- ja julgeolekupoliitika ning teiste välistegevuse valdkondade vaheline ühtsus, järjekindlus ja tõhusus. Autor on analüüsinud ja arendanud välja Lissaboni lepingu järgselt kehtivate aluslepingute õiguslikke tõlgendusi, mis võimaldavad rakendada senisest efektiivsemalt Euroopa Parlamendi pädevusi demokraatliku järelevalve funktsiooni teostamisel ning aidata seeläbi kaasa lepinguga liidu välistegevusele seatud eesmärkide täitmisele.