

The EU's Treaty of Lisbon: What's in it for Kosovo?

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Abstract

This paper will outline the most important provisions of the Lisbon Treaty in the area of 'external action', as it is called in the treaty. This basically includes what used to be called 'external relations' (of the Community pillar) and Common Foreign and Security Policy (CFSP), including defence policy (of the second pillar of the Maastricht Treaty). Will the Lisbon Treaty improve the efficiency, democratic legitimacy "as well as the coherence of its external action," as the mandate from the June 2007 meeting of the European Council claimed it should?

Introduction

The EU's latest treaty, the Treaty of Lisbon, is important for all future member states of the EU, including Kosovo, because it gives the legal foundation of how the EU operates. In the case of Kosovo, which is not yet an official candidate country, there is further the point that a stronger EU can better help Kosovo go through the transition towards a liberal democracy with a well-functioning market economy, which are the main conditions of membership, spelled out in the Copenhagen criteria for membership in 1993.

In this paper I shall outline the most important provisions of the Lisbon Treaty in the area of 'external action', as it is called in the treaty. This basically includes what used to be called 'external relations' (of the Community pillar) and Common Foreign and Security Policy (CFSP), including defence policy (of the second pillar of the Maastricht Treaty). Will the Lisbon Treaty improve the efficiency, democratic legitimacy "as well as the coherence of its external action," as the mandate from the June 2007 meeting of the European Council claimed it should? (Council of the European Union, 2007).

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The ill-fated Constitutional Treaty would have replaced all existing treaties of the EU by one new treaty. The Lisbon Treaty reverts to the classical method of treaty reform, amending the existing treaties. For that reason the treaty that was signed in Lisbon on 13 December 2007, and which entered into force on 1 December 2009, is much more difficult to read than the Constitutional Treaty was (Council of the European Union, 2004a and b). Luckily the consolidated version of the treaties incorporating the Lisbon Treaty, which was published in early 2008, is easier to read than the Lisbon Treaty itself (European Union, 2008). So in this paper I shall compare the 2003 (post-Treaty of Nice) and 2008 (post-Treaty of Lisbon) versions of the Union's Consolidated Treaties.

Does 'External Action' need better institutions?

But let me start by justifying this focus on institutions. It is based on the assumption that 'institutions matter.' This is the claim of many contemporary social scientists. If CFSP, an important part of 'external action', stays intergovernmental – or confederal – does it have the institutional capacity required to solve the problems it is supposed to solve?

In a concluding chapter to a book, I edited in 2003, I took a game-theoretical look at institutional requirements (Laursen 2003).² I argued that if you face a Prisoners' Dilemma situation, i.e. a situation where there is a temptation to cheat or defect from an agreement, you need strong surveillance and enforcement institutions, basically 'pooling and delegation' of sovereignty as happened in the European Communities originally, later the EU pillar in the Maastricht Treaty (terms from Moravcsik 1998). If the Member States do not implement decisions in what used to be the first pillar 'defection' can be sanctioned by the Commission and European Court of Justice (ECJ). This possibility does not exist in Common Foreign and Security Policy (CFSP), the second pillar of the Maastricht Treaty. I also argued that strong institutions are required when you face distribution problems – known as Battle of the Sexes in game theory. If there is a distribution problem you need to find an equitable solution, possibly compensating the loser. Budgetary means and linkage strategies – bargaining exchanges – can be used to solve distribution

² See also Laursen (2007).

problems. Brokerage by third parties, such as independent Community institutions, can sometimes assist the Member States in finding mutually acceptable solutions to distribution problems. At the same time, admittedly, there are simple coordination problems where the different actors will get the same payoff and where there is no temptation to cheat. Such situations do not require elaborate institutions – or regimes as they have been called by some International Relations (IR) scholars.³ I argued that in such situations the so-called Open Method of Coordination (OMC) applied by the EU in its so-called Lisbon Strategy (2000-2010) to make the European economy more competitive should be sufficient. Needless to say, the question you can ask then is whether the problems dealt with by the Lisbon Strategy were simple coordination problems? If some of the problems were Prisoners' Dilemma or Battle of the Sexes problems then OMC would be inadequate to insure efficient and equitable solutions. Indeed, the 10-year period of the Lisbon strategy has now finished without much success! The strategy did not create real 'commitment institutions' (term borrowed from Mattli, 1999).

If we try to use this kind of game-theoretic reasoning to CFSP we need to decide what kind of issues are faced by CFSP. Probably we find all the mentioned kinds of issues. Surely, there can be conflicting interests where CFSP cannot cope, such as the US-led intervention in Iraq in 2003. On the other side of the spectrum there may sometimes be harmony of interests or the EU may face simple coordination games. Decisions even under CFSP's consensus rules will then be easy.

The next question is: how often does CFSP face Prisoners' Dilemma and Battle of the Sexes Problems, also known as collective action problems. The answer is not easy because costs and benefits can be difficult to measure in foreign and security policy. But the wide-spread feeling that CFSP is inefficient suggests that CFSP decisions are often sub-optimal. It is known from alliance theory that partners are tempted to cheat by contributing less than average to common defence; so you can have 'free riding'. In fact, the financing of CFSP and European Security and Defence Policy (ESDP) has been a difficult and controversial issue.

³ For a good introduction to game theory and international institutions, see especially Stein, 1990.

Table 1
Nature of Issues and Institutional Requirements

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|-----------------------------------|--|--|---|--|---|
| Nature of Issue | Conflicting interests/ pure conflict | Dilemma of common interests. Temptation to defect (Prisoners' Dilemma) | Coordination problem with distributional issues (Battle of the Sexes) | Simple coordination problem. No distribution issue | Harmony of interests |
| Institutional requirements | Institutions to no avail. Institutions will probably not be created. Convergence of interests required | Pooling and delegation of sovereignty. Sanctions against defection | Pooling and delegation of sovereignty. Side- payments. Budgetary means for compensation of losers | Open Method of Coordination (OMC) sufficient | Institutional-isation not necessary. Parallel unilateral action sufficient. |

Source: Adapted from Laursen (2003).

One question arises, if the EU has not been able to pool and delegate sovereignty in CFSP, is there any hope for an efficient CFSP? The only alternative mentioned in rational theory is leadership. Already Lindberg and Scheingold (1970) mentioned leadership as an important 'input' in an integration process. They saw the possibility of both national leadership (by Member States) and supranational leadership (especially by the Commission). In his comparative theory of regional integration Mattli (1999) singled out leadership as a decisive variable for successful integration. He focused especially on national leadership, singling out Germany as a regional paymaster in the EU. There is also some recent research looking at the role of Community institutions in the grand EU bargains (Beach 2005) and the role of the Presidency in day-to-day decisions in the EU (Tallberg 2006). Both Beach and Tallberg based their work on the assumption that the EU needs to overcome collective actions problems. Community institutions and the Presidency can contribute to overcoming collective action problems. This suggests that a combination of good institutions and leadership from these institutions can contribute to efficient and equitable decisions in the EU.

Beyond these rationalist institutionalist approaches sociological institutionalists would argue that development of a stronger collective identity in the EU can also contribute to making it easier to solve problems. This may be the Lisbon Treaty's best hope when it comes to CFSP. Can the new European External Action Service (EEAS) for instance help create more common identity among EU diplomats? How strong will such identity become and could it make a difference?

The Lisbon Treaty

The Lisbon Treaty retained most of the institutional changes of the Constitutional Treaty (de Poncins 2008; Griller and Ziller 2008; and Sauron 2008). It amends the Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC), the latter being renamed The Treaty on the Functioning of the European Union (TFEU). All references to symbols of constitutionalism, including flag, anthem and motto, have been removed. Legislative acts will not be called laws and framework laws, but retain the old names of regulations and directives. The new post in the Constitutional Treaty of Union Minister for Foreign Affairs has been renamed High Representative of the Union for Foreign Affairs and Security Policy (HR). Nor does the new treaty explicitly say that Union law has primacy, although it will have such primacy based on case law of the European Court of Justice (ECJ) going back to the early years of European integration.

The Lisbon Treaty retains the provision proposed by the Constitutional Treaty for electing the President of the European Council “by a qualified majority, for a term of two and a half years, renewable once” (Art. 15(5) TEU). At the same time the European Council officially becomes an institution. The European Council will, among other things, determine “the strategic interests and objectives of the Union” for all its external action (Art. 22(1) TEU), thus in principle bringing external relations and CFSP together. The President of the European Council will also be involved with external representation of the Union. The job description of the new post is not very detailed though.

External Action in the Lisbon Treaty

The Lisbon Treaty formally abolishes the pillar structure. CFSP, the old second pillar, however will largely remain intergovernmental even after the formal abolishment of the pillar structure.

The old pillar structure created problems of coherence between external relations of the Community (1st pillar) and CFSP (2nd pillar). In the past only the Community had legal personality. The Lisbon Treaty attributes legal personality to the Union as a whole (Art. 47 TEU). So in the future the Union will also be able to

enter into international agreements under CFSP. The new High Representative will deal with both external economic relations of the Union, in his/her capacity of Vice-President of the Commission, as well as CFSP issues, in his/her capacity of High Representative and as Chairman of the Foreign Affairs Council (Art. 27(1) TEU). This should be seen as an effort to increase coherence in external action in general.

The new TEU has a longer list of external action objectives than the previous treaties. They are listed in the section on external action so they cover both external economic relations, including trade, development and humanitarian aid, as well as CFSP. Including this list in the new external action section of the treaty means for instance that the EU will have to work to consolidate human rights in its commercial policy.

Common Commercial Policy

Common Commercial Policy remains a central part of the Union's external action. It has been an exclusive competence since the Treaty of Rome (original Art. 113). The Commission negotiates trade deals multilaterally within the GATT – and now the WTO – as well as bilaterally with third countries. Decisions can be made in the Council by a qualified majority vote (QMV). The ECJ has jurisdiction. In other words, the Community method, or 'pooling and delegation' of sovereignty, is applied for commercial policy. Interestingly enough, the original article 113 did not mention the European Parliament.

The original treaty basically covered trade in goods. But some international treaties included matters where the member states remained competent. They were so-called mixed agreements. For such agreements procedural rules were and remain more complicated. Such agreements, for instance, also may require national ratification. Sometimes the European Parliament has to be consulted. Sometimes it has a right of 'assent', now renamed 'consent' in the Lisbon Treaty

The Uruguay Round of GATT extended the international trade agenda to include services and trade related aspects of intellectual property (TRIPS). The ECJ in 1994 decided that these new areas were partly under national competence.

In the treaty reforms that followed there were efforts to extend the definition of trade to include services and intellectual property. They were included by the Treaty of Amsterdam, but decisions had to be by unanimity. The Treaty of Nice

introduced QMV for services and intellectual property. But “cultural and audiovisual services, educational services, and social and human health services” would still require unanimity (Art. 133 TEC).

The Treaty of Lisbon retains QMV for services and intellectual property, and extends it to the new category of foreign direct investment. However, it retains unanimity for cultural and audiovisual services (“where these agreements risk prejudicing the Union’s cultural and linguistic diversity”) as well as social, education and health services (“where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them”).

Finally the Lisbon Treaty introduces the so-called ordinary legislative procedure for commercial policy, which gives the European Parliament (EP) a much stronger role in commercial policy (Art. 207 TFEU). Making the EP a co-legislator in commercial policy is one of the more important innovations of the Lisbon Treaty. The same happens in the area of the Common Agricultural Policy (CAP), the *bête noir* of the EU for many Third Countries (Art. 43 TFEU, ex. Art 37 TEC).

Common Foreign and Security Policy

The Union’s CFSP competence remains limited in various ways by the Treaty of Lisbon. According to Article 24 TEU there are ‘specific rules and procedures’ for CFSP. Unanimity will remain the normal decision rule. Adoption of legislative acts is excluded. And the ECJ normally has no jurisdiction. There are two exceptions: The reference to Article 40 means that the ECJ will “be empowered to referee disputes over the interface of the Union’s general authority and its specific authority relating to the CFSP” (Siebersson, 2008, p. 180). The other exception concerns restrictive measures involving individuals. The Maastricht Treaty had introduced procedures for adopting sanctions involving both CFSP (the political decision) and the Community (the actual sanctions, often involving trade measures). These sanctions were aimed against states. This created a problem for sanctions against individuals, so-called ‘smart sanctions’ that the EU may want to use against terrorists (see Wouters et al. 2008, p. 193). The Lisbon Treaty has a new article that allows restrictive measures “against natural or legal persons and groups or non-State

entities” (Art. 215(2) TFEU). Article 275 TFEU gives the ECJ jurisdiction to review the legality of such restrictive measures against natural or legal persons. This is a very technical change, but an important one.

CFSP is not listed in the treaty’s lists of either exclusive or shared competences. One of these lists mentions common commercial policy as an exclusive competence of the Union (Art. 3(1) TFEU). Development cooperation and humanitarian aid are mentioned among shared competences (Art. 4(4) TFEU). CFSP is mentioned separately as a competence without giving this competence a specific name (Art. 2(4) TFEU).

These various provisions of the new treaty show that despite the formal abolishment of the pillar structure there is still an important difference between external (economic) relations, which used to fall under the old 1st pillar, and CFSP, the old 2nd pillar. The Member States were not ready to extend the ‘Community method’ to the latter. So a *de facto* special CFSP pillar will remain.

Although the basic decision rule for CFSP is unanimity, there are possibilities of some decisions being made by a QMV. Of the four possibilities for QMV mentioned in the treaty three already existed previously. The new one is the one where the HR proposes a decision following a ‘specific request’ from the European Council. However, unanimity is still the normal rule in the European Council.

The treaty also includes so-called ‘constructive abstention’, which goes back to the Amsterdam Treaty. Only those voting in favour of a decision are committed. Those abstaining, and explaining why, in a declaration, are not committed but accept that the decision commits the Union (Art. 31(1) TEU).

The idea that the Council can make implementing decisions by QMV is not new, but the Member States have so far hesitated to use this possibility. In Article 31 TEU the possibility is linked with a so-called ‘emergency brake’. A state that has ‘vital’ reasons for opposing a decision can request that the decision be moved from the Council (of Ministers) to the European Council (of Heads of State or Government) for a decision by unanimity. There is a tightening here since it used to be ‘important’ reasons under the Treaty of Nice (UK, House of Commons, 2008, p. 42). On the other hand, the article in question also includes a bridging clause – *passerelle* - whereby it can be decided by unanimity in the European Council to move some area(s) of CFSP decision making, beyond the four listed, from unanimity to

QMV. This does not include defence matters, though. So all in all, a complex set of rules. Most likely unanimity will remain the norm. But pressures for decisions in a Union of 27, or more member states in the future, could produce situations where the Chair will decide for a vote by QMV – the way it eventually happened after the Luxembourg Compromise of 1965, where General de Gaulle insisted on having a national right of veto for important decisions, even if the Treaty of Rome prescribed a QMV.

Let's add that the UK secured two Declarations during the Lisbon Intergovernmental Conference (IGC), namely nos. 13 and 14, which stress the intergovernmental nature of CFSP. Declaration 13 says that the creation of the office of the HR and the establishment of an External Action Service “do not affect the responsibilities of the Member States as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.” Declaration 14 specifically mentions the Security Council of the United Nations and says that the CFSP provisions of the treaty “do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.”

So CFSP has been strongly ring-fenced by the treaty.

The new High Representative for Foreign Affairs and Security Policy (HR) shall conduct CFSP and be a Vice-President of the Commission. This has been referred to as double-hatting. Since he or she will also chair the Foreign Affairs Council (Art. 18(3) TEU) the HR will arguably have three hats. The position is a major innovation. The new HR should become a central figure in the external (economic) relations as well as foreign and security policy of the Union. Some turf battles with the new permanent President of the European Council as well as the President of the Commission can be expected. Further there will also be a General Affairs Council to be chaired by the rotating national Presidency. Much will depend on the personalities of those appointed, and whether some memorandum of understanding about the roles is worked out or develops.

The HR will be assisted by a new European External Action Service (EEAS) composed of officials from the Council Secretariat, the Commission and seconded from Member State Foreign Ministries. This is another important innovation. Details

of the arrangement are currently been worked out. The EEAS is expected to reduce duplication and facilitate the development of a more effective external policy of the EU (UK, House of Parliament 2008, pp. 63-66). Notice however that the provisions on the EEAS are to be found in the treaty section on CFSP, not in the general section on 'external action'. So how much of a coordinating body will it be? How much can it contribute to consistency between the different components of 'external action'?

It is worth mentioning that the existing Commission Delegations in third countries and at international organisations have become EU Delegations. Diplomatic missions of Member States are required to cooperate with Union delegations (Art. 32 and 35 TEU).

The instruments of CFSP used to be joint actions and common positions, introduced by the Maastricht Treaty, and common strategies, introduced by the Amsterdam Treaty. The distinction between the three could sometimes be difficult in practice. The Lisbon Treaty instead talks about general guidelines and decisions. This at least is a simplification.

The basic budget provisions of the Lisbon Treaty for CFSP remain the same as those that existed previously. Administrative expenses will be charged to the Union budget, while operating expenses normally will 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" (art. 41(3) TEU). Financing military and defence operations can thus potentially be a problem. The Lisbon Treaty tries to help by adding provisions for urgent financing, including the setting up of a start-up fund.

Common Defence and Security Policy (CDSP)

Common Defence and Security Policy (CDSP), which used to be called European Security and Defence Policy (ESDP), gets a more prominent place in the new treaty. The basic definition does not change much, but there is now a new emphasis on operational capacity including both civilian and military assets.

The so-called Petersberg tasks, defined at a meeting of the Western European Union (WEU) in 1992, and included in the EU treaties by the Amsterdam Treaty, are extended to include joint disarmament operations, post-conflict

stabilisation as well as “fight against terrorism, including by supporting third countries in combating terrorism in their territories.” Both civilian and military means can be used.

The emphasis on operational capacity has led to the establishment of a European Defence Agency. In fact, this agency has already been established in 2004.

Flexibility Provisions in CFSP and CSDP

The Lisbon Treaty will introduce more flexibility in CFSP, including CSDP. This is an important aspect of the treaty.

First, the Lisbon Treaty allows for ‘enhanced cooperation’ in all areas, including CFSP and CSDP (Art. 20 TEU). The Treaty of Nice did not allow for ‘enhanced cooperation’ in defence. Establishing enhanced cooperation will require a minimum of nine Member States (Art. 20(2) TEU), against eight previously. Enhanced cooperation in CFSP, including CSDP, further requires unanimity in the Council (Art. 329(2) TFEU).

The Lisbon Treaty also introduces the new concept of ‘permanent structured cooperation’ in the defence area. This is considered an important innovation by many observers (e.g. Angelet and Vrailas 2008). Contrary to ‘enhanced cooperation’ it does not require unanimity to be established, but a QMV. The idea is that Member States with greater willingness and capacity in the area of defence ‘shall’ go together in some kind of closer cooperation of a more permanent kind. This cooperation is geared towards increasing the military capabilities of the Member States and thus the Union.

‘Constructive abstention’ mentioned above, and which is not new, can also be seen as a kind of flexibility, but more *ad hoc*.

Importantly, for the expanded Petersberg tasks, the Lisbon Treaty mentions the possibility of entrusting “the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task” (Art. 44 TEU). Such a group is often referred to as a ‘coalition of the able and willing.’

All in all there are now a number of flexibility provisions which can be applied in the areas of CFSP and CSDP.

Flexibility arrangements can be seen as a way to get around unanimity requirements in the treaty. Needless to say joint action by all members will be a stronger manifestation of common identity and solidarity and may well in many situations be more efficient.

Mutual Defence and Solidarity

A somewhat controversial new mutual defence or mutual assistance clause has been added to the treaties by the Lisbon Treaty (Art. 42 TEU). The language can resemble the collective defence articles of the WEU and NATO treaties. Notice the provisos though. The obligation of assistance “shall not prejudice the specific character of the security and defence policy of certain Member States”, read non-aligned Member States. Further, commitments must be consistent with NATO commitments, a stipulation considered important by the more pro-Atlantic Member States, including the UK.

Finally, I should mention the new mutual solidarity clause, which is part of the TFEU. This deals with terrorist attacks against Member States or natural or man-made disasters in Member States. The article asks for solidarity and mobilisation of all instruments, including military resources. This is the Union’s response to events like 9/11 in general and the terrorist bombings in Madrid and London in particular.

Significance of Changes

If ‘institutions matter,’ as claimed by many social scientists, the Lisbon Treaty should be expected to produce more efficiency and legitimacy as well as more coherence and effectiveness in the Union’s external action. The theoretical reasons for this are the following:

1. The extended use of the so-called ordinary legislative procedure increasing the involvement of the EP should in principle produce more legitimacy.
2. The increased use of QMV in the Council should increase efficiency, which in turn may also be good for legitimacy to the extent that grid-lock can be avoided or at least be reduced. More concrete results may produce more support.

3. The new double or triple-hatted HR should bring more coherence to external action. The EEAS is an important new agency that should help increase the capacity for external action, by providing information and analysis.
4. If the member states are willing to use QMV the possibilities are there in the treaty, also for CFSP, although still normally based on preceding unanimity in the European Council, where the Union's strategic interests are defined. In the end much will depend on the political will of the member states. As long as unanimity dominates you have 27 veto points in EU-27, and you will have more in the future as the Union moves towards further enlargements.
5. The new permanent President of the European Council may also be able to give the EU more continuity and direction.

The EU is promising much in its treaties. The list of objectives, values and good intentions is long. But the member states have ring-fenced CFSP in the Treaty. It remains intergovernmental. So the discrepancy between rhetoric and action will most likely remain considerable. Those who favour increased capacity for international action of the EU can hope that there will be a convergence of interests among the Member States. Interaction, actor socialisation and learning processes may gradually produce collective European identities among foreign policy decision-makers in Europe, which in turn may affect interests. But the rationale of collective action will then still have to be communicated to the European publics in a convincing way.

The Lisbon Treaty has also increased the possibility of some member states going ahead without waiting for the slower members, the laggards. Flexibility, multi-speed integration, in various forms, have contributed to the integration process in the past, so why not in other areas in the future, including CFSP? Schengen cooperation started among a small group of five states. Today it involves most member states. Economic and Monetary Union (EMU) did not include all member states at the outset, but the number of participating states has increased since 1999, when the single currency was introduced, and more member states are expected to

join in the coming years. This is why the increased possibility of flexibility in CFSP may also turn out to be a useful tool in the future.

In the area of defence in particular we know that things will only move once France and the UK have agreed and preferably Germany has joined. Then other Member States may 'bandwagon.' The development of a common defence policy, made possible by the Treaty of Maastricht, only started after the historic meeting of minds at the Franco-British summit at Saint Malo in 1998 (see for instance Howorth 2007). Then things suddenly moved very fast. But it may be that a kind of plateau has been reached now and that further incentives and instruments are needed. The Lisbon Treaty has added to the toolbox, but it cannot change the constraints of domestic politics. National leadership is also required.

To the initial question: 'What's in it for Kosovo?' the answer then is that Kosovo, and other countries in the Western Balkans that aspire for membership, can hope that the EU will become a more coherent and efficient international actor that will better be able to contribute to solutions of the problems in the region. The intergovernmental character of CFSP remains a problem for Kosovo, though. The EU's policy towards Kosovo is rudimentary because of disagreements between the member states and the unanimity requirement. The fact that five member states have not officially recognized Kosovo's independence is a serious problem that will be difficult to solve. But the EU can and is trying to contribute to finding some negotiated understanding, or some *modus vivendi*, between Kosovo and Serbia. Eventually this may make it easier for the five member states that have not recognized Kosovo to do so.

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