

## Institute for European Integration Research

### Working Paper Series

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# EU Policies in the Lisbon Treaty: A Comparative Analysis

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with minor stylistic improvements.

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## **Abstract**

*This paper presents a collaborative project by a team of members of the Institute for European Integration Research at the Austrian Academy of Sciences. It compares five EU policy areas in the following dimensions: common objectives on supranational level, EU competences in the field, available policy instruments, decision-making procedures and institutional developments, and finally the importance of the Lisbon Treaty's coming into force (or, alternatively, its failure). One insight from the comparative approach is that the Lisbon Treaty outshines previous EU reforms in terms of introducing new (explicit) objectives, improved policy instruments, new (explicit) competences and room for decisions without unanimity requirement. The final chapters offer a cross-sectoral discussion of reform potentials and their practical limitations, based on tables with meta-level overviews. The policies discussed in detail cover energy, social, foreign, security & defence as well as justice & home affairs.*

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## List of Abbreviations

DG	Directorate General
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
EP	European Parliament
EU	European Union
Eurojust	European Judicial Cooperation Unit
Europol	European Police Office
Frontex	European Agency for the Management of Operational Cooperation at the External Borders
FYROM	Former Yugoslav Republic of Macedonia
IGC	Intergovernmental Conference
NATO	North Atlantic Treaty Organisation
OMC	Open Method of Coordination
QMV	Qualified Majority Voting
SEA	Single European Act
TEC	Treaty establishing the European Community
TEC-A	Treaty establishing the European Community - Version of the Treaty of Amsterdam
TEC-N	Treaty establishing the European Community - Version of the Treaty of Nice
TEU	Treaty establishing the European Union
TEU-A	Treaty establishing the European Union -Version of the Treaty of Amsterdam
TEU-L	Treaty establishing the European Union -Version of the Treaty of Lisbon
TEU-M	Treaty establishing the European Union -Version of the Treaty of Maastricht
TEU-N	Treaty establishing the European Union -Version of the Treaty of Nice
TFEU	Treaty on the Functioning of the European Union
TREVI	Terrorisme, Radicalisme, Extrémisme, Violence Internationale
UK	United Kingdom
WEU	Western European Union

# 1. INTRODUCTION AND INSTITUTIONAL BACKGROUND (GERDA FALKNER)

Although the fate of the Lisbon Treaty is not yet decided<sup>1</sup>, researchers need to discuss if the changes would bring significant innovation, and if so, to what degree. Even if the changes agreed upon by the Member States' governments never come into force, the agreements reached in the tough negotiations will still represent benchmarks for future deals. Moreover, some changes can be implemented without formal treaty reform and hence the Lisbon Treaty could be of some significance even without ever being ratified.

European integration is a complex and multiform process and in this case, policy specific differences are also of crucial significance. Some fields are salient in terms of the innovation the new legal bases would represent, others are hardly affected at all. Therefore, this research paper of the Institute for European Integration Research at the Austrian Academy of Sciences will compare a number of policy areas before, and after the Lisbon Treaty, regarding:

- common objectives at the EU level (chapter 2),
- EU competences in the field (chapter 3)
- the available policy instruments (chapter 4)
- decision-making procedures, institutional developments and position in the Treaty architecture (chapter 5).

On this basis, we will discuss the importance of the Lisbon Treaty from the policy perspective and will outline which changes in the analysed policies could be implemented on the basis of the existing Treaties (chapter 6). A cross-policy comparison of the Lisbon Treaty's impact will

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<sup>1</sup> This paper covers the content of the Lisbon Treaty in five policy areas, not the controversies surrounding its ratification process. The state of affairs around the time of completion of our EIF Working Paper is e.g. represented in O'Brennan 2008, Kaczynski et al. 2008.

end this Working Paper, putting the policy specific insights into context (chapter 7). A number of figures and tables will be capturing the overall development, offering a reader friendly analytical overview.

The idea for this project originated in the new director's desire to foster co-operation and teamwork among the Institute's scientists. It is a favourable circumstance that the members of the Institute for European Integration Research are specialists in several of those EU policies where the Lisbon Treaty would actually bring about significant innovation. Most importantly, Justice and Home Affairs, as well as foreign and defence policies, need mentioning here. Further fields included in our collaborative work (energy policy, social policy) experience less, or less relevant changes. Hence, smaller stakes are involved in case the Lisbon Treaty never enters into force. In any case, the comparative method puts accomplishments and challenges into perspective.

This is not only this paper's approach but a feature that characterises our Institute more generally. In 2007, the Austrian Academy of Sciences initiated a reform of the Institute for European Integration Research. It is now a political science institute focusing exclusively on the European Union and its policies across multiple levels. Our new research programme builds on the analytical, variable-based comparison of policy areas. Our ambition is to further theories of political steering in multi-level systems, with the European Union as the case at hand. Building on the interesting but often eclectic state-of-the-art in modern political and social sciences, both genuine problem-solving potentials and specific joint-decision traps built in the EU's political system deserve a systematic and encompassing analysis. This research should reach beyond the narrow realm of individual case or sector studies. Nowadays, the question of how to prevent decision-making failure in multi-level political systems is of pre-eminent importance both in Europe and globally.

Within this analytical field, our Institute will lend itself to three closely related and mutually non-exclusive research areas: the EU's internal policies such as e.g. energy policy,



environmental policy, social policy, etc.; the EU as an external or even global actor (in the Common Foreign, Security and Defence Policies, and beyond) with specific sources of influence, specific coordination problems and specific (inter)dependencies; and the frequently insufficient implementation of supranational policies in the domestic spheres and Europeanisation effects on various levels.

From now on, the Institute for European Integration Research's staff will regularly embark on a collective research project. Some of these will be longer term and will include prominent international scholars. In this initial year 2008, right after the Institute's fresh start with its research programme, we decided to co-author this working paper. We chose a project and approach that builds on and further solidifies our EU policy expertise, on the one hand, and that we considered of interest for a wide audience, on the other hand. The publication in English and as an online working paper shall make the text easily accessible in the shortest possible time. This seems appropriate both regarding the topic and the timing of our exercise (with a new referendum in Ireland being hotly debated these days).

While all staff of the Institute for European Integration Research discussed all parts of the paper intensively, the text on each EU policy has one or two researchers as the responsible author(s):

1. Energy policy (Johannes Pollak, Peter Slominski)
2. Social policy (Andreas Obermaier)
3. Foreign policy (Jozef Batora)
4. Security and defence policy (Nicole Alecu de Flers)
5. Justice and Home Affairs (Florian Trauner)

Gerda Falkner, Director of the Institute for European Integration Research since 1 January 2008, initiated as well as coordinated this internal research project and drafted the

introductory and comparative sections, on the basis of our policy experts' information and with their collaboration.

She thanks all authors<sup>2</sup> for their efforts and for the collegial and fruitful debates on sometimes intricate issues. As always, the look across fences (here: policy areas) sharpens our mind and reveals differences in empirics, but also concepts, that might otherwise have gone unnoticed. The comparative approach may be costly in terms of need for discourse and working time, but it is in a unique position to offer fresh insights and put older ones into perspective.

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<sup>2</sup> All authors thank Maria Duftner (formatting, website management) and Lindsay Hughes (language editing).

## **2. COMMON OBJECTIVES AT THE EU LEVEL (INCLUDING NEW ISSUES RAISED IN THE LISBON TREATY)**

### **2.1. Energy policy (Johannes Pollak, Peter Slominski)**

For more than fifty years the objectives of the EU energy policy have revolved around supply security (diversification of suppliers and supply routes), the creation of an internal European Energy Market in oil, gas, and electricity (including price transparency and unbundling of vertically integrated energy companies), and sustainability mainly directed towards energy efficiency and energy savings. Those three objectives have time and again been repeated in Council Conclusions, White Papers, Green Papers, Directives, Regulations, and Commission Communications. Despite these efforts, neither a fully-fledged common Energy market nor a sufficient level of energy security and sustainability has been achieved so far.

Two of the three founding treaties explicitly deal with energy issues: the 1951 Treaty establishing the European Coal and Steel Community<sup>3</sup> and the 1957 Euratom Treaty. Both treaties can be understood as *leges speciales* (Grunwald 2003), i.e. they are sectoral treaties trying to introduce coordination with regard to coal, steel and nuclear energy, but did not intend to establish a coherent and common energy policy. Although the then six Member States agreed on the need for such an integrated approach and the European Economic Community Commission demanded more coordination in the energy area (EEC Commission Report 17 September 1958) it took the Member States until 1964 to sign a protocol in which they emphasized the need for a common energy market and evinced their will to establish a common energy policy. In the early years the Member States were more interested in securing the energy supply of their national industries, which were needed for Europe's reconstruction after the Second World War. And the best way to do so, seemed to be championing national

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<sup>3</sup> The ECSC Treaty expired on 23 July 2002.

energy companies to a large degree owned by the respective state. It took more than two decades to overcome this thinking and to introduce market principles in the energy field. Due to the two oil crises in the 1970s, the highly volatile oil price, the overproduction of coal in Germany and the overproduction of nuclear energy in France, the Member States risked their first timid steps towards liberalisation and deregulation since the late 1980s (Schmidt 1998: 183ff). Those steps did not require a change of primary treaty law but were based on general common market provisions of the EC-Treaty.

Although the European Commission had already proposed a wide ranging and comprehensive energy chapter in the negotiations prior to the Maastricht Treaty, the Member States only agreed to include energy in the list of activities and objectives (Art. 3 EC). Contrary to other policy fields, in which specific and concrete instruments for the achievement of an objective were included, no measures were taken up for energy policy. The Treaty of Amsterdam did not touch on energy policy at all. For the first time, the Constitutional Treaty, which failed ratification in 2005, provided for a coherent energy article (Art. III-256). The Treaty of Lisbon largely keeps this article, in a specific chapter on energy, and includes a reference to energy solidarity between the Member States. While Member States are still free to choose from different energy sources and the structure of their energy supply (Art. 192(2)) the Lisbon Treaty stresses the importance of energy solidarity (Art. 122) between the Member States to (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks (Art. 194).

## 2.2. Social policy (Andreas J. Obermaier)

In the Treaty of Rome in 1957, social policy was considered to be an adjunct to economic policy. It remained largely in the hands of Member States. The few social policy objectives (in a wide sense) were: non-discrimination of workers regarding employment, remuneration and other conditions of work and employment (Art. 48 EEC Treaty), social security for migrant workers and their dependants (Art. 51 EEC Treaty), improved working conditions and an improved standard of living for workers (Art. 117 EEC Treaty), promotion of close cooperation between Member States in the social field (i.a. employment, labour law and working conditions, social security, the right of association and collective bargaining between employers and workers) (Art. 118 EEC Treaty), equality between women and men regarding pay (Art. 119 EEC Treaty), and the maintenance of the existing equivalence between paid holiday schemes (Art. 120 EEC Treaty).

In the Single European Act in 1986, Member States set the additional objectives of improving and harmonising the conditions of health and safety of workers (Art. 118(a) EEC Treaty), of developing the dialogue between management and labour (Art. 118(b) EEC Treaty), and of strengthening economic and social cohesion (Art. 130(a) EEC Treaty).

With the Treaty of Maastricht in 1992, the objectives of promoting social progress (Art. B TEU) and of promoting “a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States” (Art. G TEU) were added.

The Treaty of Amsterdam in 1997 set the additional goal of promoting coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment (Art. 3 TEC-A).

The Lisbon Treaty enlarges and regroups the (social) objectives in Article 3 TEU-L. Accordingly, the EU aims at promoting the “well-being of its peoples” (Art. 3(1) TEU-L) and

at working “for the sustainable development of Europe based on (...) a highly competitive social market economy, aiming at full employment and social progress” (Art. 3(3) TEU-L). Here, competition is only an attribute of social market economy. The current TEU-N, in contrast, stresses the internal market based on the principle of an open market economy. Also, it speaks only of “a high level of employment” instead of “full employment.” Additional new social objectives are the fight against “social exclusion and discrimination”, the promotion of “social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”, and the promotion of “economic, social and territorial cohesion, and solidarity among Member States” (Art. 3(3) TEU-L).

An innovation within the Lisbon Treaty is the explicit anchoring of the “social partners” and “social dialogue” in primary law in the chapter on social policy (Art. 152 TFEU).<sup>4</sup> The current TEU-N in the chapter on social provisions only speaks of the “dialogue between management and labour” as an objective (see Arts. 136, 138, 139), without explicitly mentioning social partnership.

The Lisbon Treaty also contains a provision which has been described in the literature as a horizontal “social clause” (see e.g. Treib 2004: 18). Article 9 TFEU states that “[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”. Not “full employment” as inscribed in the EU objectives in Art. 3 TEU-L, but a “high level of employment” is mentioned here.

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<sup>4</sup> In the Constitutional Treaty from 2004, this provision was originally included in Chapter VI on democracy.

### 2.3. Foreign policy (Jozef Batora)

The beginnings of foreign policy cooperation between the six original Member States of the European Communities can be traced to the idea of a European Defence Community proposed by the French government in 1950. Although it was rejected by the French national assembly in 1954, the idea lived on particularly among the federalists and conservatives in the European Community (Edwards 2005:41). The Rome Treaty did not contain provisions concerning foreign policy and so the direct predecessor of today's Common Foreign and Security Policy was European Political Cooperation established outside the treaties in 1970, which was primarily an attempt by smaller Member States to institutionally tame the dominance of the large Member States in external relations (ibid.) The Common Foreign and Security Policy was introduced in the Maastricht Treaty. Article J1 of the TEU identifies the following objectives: a) to safeguard the common values, fundamental interests, and independence of the Union; b) to strengthen the security of the Union in all ways; c) to preserve peace and strengthen international security; d) to promote international cooperation; and e) to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

While these objectives remain rather vague and open to various interpretations, the TEU is somewhat more specific in describing the role of the Union in developmental cooperation. In this respect, the article 130u TEU specifies the following objectives: a) the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them; b) the smooth and gradual integration of the developing countries into the world economy; c) the campaign against poverty in the developing countries; d) the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms. The objectives of the Common Foreign and Security Policy were further specified in a 1992 Report by the foreign ministers to the

European Council in Lisbon on the potential use of Common Foreign and Security Policy joint actions in relation to third countries.<sup>5</sup>

In a situation where the Maastricht Treaty contained numerous but rather vaguely phrased goals, there was a need for a set of common strategic guidelines that would enable shared interpretations of international situations and hence provide some form of legitimacy for EU actions on a global scale. The European Security Strategy adopted in December 2003 was the first full fledged strategic document setting out objectives and strategic priorities for the EU as a global player with global responsibility.<sup>6</sup>

Following up on the strategy-development in the form of the European Security Strategy, the Lisbon Treaty enhances the relatively vague formulations of the Maastricht Treaty regarding the goals of the EU. The key difference is that it includes the meta-goal of promoting the principles of organizing inter-state political order in Europe on a global scale. Hence, Art 10A of TEU-L is a statement of normative and perhaps system-transformative foreign policy:

“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the

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<sup>5</sup> The following objectives of joint actions are included: a) strengthening democratic principles and institutions, and respect for human and minority rights; b) promoting regional political stability and contributing to the creation of political and/or economic frameworks that encourage regional cooperation or moves towards regional or sub-regional integration; c) contributing to the prevention and settlement of conflicts; d) contributing to a more effective international coordination in dealing with emergency situations; e) strengthening international cooperation in issues of international interest such as the fight against arms proliferation, terrorism, and traffic in illicit drugs; and f) promoting and supporting good government (cf Smith 2008:7).

<sup>6</sup> The strategy is based on the notion of “human security” and with its focus on the need to protect the dignity of individuals it represents a departure from traditional realist-inspired doctrines of territorial defence (Matlary 2006). It identifies threats to the EU as emanating from sources distant from European territory and hence justifies deployment of EU troops and capabilities of civilian crisis management in crisis prevention operations. It has both a regional and a global focus. With regard to the former, it sets the promotion of a “ring of well-governed countries” in the EU neighbourhood. Regarding the latter, it envisions a global order based on “effective multilateralism”, which besides the EU’s traditional propensity towards multilateral solutions also prefers engagement and dialogue with rogue states rather than their isolation. Finally, it promotes the doctrine of “preventive engagement”, which would allow for early involvement in crisis regions around the world with the aim of preventing the deterioration of crises.



wider world...” More specifically, Art 10 (2) says that “the EU shall define and pursue common policies and actions in order to: a) safeguard its values, fundamental interests, security, independence and integrity; b) consolidate and support democracy, the rule of law, human rights and the principle of international law; c) preserve peace, prevent conflicts and strengthen international security (in accordance with the UN Charter and CSCE principles, including those relating to external borders); d) foster sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources in order to ensure sustainable development; g) assist populations, countries and regions confronting natural or man-made disasters; and h) promote an international system based on stronger multilateral cooperation and good global governance. “ The latter point represents a formalization of a process in which the Union has been actively promoting regional integration in other world regions with the aim of spreading its own model of governance on a global scale (Farrell 2005, Hardacre and Smith 2009).

## 2.4. Security and defence policy (Nicole Alecu de Flers)

As far as the field of security and defence policy was concerned, neither the Treaty of Rome nor the Single European Act contained common objectives, and military or defence aspects of security were excluded from European Political Cooperation (EPC) – the forerunner of the Common Foreign and Security Policy (CFSP).

The Maastricht Treaty was the first treaty to contain a provision concerning the EU's responsibility for all questions relating to its security (Art. J.4 TEU-M). However, there was not a serious attempt to coordinate security policy until the late 1990s because several Member States, particularly Great Britain, wished to deny the EU a significant role in the security and defence field. The foundations for what is now referred to as the European Security and Defence Policy (ESDP) – and what would eventually be relabelled as the Common Security and Defence Policy (CSDP) in the Lisbon Treaty – were not laid until December 1998 when the British Prime Minister Tony Blair agreed in a meeting with French President Jacques Chirac in St. Malo that “the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises”<sup>7</sup>. This was affirmed by the heads of state and government of the EU Member States at the EU summit in Cologne in June 1999. Since then there have been intensive efforts to develop a European Security and Defence Policy and to create the preconditions for the development of a genuinely European approach to civil-military crisis management in the framework of the EU (Algieri/Bauer 2008: 137). However, the build-up of the institutional and operational dimensions of the European Security and Defence Policy has mostly taken place outside the treaties. Therefore, the most important overall innovation of the Lisbon Treaty is that the Treaty on European Union as amended by

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<sup>7</sup> Joint Declaration on European Defence issued at the British-French Summit, Saint Malo, France, 3-4 December 1998.

the Lisbon Treaty (TEU-L) contains an individual section on “Provisions on the Common Security and Defence Policy” (Art. 42-46 TEU-L).

As far as overall, principled objectives regarding security and defence policy are concerned, the Maastricht Treaty had already mentioned that some of the objectives of the Common Foreign and Security Policy were “to strengthen the security of the Union and its Member States in all ways” as well as “to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter” (Art. J.1 TEU-M; see above). These objectives can also be found in a slightly extended formulation in the Lisbon Treaty, which lists among the objectives of the Union’s external action to “preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders” (Art. 21(2) TEU-L).

Regarding specific objectives for the policy field, the section on the “Common Security and Defence Policy” in the TEU-L starts with the following provision in Art. 42(1): “The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets.” Since the Amsterdam Treaty defence policy is understood in the sense of the so-called “Petersberg tasks” of the Western European Union (WEU), i.e. “humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking”. These were then incorporated into the TEU (Art. 17 TEU-A) and thus laid the basis for the operative development of the European Security and Defence Policy. In the sense of a comprehensive concept of security, in Art. 43(1) TEU-L the Petersberg tasks were updated, and other missions added, such as joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilisation. Furthermore, it was stated

that “[a]ll these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.”

The Lisbon Treaty also introduces a mutual defence clause and a solidarity clause as two further significant innovations, which may promote solidarity between the EU Member States in the field of security and defence policy. Art. 42(7) TEU-L, which contains the mutual defence clause, obliges the Member States to give a Member State which is the victim of armed aggression on its territory “aid and assistance by all the means in their power”. This includes the possibility of military aid, although it is not explicitly stressed (Algieri/Bauer 2008: 150). During the Intergovernmental Conference (IGC) in 2003/2004 some Member States, especially the neutral/non-aligned countries, had stated objections. It was therefore specified that mutual defence would not affect the specific nature of the security and defence policy of certain Member States and that this commitment should be consistent with the commitments within NATO, which for its members would remain the foundation of their collective defence. In addition, Art. 222 of the Treaty on the Functioning of the European Union (TFEU), which contains the solidarity clause, provides that the EU shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, if a Member State is the victim of terrorist attack or natural or man-made disaster. Although this clause is not included in the section on “Common Security and Defence Policy” in the TEU-L, there are significant overlaps, considering the possibility to draw on the military resources made available by the Member States.

## 2.5. Justice and Home Affairs (Florian Trauner)

At the beginning of EU cooperation in the area of Justice and Home Affairs (JHA), the objectives were primarily to provide “compensatory measures” for the competition of the single market project, and to deal with the emergence and/or increase of trans-national threats such as terrorism and organised crime (Lavenex/Wallace, 2005: 459-463). These objectives were pursued in intergovernmental cooperation forms outside the EC framework, most notably in the TREVI and Schengen cooperation.<sup>8</sup> The Maastricht Treaty first added an intergovernmental “Justice and Home Affairs” pillar to the EU’s treaty architecture and asked “to develop close cooperation on justice and home affairs” (Title 1, Art. b TEU-M).

The common objectives at the EU level became significantly more ambitious with the Treaty of Amsterdam. Article 2 TEU-A first introduced the idea of establishing a European “area of freedom, security and justice” and promoted the development of EU policies in Justice and Home Affairs. On the basis of the Amsterdam Treaty, the EU’s cooperation in Justice and Home Affairs took on an entirely new quality and developed a substantial growth dynamic (see e.g. Monar, 2006; Lavenex/Wallace, 2005). EU action in Justice and Home Affairs was no longer seen as complementary to the functioning of the single European market, but as a means to realise the ambitious project of an area of freedom, security and justice. To implement the treaty objective in Justice and Home Affairs, the EU has adopted two work programmes, the 1999 Tampere programme (European Council, 1999) and the 2004 The Hague programme (Council of the European Union, 2004). The policy objectives of both

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<sup>8</sup> TREVI is the abbreviation for the French words ‘Terrorisme, Radicalisme, Extremisme et Violence Internationale’. Between 1975 until 1993, TREVI provided EC members states with a framework to fight terrorist groups. It was a loose form of intergovernmental cooperation, as it had no permanent institution and lacked legal instruments. Its mandate, however, was gradually expanded and eventually covered also other areas such as the fight against drug trafficking and organised crime.

The Schengen cooperation, initiated by France, Germany, Belgium, Luxembourg and the Netherlands in 1985, aimed at realising the principle of free movement of persons among the signatory states. The 1990 Schengen Convention set out “compensatory measures” for the abolishment of internal border controls including the harmonisation of external border checks, a common visa policy, carrier sanctions, cross-border police cooperation, and the establishment of the Schengen Information System (SIS).

programmes have been similar, with the development of a common immigration, asylum and external border control policy alongside the prevention of terrorism topping the agenda.<sup>9</sup>

The Lisbon Treaty reinforces the objective of providing the European citizens with an area of freedom, security and justice. Instead of the wording of the Treaty of Amsterdam of “maintain[ing] and develop[ing]” an area of freedom, security and justice,<sup>10</sup> the Treaty of Lisbon specifies that the Union “shall *offer* its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime” (Art. 3, par. 2 TEU-L, emphasis added). Therefore, the Lisbon Treaty applies a more determined wording, reflecting that the EU now considers itself beyond the development phase of the project of establishing an area of freedom, security and justice.

The Lisbon Treaty's policy-objectives in Justice and Home Affairs are outlined in Article 67 TFEU. It starts by emphasising that the different legal systems of EU Member States shall not be merged at EU level. “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States” (Art. 67, Par. 1 TFEU). Paragraph 2 defines that the Union “shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border controls, based on solidarity between Member States, which

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<sup>9</sup> According to the Hague programme, the objective for the period 2005-2010 is to “improve the common capability of the Union and its Member States, to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications. This is an objective that has to be achieved in the interests of our citizens by the development of a Common Asylum System and by improving access to the courts, practical police and judicial cooperation, the approximation of laws and the development of common policies” (Council of the European Union, 2004: 3).

<sup>10</sup> This wording remained unchanged in the Treaty of Nice.

is fair towards third-country nationals”. By calling for a “common policy” at EU level, the policy-objectives for these issue areas are the farthest-reaching. Regarding police cooperation and judicial cooperation in both criminal and civil justice, the EU does not seek to establish a uniform policy. The safeguarding of internal security shall be guaranteed by adopting measures “to prevent and combat crime, racism and xenophobia” and to ensure “for coordination and cooperation between police and judicial authorities and other competent authorities” and “through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws” (Art. 67, par. 3 TFEU). With regard to civil justice, the EU seeks to “facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters” (Art. 67, par. 4 TFEU). The overall objective is therefore to enhance compatibility between the different legal systems of the EU rather than merging them.

### **3. EU COMPETENCES IN THE FIELD**

As opposed to the objectives mentioned in the Lisbon Treaty (be it overall, principled objectives or more specific objectives), this chapter will study the legal competences. These can be “exclusive competences” where the Member States are no longer competent (see Article 2 TFEU), shared competences with the Member States, as well as purely coordinative or supportive competences where no legal harmonisation of domestic laws is allowed at the supranational level.

#### **3.1. Energy policy (Johannes Pollak, Peter Slominski)**

The Lisbon Treaty introduces for the first time an individual energy chapter which reflects the growing political importance of that field. With regard to competences, neither the founding treaties nor the Single European Market established any specific competences in the energy field. Activities in the field of energy were based on the general competences stipulated in the EC Treaty with regard to liberalisation (Art. 95; Art. 47; Art. 55), supply difficulties of certain products (Art. 100), subsidiary competences (Art. 308), and environmental policy (Art. 175). The latter only provided leverage because the Single European Act moved environmental competences to the supranational level. However, this did not compel the Commission to continue pushing for coordination, liberalisation and deregulation from the early 1990s onwards (Briche 1997). It was not before the Maastricht Treaty that energy was mentioned for the first time on the level of primary law (Art. 3(1) u; Art. 154; Art. 175). However, all these explicit references proved to be largely irrelevant as the legal basis of subsequent secondary legislative acts.

Currently, the “third legislative package”, comprising two Directives and three Regulations proposed by the Commission in September 2007, is being debated in the Council and the



European Parliament and is largely based on the general internal market provision of Art. 95 EC. The legislative package comprises five proposals: a revision of the existing single market Directive for energy and gas, a Regulation for the establishment of an EU agency for the coordination of national energy regulators, two Regulations concerning transborder interconnectivity, and a new attempt to unbundle energy production, transmission and distribution (Geden 2008). Despite this new energy chapter in the Lisbon Treaty, the Member States retain their right to determine the conditions for exploiting their energy resources, their choice between different energy sources and the general structure of their energy supply (Art. 194(2) para. 2). It remains open to debate whether the energy chapter conferred additional competences to the supranational level or whether it only codified existing competences (Kuhlmann 2008: 26). The energy chapter in the Lisbon Treaty increases the coherence of the EU's energy policies thus replacing the various provisions spread out in the EC Treaty. . What seems certain, however, is that the new chapter reflects a growing political commitment of the EU Member States and it will provide the Commission with a more solid base for future policy and legislative proposals (Inglis 2008).

### 3.2. Social policy (Andreas J. Obermaier)

The sole explicit legislative competence in the field of social policy in the original EEC Treaty concerned social security for migrant workers (Art. 48). However, an extensive interpretation of the treaty by the European Commission and the European Court of Justice allowed for further social policy legislation. Starting in the mid-1970s, the EEC regulated general working conditions and health and safety in the workplace with unanimous Council decisions based on “subsidiary competence” provisions in Articles 100 and 235 EEC Treaty (see Falkner 2007: 273).

The role of social policy grew with the Single European Act and the insertion of Article 118(a) EEC Treaty (today 137 TEC-N) on minimum harmonisation concerning health and safety of workers.

With the Maastricht Treaty and the annexed “Agreement on social policy”, from which the United Kingdom opted out, Member States gave a wide range of social policy competences to the Community: working conditions, social security and social protection of workers, protection of workers where their employment contract is terminated, information and consultation of workers, representation and collective defence of the interests of workers and employers, and the modernisation of social protection systems (Art. 2, Agreement on social policy). Pay, the right to association, the right to strike, and the right to impose lock-outs were explicitly excluded from the scope of the treaty.

The Treaty of Amsterdam added further social policy competences: action against discrimination (Art. 13 TEC-A), the fight against social exclusion (Art. 137(2) TEC-A), the “principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value” (Art. 141(3) TEC-A), and employment policy coordination (Arts. 125-130 TEC-A).

Finally, the Treaty of Nice added “measures” to improve transnational co-operation under Article 137 TEC-N and “incentive measures” to combat discrimination as defined by Article 13 TEC-N.

The Lisbon Treaty introduces a systematic differentiation of competences between the EU and its Member States. Social policy becomes both part of the shared EU competences – but only for the aspects defined in the Treaty (Art. 4(2)(b) TFEU) – and the supportive, supplementing and coordinating EU competences (Art. 5(3) TFEU). The Lisbon Treaty gives only very few additional social policy competences to the Community. The EU can henceforth enact provisions regarding social security not only for migrant workers and their dependants but also for self-employed migrant workers and their dependants (Art. 48(1) TFEU). In addition, it may adopt social security and social protection measures in order to guarantee the basic right of EU citizens to move and reside freely within the territory of the Member States (unanimity, special legislative procedure) (Art. 21(3) TFEU).<sup>11</sup>

While introducing new competences, the Lisbon Treaty at the same time establishes a number of “red lines” that restrict EU social policy competences. In the course of elaborating the original Constitutional Treaty, which later became the Lisbon Treaty, especially governmental representatives of the United Kingdom, Ireland, Spain, the Czech Republic and Estonia were in principle against the extension of competences and of qualified majority voting to all social policy areas (see Treib 2004: 26). As compensation for the few concessions they were willing to accept, they asked for “red lines” to be drawn in the Treaty. The United Kingdom (and also Luxembourg) wanted the inclusion of a “safeguard procedure” into the Treaty with regard to free movement of workers (see Treib 2004: 26; Secretary of State 2003: 35). The new Article 48(2) determines that single Member States may refer a legislative draft to the European Council in case it “would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system”. In such

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<sup>11</sup> The current TEC-N determines that the right of citizens to free movement and free choice of residence does not include provisions on social security or social protection (Art. 18(3)).

cases, the “ordinary legislative procedure” will be suspended and the European Council – after discussion – will within four months either refer the draft back to the Council that will terminate the suspension, or it will take no action or request that the European Commission submit a new proposal. In addition to this safeguard procedure regarding the competence for migrant workers, the Netherlands, Austria and Belgium initiated a protocol on “services of general interest” that was attached to Article 14 TFEU (see Österreichischer Nationalrat 2008: 39). This Protocol N° 26 determines in its Article 2 that “[t]he provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organize non-economic services of general interest”.

### 3.3. Foreign policy (Jozef Batora)

The Rome Treaty (1957) specified three areas in which the Community can act in external affairs: Common Commercial Policy; the power to conclude association agreements with third countries and groups of states; and the possibility of cooperating in the United Nations, the Council of Europe, and the Organization of Economic Cooperation and Development (OECD). The first aspect is related to the fact that the Community is a customs union and the Community has the right to negotiate import quotas and Regulations for products from third countries as well as trade agreements with third countries (Smith 2008:35-36). In such processes, the Commission is in charge of negotiations. It does so based on a mandate/authorization and instructions by the Council. The Council approves the agreement (*ibid.*, p.37).

The competences of the Union in the field of foreign and security policy are relatively broadly conceived. The Maastricht Treaty said the following: “The Union and its Member States shall define and implement a common foreign and security policy, governed by the provisions of this Title and covering all areas of foreign and security policy” (Art. J1). This is furthermore elaborated as follows: “The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence” (Art. J4 TEU). In the Lisbon Treaty, the Common Foreign and Security Policy is reformulated as a competence of the Union: “The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence” (Art. 24(1) TEU-L). Obviously, the change in the wording compared to the Maastricht Treaty indicates that the possibility to frame a common defence is here not taken as an open question but rather as a matter of time (see also pt. 2.4. below). The Lisbon Treaty furthermore posits that the Union “shall conduct the common foreign and security policy by: (a) defining the general guidelines;

(b) adopting decisions defining: (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii); and by (c) strengthening systematic cooperation between Member States in the conduct of policy” (Art. 25 TEU-L). It is expected that the Member States shall support the Union’s external action “actively and unreservedly in a spirit of loyalty and mutual solidarity” (Art. 24(3) TEU-L).

### 3.4. Security and defence policy (Nicole Alecu de Flers)

In Art. 24(1) TEU-L it is stated that the EU's competence in matters of the Common Foreign and Security Policy shall also cover "all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence" (also see section 2.3. above). In this regard the text of the Lisbon Treaty only marginally departs from the respective formulation of the Treaty on European Union as amended by the Nice Treaty, which stated that the Common Foreign and Security Policy "shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide" (Art. 17 TEU-N). The most notable change of wording in this regard occurred with the Amsterdam Treaty, which referred to "the *progressive* framing of a common defence policy, which might lead to a common defence, should the European Council so decide", as compared to the Maastricht Treaty, which spoke of "the *eventual* framing of a common defence policy, which might *in time* lead to a common defence" (emphasis added).

Historically, the competences of European Political Cooperation and later the Common Foreign and Security Policy, including the European Security and Defence Policy, have been framed in a different manner than the competences in other, more communitarised policy fields of the EU. Although the coordination on the EU level with regard to the Common Foreign and Security Policy/European Security and Defence Policy has been intensified over the years, the Member States have been eager to ensure that no essential powers are taken away from them – especially with regard to security and defence policy. Furthermore, against this background, the roles of the supranational institutions of the EU have been marginalized in the Common Foreign and Security Policy/European Security and Defence Policy in comparison to the roles of the European Council and the Council (see below).

The Lisbon Treaty perpetuates the distinct character of the Common Foreign and Security Policy /Common Security and Defence Policy in terms of the respective rights accorded to the Member States and the EU by also stressing in Art. 24(1) TEU-L that the Common Foreign and Security Policy (including the Common Security and Defence Policy) “is subject to specific rules and procedures”.

The Member States’ unwillingness to transfer significant competences to the EU also becomes clear considering that at the beginning of the section on the “Provisions on the Common Security and Defence Policy” it is stated that the Common Security and Defence Policy “shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework” (Art. 42(2) TEU-L). This provision had already been included in the Maastricht Treaty because of the pressure of some NATO Member States (most importantly Great Britain) and Ireland, which at that time was the only neutral/non-aligned Member State of the EU.



### 3.5. Justice and Home Affairs (Florian Trauner)

The Maastricht Treaty first transferred Justice and Home Affairs competences to the European Union.<sup>12</sup> The treaty defined a wide range of Justice and Home Affairs' matters as of "common interest"<sup>13</sup> and subsumed them under the intergovernmental third pillar of the EU's temple structure. The Amsterdam Treaty changed the competence structure within the EU and added new competences to the EU level. The policy fields of asylum, immigration, external border controls and civil law matters were transferred to the Community first pillar, and measures to prevent and combat racism and xenophobia added as new competences to the intergovernmental third pillar (Title VI TEU-A). Most importantly, the Amsterdam Treaty also integrated the Schengen acquis into the legal framework of the European Union. The Nice Treaty did not revise the competence structure in Justice and Home Affairs, yet introduced a new article on Eurojust, the European Judicial Cooperation Unit (Art. 31 TEU-N).

Under the Treaty of Lisbon, the EU's policies in Justice and Home Affairs are defined as a "shared competence" and subsumed under Title V TFEU "Area of Freedom, Security and Justice". The title outlines the EU's competences regarding policies on border checks, asylum and immigration (Chapter 2), judicial cooperation in civil matters (Chapter 3), judicial cooperation in criminal matters (Chapter 4) and police cooperation (Chapter 5). The competences regarding criminal justice are limited to establish "minimum rules" in order to facilitate mutual recognition of judgements and judicial decisions which remains the major governance mode (Art. 82, par. 1 TFEU). Moreover, to demonstrate respect for the different

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<sup>12</sup> As mentioned beforehand, EC Member States already cooperated before the Maastricht Treaty on issues of Justice and Home Affairs, yet in intergovernmental cooperation forms outside the EC framework. According to Jörg Monar (2001), the most important "laboratories" to deepen cooperation in the area of Justice and Home Affairs were the Council of Europe, the TREVI and the Schengen cooperation.

<sup>13</sup> Those were asylum policy, entry rules at the EU external border, immigration policy and policy regarding nationals of third countries, combating drug addition, the fight against fraud, judicial cooperation in civil matters, judicial cooperation in criminal matters, customs cooperation, police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime.

legal traditions of EU Member States, the treaty includes an emergency break by giving each Council member the possibility to refer a draft Directive to the European Council if “fundamental aspects of its criminal justice system” (Art. 82, par. 3 TFEU) are affected.<sup>14</sup> With regard to police cooperation, EU Member States retain the full responsibility “with regard to the maintenance of law and order and the safeguarding of internal security” (Art. 72 TFEU). The EU’s competences concern primarily the establishment of operational cooperation between law enforcement authorities, including the collection, storage, processing, analysis and exchange of relevant information. At the same time, the Lisbon Treaty facilitates procedures for “enhanced cooperation” of at least nine Member States in judicial cooperation in criminal matters (Art. 82, par. 3 TFEU), operational police cooperation (Art. 87, par. 3 TFEU) and with regard to the creation of a European Public Prosecutor’s Office (Art. 86, par 1 TFEU).

Compared to the Nice Treaty framework, the Lisbon Treaty transfers several new competences to the EU level:

- The definition of “strategic guidelines for legislative and operational planning within the area of freedom, security and justice” (Art. 68 TFEU);
- The adoption of measures “laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation policies [in Justice and Home Affairs], in particular in order to facilitate full application of the principle of mutual recognition” (Art. 70 TFEU);
- With regard to the policy field of border checks, asylum and immigration, enhanced competences to introduce an “integrated management system” for EU external borders (Art. 77, par. 1c TFEU), to develop a common policy on asylum (Art. 78, par. 1 and 2 TFEU), to combat trafficking in persons (Art. 79, par 2d TFEU) and to

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<sup>14</sup> If the European Council does not reach consensus, however, at least nine Member States can establish an “enhanced cooperation” on the basis of the draft directive.

promote the integration of third country nationals residing legally in the EU (Art. 79, par. 4 TFEU);

- With regard to judicial cooperation in civil matters, enhanced competences to adopt measures “concerning family law with cross-border implications” (on the basis of the special legislative procedure) (Art. 81, par. 3 TFEU);
- With regard to judicial cooperation in criminal matters, more areas of crime for which the EU may “establish minimum rules concerning the definition of criminal offences and sanctions” (Art. 83, par 1 TFEU) and new competences for the establishment of a European Public Prosecutor’s Office from the structures of Eurojust in order “to combat crimes affecting the financial interests of the Union” (on the basis of the special legislative procedure) (Art. 86, par. 1 TFEU);
- Regarding police cooperation, enhanced tasks for Europol (Art. 88, par. 2 TFEU).

However, the competences of the EU in the area of freedom, security and justice are not applicable in all Member States. The Lisbon Treaty preserves special arrangements. When the Amsterdam Treaty integrated the Schengen acquis into the framework of the EU, the UK, Ireland and Denmark obtained opt-outs and refrained from participating in them. However, they agreed to sign special provisions allowing them to participate in certain Schengen provisions.<sup>15</sup> In the Lisbon Treaty, the UK government, together with Ireland, may not participate in measures under the newly communitarised policy fields. In addition, a new provision gives the two states the possibility to withdraw an ‘opt-in’ decision to a measure based on the Schengen acquis within three months (Art 5, par. 2, Protocol integrating the Schengen acquis into the framework of the European Union). Denmark obtains a similar opt-in option with the difference that the country has no right to withdraw its opt-in decision once made (see Bauer, 2008: 110).

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<sup>15</sup> By contrast, the non-Member States Norway and Iceland fully participate in the Schengen cooperation and are associated with the Dublin Convention. Switzerland as another non-EU-member state is expected to fully cooperate in the Schengen system, together with Liechtenstein, as of December 2008.

## 4. AVAILABLE POLICY INSTRUMENTS

### 4.1. Energy policy (Johannes Pollak, Peter Slominski)

Despite the new energy chapter, the Lisbon Treaty remains silent when it comes to policy instruments. In any case, Directives and Regulations have been and will be the most relevant binding policy instruments in the field of energy policy. Apart from these binding instruments, there exists an abundance of non-binding policy instruments which are of particular relevance in the EU's attempt to establish a common energy policy. For instance, Green and White Papers adopted by the Commission serve as enormously influential instruments in forging a common European energy approach (e.g. the Green Paper A European Strategy for Sustainable, Competitive and Secure Energy, COM(2006) 105). The same holds true for other unbinding instruments such as communications (e.g. An Energy Policy for Europe, COM(2007) 1) or European Council conclusions which often serve as the political stimulus for subsequent activities of the Commission. Furthermore, the EU institutions also apply Action Plans (e.g. 2007-2009 "An Energy Policy for Europe") and measures for energy related research in the research framework programmes. Last but not least, we can also discern informal counselling fora such as the Florence Forum on electricity, the Madrid Forum on gas, and the Prague/Bratislava Forum on nuclear energy, the Commission founded Council of European Energy Regulators, bilateral and multilateral energy dialogues (e.g. Black Sea Synergy), and international treaties (e.g. Energy Charter Treaty). All of these instruments have been created independently of former Treaty reforms and will continue to operate whether the Lisbon Treaty will enter into force or not.

## 4.2. Social policy (Andreas J. Obermaier)

In the domain of social policy, the main policy instrument at the Community level is EU law in the form of directives. Until the end of 2006, the Community enacted 97 directives in the areas of general working conditions, health and safety at work, and equality of men and women (own calculation). The Community has also legislated few social policy regulations, e.g. in the area of social security for migrant workers. In addition, further non-binding acts have been passed, such as communications and recommendations by the European Commission as well as resolutions and recommendations by the Council.

The Lisbon Treaty codifies and substantiates three already existing social policy instruments.<sup>16</sup> First, it substantiates the Open Method of Coordination (OMC), which has had a treaty base since 1997, and which has been applied to ever more social policy fields since. The Lisbon Treaty states more precisely the role of the European Commission within the OMC. It can start initiatives that aim at establishing “guidelines and indicators”, exchanging “best practice”, and “periodic monitoring and evaluation” (Art. 156 TFEU). The second policy instrument (at large) codified by the Lisbon Treaty is the Tripartite Social Summit for Growth and Employment. Its objective is to recognise and promote social partnership at the EU level (Art. 152 TFEU).<sup>17</sup> The third instrument (widely interpreted)<sup>18</sup> with new explicit treaty base is the Charter of Fundamental Rights, which was signed and proclaimed by the presidents of the European Parliament, the Council and the Commission in 2000. However, it will become legally binding only with the coming into force of the Lisbon

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<sup>16</sup> “Policy instrument” is understood here in a wide sense.

<sup>17</sup> The bipartite dialogue between management and labour at the EU level exists since 1985. The Tripartite Social Summit started in 2003. Once a year it brings together the Council Presidency and the two subsequent Presidencies, the Commission, as well as the social partners in order to ensure their participation in implementing the EU’s economic and social policies.

<sup>18</sup> The Charter of Fundamental Rights may become a legal “policy instrument” if national courts refer cases to the European Court of Justice, or if citizens directly bring actions against a European Union institution before the European Court of Justice.

Treaty.<sup>19</sup> The Charter introduces new rights, including basic social rights, in its (however limited) scope of application.<sup>20</sup> These rights entail e.g. the freedom to choose an occupation and the right to engage in work (Art. 15), equality between men and women in employment, work and pay (Art. 23), the right of collective bargaining and action (Art. 28), etc. (see especially Title IV on “Solidarity”). Social basic rights are alien to some of the existing Member State constitutions, such as Austria and the United Kingdom (see Treib 2004). One major drawback, however, is that courts (the European Court of Justice and national courts) cannot apply the Charter to laws, regulations or administrative provisions, practices or action in Poland and the United Kingdom. These two Member States chose to “opt out” from the legal applicability of the Charter.<sup>21</sup>

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<sup>19</sup> Despite the binding legal effect of the Charter with the future coming into force of the Treaty of Lisbon, it will not become primary law but exert its effect as part of the Treaty of Lisbon. Article 6 TEU-L states that the rights, freedoms and principles set out in the Charter and the Treaties have the “same legal value”. However, “[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties” (Art. 6(1) TEU-L).

On the binding legal effect of the Charter see e.g. the Memorandum of the Federal German Foreign Office regarding the Treaty of Lisbon (<http://www.auswaertiges-amt.de/diplo/de/Europa/Downloads/Denkschrift-lissabon.pdf>), the analysis of the constitutional office of the Federal Austrian Chancellery ([http://www.parlament.gv.at/PG/DE/XXIII/I/I\\_00417/imfname\\_097745.pdf](http://www.parlament.gv.at/PG/DE/XXIII/I/I_00417/imfname_097745.pdf)), or the Committee on Employment and Social Affairs of the European Parliament (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-404.795+03+DOC+PDF+V0//EN&language=EN>).

<sup>20</sup> The scope of the provisions of the Charter is determined in its Chapter VII: the provisions “are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”.

<sup>21</sup> Article 1(1) of Protocol N° 30 on the application of the Charter states the following: “The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms”. This caveat is specifically stressed in Article 1(2) of Chapter IV on “Solidarity”.

The opt-out by the UK and Poland is not of a general nature, but only regarding the enforceability of the rights at their Member State level (regarding this nuance see e.g. Österreichischer Nationalrat 2008: 224).

### 4.3. Foreign policy (Jozef Batora)

There are three kinds of foreign policy instruments available to the EU – diplomatic, economic and military (Smith 2008: 54-75). When it comes to the diplomatic instruments, the Commission has been represented around the world by a network of 123 Delegations ('embassies') staffed by the External Service. As of 1992 Maastricht TEU, the 'Unified External Service' of the EC has been increasingly performing political functions (adopting standard diplomatic practice) in addition to the traditional mainstay of their work within the management of the programs and trade portfolios. According to the Art 20 of the Maastricht TEU, the delegations of the EU in third countries are in charge of coordination of the EU's diplomatic presence.<sup>22</sup> The High Representative for Common Foreign and Security Policy has been appointing Special Representatives in regions and countries where the EU had been engaged (e.g. Bosnia Herzegovina, Middle East peace process, South Caucasus, Georgia). Other instruments include declarations; diplomatic sanctions; diplomatic recognition; sending cease-fire monitoring missions (e.g. Georgia 2008) and/or election observers; arms embargoes (e.g. China, North Korea); and indeed broadly conceived elements of conditionality motivated by EU membership and other forms of attachment to the EU.

The economic instruments include primarily aid and development programs. In 2007, the Community budget included the following instruments (in Euro): Instrument for Pre-Accession (Western Balkans, Turkey – 1.23 billion); European Neighborhood and Partnership Instrument (ENP countries – 1.41 billion); Development Cooperation Instrument (all developing countries – 2.2 billion); Industrialized Countries Instrument (24,7 million);

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<sup>22</sup> Art 20, Maastricht TEU: "The diplomatic and consular missions of the Member States and the Commission Delegations in third countries and international conferences, and their representations to international organisations, shall co-operate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented. They shall step up co-operation by exchanging information, carrying out joint assessments and contributing to the implementation of the provisions referred to in Article 20 of the Treaty establishing the European Community."

Democracy and Human Rights Instrument (142 million); Instrument for Stability (funds for urgent responses to crises in third countries; capacity building in crises regions etc. – 212.8 million); Instrument for Nuclear Safety Cooperation (1.26 million); Humanitarian Aid (732.16 million); Macro-economic assistance (58.2 million); Common Foreign and Security Policy (159.2 million); EC Guarantees for Lending Operations (200 million); Other actions and programs (390.12 million). This added up to a total of Euro 6.812 billion (source: European Commission, 'General Budget' 2007, cf. Smith 2008:60). Besides financial allocations, another kind of economic instrument is the negotiation of agreements including trade agreements; cooperation (and/or development cooperation following Maastricht) agreements; and association agreements. Further economic instruments include: tariff reductions, quota increases, extending loans.

Finally, when it comes to military instruments, included are primarily the various European Security and Defence Policy missions (e.g. Concordia in FYROM in 2003, Althea in Bosnia Herzegovina since December 2004). This is related to capacity building following the Headline Goal 2010, which includes the plan to constitute 10-15 multinational 'battlegroups'. The establishment of the European Defence Agency founded in 2004 may also be considered an instrument in the area of Common Foreign and Security Policy as its aim is effective military spending in the EU (for more on these aspects see pt. 3.4. and pt. 4.4.).



#### 4.4. Security and defence policy (Nicole Alecu de Flers)

As far as the implementation of the European Security and Defence Policy is concerned, the EU has strengthened its military and civilian capabilities in recent years. At the EU summit in Helsinki in December 1999, it was decided to set up a European Rapid Reaction Force (ERRF) of 50.000-60.000 persons, deployable within 60 days and for at least a year and capable of the full range of Petersberg tasks ('Helsinki Headline Goal') by the year 2003.<sup>23</sup> The European Council in Brussels in June 2004 endorsed a new target, the so-called 'Headline Goal 2010'. Among other things, so-called 'battle groups' were initiated, in order to enable the EU to respond with rapid and decisive action to a crisis and to conduct stand-alone operations or the initial phase of larger operations. In addition, the EU has built up its civilian capabilities and a Civilian Headline Goal was formulated: The Member States have committed to provide expert personnel in the priority areas of police, strengthening of the rule of law, strengthening civilian administration and civil protection. Nevertheless, there remain considerable deficits, especially insofar as the EU is not capable of conducting larger missions on the high end of the military intensity scale.

The Lisbon Treaty puts down that "Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy [...]. Those Member States which together establish multinational forces may also make them available to the common security and defence policy" (Art. 42(3) TEU-L). Art. 42(3) TEU-L further provides that the Member States "shall undertake progressively to improve their military capabilities".

Generally, the hitherto existing subdivision of legal instruments, which were relevant for the Common Foreign and Security Policy, namely common strategies, joint actions and common

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<sup>23</sup> Furthermore, on the basis of the so-called 'Berlin Plus' agreement from March 2003 the EU has assured access to NATO structures, mechanisms and assets to carry out military operations if NATO declines to act (while the EU has guaranteed that it will not intervene in crises in which NATO decides to engage).

positions, is abandoned in the Lisbon Treaty and a single 'legislative' procedure, the Council's 'European decisions', is referred to instead (Missiroli 2008: 6). According to Art. 25 TEU-L, in the framework of the Common Foreign and Security Policy the EU shall adopt "decisions defining: (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii)".

With regard to the Common Security and Defence Policy, decisions, including those initiating a mission, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State (Art. 42(4) TEU-L). In this respect, the High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate. Art. 43(2) TEU-L further states that the decisions adopted by the Council shall define the objectives and scope of the Common Security and Defence Policy tasks and the general conditions for their implementation.

In addition, in view of the fact that probably not all Member States will always be willing and able to take part in a concrete crisis management measure, in Art. 42(5) and 44 TEU-L it is provided that on the basis of consensus of all Member States the Council may entrust the execution of a certain operational task to a group of Member States which are willing and have the necessary capability for such a task.

#### **4.5. Justice and Home Affairs (Florian Trauner)**

The EU draws on two sets of policy instruments to implement Justice and Home Affairs objectives, namely on legislative action and operational cooperation. Legislation in the Justice and Home Affairs field pursues three primary usages that are “legislation for harmonization, for mutual recognition and for institutionalization purposes” (Monar, 2006: 505). Legalisation for harmonisation seeks to downsize the differences between the national criminal law systems in order to remove obstacles in the fight against organised crime. The challenge in this respect is that the national legalisation is most often “firmly rooted in long-standing legal tradition, constitutional norms and long-accepted concepts about the administration of justice and the maintenance of public order” (Mitsilegas et al., 2003: 10). As a result, there is only a limited set of harmonisation legislation at EU level. Legislation for mutual recognition has become the cornerstone of judicial cooperation in both EU civil and criminal matters (see Lavenex, 2007). The most important and farthest-reaching legislative act under this heading was the Framework Decision on a European Arrest Warrant of 13 June 2002. Regarding the final category, the major objective of legislation for institutionalisation purposes is the establishment of specialised agencies and bodies.

The “proliferation of semi-autonomous agencies and bodies” (Lavenex/Wallace, 2005: 470) is a particular characteristic of EU cooperation in Justice and Home Affairs. They seek to facilitate effective cross-border operational cooperation between national law enforcement authorities and help in exchanging and analysing information. The European Police Office (Europol), the European Agency for the Management of Operational Cooperation at the External Borders (Frontex) and the European Judicial Cooperation Unit (Eurojust) have substantial coordination powers, yet no European agency has the authority to apply coercive

measures.<sup>24</sup> Europol and Eurojust, however, have eventually gained some operational powers and may participate in joint investigation teams with the consent of the member state concerned. Regarding the innovations which the Lisbon Treaty brings about, the role of the European Parliament vis-à-vis the specialised agencies will be substantially strengthened. The Lisbon Treaty will also provide for the possibility that a European Public Prosecutor's Office may be established from Eurojust (Art. 86 TFEU). A shortcoming of the Lisbon Treaty is that the articles on the operational cooperation in the area of freedom, security and justice continue to be separated from operational cooperation in the EU's external relations. Since the EU has established an increasingly closer nexus between internal security and external action, this separation might evoke confusion on the parts of the third countries, inter-institutional turf wars, and complicated modes of decision-making (see Monar, 2008: 381-382).

The operational cooperation and the exchange of information are facilitated by several specialised databases. The Schengen Information System (SIS), for example, has become a central law-enforcement instrument in the fight against cross-border crime. In 2005, it stored around 13.3 million files including persons who were refused entry into the Schengen area, wanted persons, and stolen cars or missing objects (quoted in Monar, 2006: 501). In addition, the EU Member States have set into being the Visa Information System (VIS), holding data on every visa applicant, and Eurodac, a system for comparing fingerprints of asylum seekers and illegal migrants.

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<sup>24</sup> Europol, Eurojust and Frontex are probably the best-known, yet not sole European agencies. The European Police Chiefs' Task Force (PCOTF) should facilitate the development of personal and informal links among national police chiefs to facilitate information exchange. The European Police College (CEPOL) supports the cooperation among national police training institutions for senior police officers of EU Member States. A special position within the structures of the Council holds the EU's Counter Terrorism Coordinator, at the time of writing Mr Gilles de Kerchove. Two monitoring bodies complement the set of specialised agencies: The European Monitoring Centre on Drugs and Drug Addiction (EMCDDA) was set up in 1993 and is seated in Lisbon. The Vienna-based European Monitoring Centre on Racism and Xenophobia (EUMC) was created in 1997. In 2007, a Council Regulation transformed it into the European Union Agency for Fundamental Rights (FRA).

## **5. DECISION-MAKING PROCEDURES, INSTITUTIONAL DEVELOPMENTS AND POTENTIAL SHIFTS BETWEEN THE “PILLARS”**

### **5.1. Energy policy (Johannes Pollak, Peter Slominski)**

Since hitherto EC primary law did not include a proper chapter on energy issues specifying under which procedure pertinent secondary law should be adopted, auxiliary constructions for the achievement of energy objectives were used. Depending on the legal treaty basis, different decision-making procedures are applied. For instance, for the gradual establishment for the single energy market Art. 47(2) and Art. 55, EC were used and the codecision procedure according to Art. 251 EC was applied. The same holds true if Art. 95 (concerning liberalisation), Art. 100 EC (concerning supply disruption), Art. 154-156 EC (concerning transeuropean networks), and Art. 175 EC (natural resources) build the bases for legislative activity. However, Art. 175(2c) EC stipulates that in “measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply“ the Member States have to act unanimously.

In order to ensure realisation of – the above mentioned – goals, the Lisbon Treaty foresees the application of the ordinary legislative procedure (Art. 194(2)) which means that the EP and the Council are co-legislators in the field. The ordinary legislative procedure is laid down in detail in Art. 294 and corresponds with the current co-decision procedure under Art. 251 EC. Additionally the Economic and Social Committee and the Committee of the Regions have to be consulted (Art. 194(2)). In contrast, measures which are primarily of a fiscal nature are adopted by a special legislative procedure, i.e. unanimity within the Council and consultation of the EP only. The amendments introduced by the Lisbon Treaty reflect the growing importance of the EP, which has gained an ever increasing role in prior Treaty reforms but has brought hardly any change in terms of stronger involvement of the EP in the realm of

energy policy. For instance, the “third legislative package” proposed by the Commission in 2007 and currently under discussion in the Council and the Parliament will already be adopted under the co-decision procedure. However, since the new ordinary legislative procedure will make it less likely that new proposals will be based on unanimity-requiring provisions (such as now Art. 308 EC), one can argue that the Lisbon Treaty strengthened the role of the EP (Kuhlmann 2008: 22) and gave somewhat more leeway for using majority voting.

Since this is the first time that an energy chapter has successfully been included in primary law, there will be no formal power shifts between the pillar structure of the EU.

## 5.2. Social policy (Andreas J. Obermaier)

Until the adoption of the Single European Act (SEA), social policy acts could only be agreed on unanimously. The SEA introduced qualified majority voting (QMV) for the harmonisation of health and safety conditions at work and provided for the cooperation procedure.

The Treaties of Maastricht and Amsterdam extended QMV to increasingly more areas (see Table 2 in the Annex) and the co-decision procedure replaced the cooperation procedure in many areas. However, the following four areas still require unanimity: social security and social protection of workers; protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers and employers, including co-determination; and conditions of employment for third-country nationals legally residing in the Union territory.

There was and is a vivid debate among Member States whether the EU should employ a more active stance in social policy, specifically whether all areas in Article 137 TEC-N should be decided with QMV. However, there is no consensus in these debates. The reluctance to promote a more pro-active EU social policy is mirrored in the Lisbon Treaty, in which the four fields mentioned above still need unanimity. The only change of decision mode in the social policy area concerns social security for migrant workers (Art. 48 TFEU). Here, unanimity in the Council was changed to QMV.<sup>25</sup> However, a safeguard procedure was inserted in order to curtail this innovation, similar to judicial cooperation in criminal law, but without the option of enhanced cooperation (for the procedure see Part 2.2.).

In line with the overall strengthening of the European Parliament (EP), the Lisbon Treaty provides for the cooperation of the EP and the Council regarding new measures and directives in the field of social policy (Art. 153 TFEU). This cooperation takes place in accordance with

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<sup>25</sup> In fact, this change of decision mode would concern three proposals on the coordination of social security for migrant workers (a procedure and two annexes), which are currently pending because no unanimous agreement can be reached (see European Parliament 2008b: 4).

the ordinary legislative procedure (former co-decision procedure) (Art. 294 TFEU). In two areas, the Lisbon Treaty also provides for the information of the EP without going into detail: agreements between management and labour (Art. 155(2)); and social policy coordination (Art. 156 TFEU).

Lastly, the Lisbon Treaty specifies the mode for establishing the Social Protection Committee, which has been anchored in primary law since the Treaty of Nice in 2001.<sup>26</sup> The Council decides “by a simple majority” (Art. 160(1) TFEU).

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<sup>26</sup> The Social Protection Committee was established informally in 1999 as a group of high-level officials. A Council decision formalised its existence in 2000 (see 2000/436/EC).



### 5.3. Foreign policy (Jozef Batora)

Decision-making in the field of foreign policy is concentrated in the Council (see pt. 4.3. for more details on procedures), while chief instruments of EU foreign policy (mostly financial aid) are held by the Commission, and indeed, by the Member States (in particular military capabilities). Key changes in the decision-making in the foreign policy field envisioned in the Lisbon Treaty relate to the creation of the post of the High Representative of the Union Foreign Affairs and Security Policy (HR UFASP) (Art 27). S/he would take over the functions of the current High Representative for Common Foreign and Security Policy (Solana); S/he would also become the Vice-President of the Commission in charge of the coordination of the Commission's external relations portfolios – RELEX, Trade, Development, Enlargement (currently the President of EC Barroso is in charge); and s/he would hold the chairmanship of the EU's Foreign Affairs Council (currently in the hands of the foreign minister holding the rotating Presidency). In this way, an institutional bridge is to be built between the 1<sup>st</sup> and the 2<sup>nd</sup> Pillar, which however would not mean the abolishing of the pillar structure in the field of Common Foreign and Security Policy.

Given the triple-functional integration, the High Representative of the Union Foreign Affairs and Security Policy would not be only 'double-hatted', but in fact 'triple-hatted'. The question is to what extent a single person can physically attend to all the duties related to these three hats. Possibly a system of permanent secretaries (or deputies) for various portfolios supporting the work of the High Representative of the Union Foreign Affairs and Security Policy would need to be created. This, though, might raise further legitimacy and accountability issues, as well as questions as to the ability of the High Representative to reconcile procedural matters from both the first and the second pillar (Avery 2008).

Further issues are related to the procedures in the College of Commissioners. Currently, the College works upon the *primus inter pares* principle, where President Barroso is in charge of

coordination. With the introduction of the post of Vice-President, this principle would be broken and a hierarchical relation between a member of the College (the Vice-President) and a number of Commissioners responsible for external relations portfolios would be created (ibid.).

The Lisbon Treaty also envisions the creation of European External Action Service (EEAS) to assist the work of High Representative of the Union Foreign Affairs and Security Policy. It is to be comprised of the following elements: officials from relevant departments of the Council Secretariat; staff from the Commission (DG Relex, Delegations, others); national diplomats from Member States. The Treaty leaves open the actual organizational arrangements as well as the functions and competences of the European External Action Service: “The organization and the functioning of the service shall be established by a decision of the Council, acting on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.” (Art. 27(3)). A number of issues stand out in relation to the European External Action Service: Should the European External Action Service support the High Representative of the Union Foreign Affairs and Security Policy in chairing the meetings of the Foreign Affairs Council? Should the European External Action Service support the new President of the European Council? How will the European External Action Service be related to the Commissioners? How would the careers in the European External Action Service be integrated with career paths in national foreign ministries? Will national foreign services send their best people to the European External Action Service or will this be a place for junior officials to acquire international experience? Will each member state be allowed to have a particular number of ambassadors in the European External Action Service? How will ambassadorial posts be assigned to avoid dominance of the Big3? There are currently about 350 officials in the Council Secretariat and about 5700 in the Commission External Service (5000 at Delegations, 750 in DG Relex in Brussels). How would the competences of the current Council Secretariat staff (political decision-making) be maintained in an organization heavily dominated in numbers by Commission staff? What

status will the European External Action Service have? (agency or ‘common service’?) Will the European External Action Service be financed through the Community budget as anticipated? In turn, what will be the role of the European Parliament (authority of the EC budget) in ensuring the accountability of the European External Action Service ? These questions remain to be settled.

In sum, the establishment of the post of High Representative of the Union Foreign Affairs and Security Policy and of the European External Action Service as envisioned in the Lisbon Treaty would entail procedural and structural integration of the elements working in the area of external affairs in the first and second pillars. Also, in terms of policy substance, much of what traditionally constitutes ‘domestic’ issues such as environment, energy, migration, transport and fisheries has been increasingly ‘internationalized’ in recent decades. An important question in this respect is to what extent the High Representative of the Union Foreign Affairs and Security Policy and the European External Action Service would be involved in the management of these aspects of the Commission’s portfolio. The pillar structure would, however, remain de facto functional.

#### **5.4. Security and defence policy (Nicole Alecu de Flers)**

The European Council remains the decision-making forum for the Common Security and Defence Policy, which “shall identify the Union’s strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions” (Art. 26(1) TEU-L). In addition to the European Council, the Council remains the centre of power for the Member States for determining the direction and scope of the Common Foreign and Security Policy/Common Security and Defence Policy. It is also important to mention that through the establishment of permanent structures since the beginning of this century, such as the Political and Security Committee (PSC), the European Union Military Committee (EUMC) and the Military Staff of the EU (EUMS) as well as the Committee for Civilian Aspects of Crisis Management (CIVCOM), the consultation and decision-making process for the European Security and Defence Policy has become more consistent (Algieri/Bauer 2008: 137).

According to the Lisbon Treaty, as in the field of the Common Foreign and Security Policy, the High Representative of the Union for Foreign Affairs and Security Policy shall contribute through his/her proposals to the development of the Common Security and Defence Policy, which s/he shall carry out as mandated by the Council (Art. 18(2) TEU-L). It was again provided that the possibility of decisions by qualified majority “shall not apply to decisions having military or defence implications” (Art. 31(4) TEU-L) and decisions in this field “shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State” (Art. 42(4) TEU-L).

In addition, in order to react to the permanently increasing demands from the international environment regarding the EU’s capabilities for civil and military crisis management, the Lisbon Treaty contains some provisions based on flexible arrangements. The provisions on

permanent structured cooperation in Art. 42(6) and 46 TEU-L would undoubtedly constitute a major departure from the current provisions in the TEU-N and had already been discussed very controversially during the 2003/2004 Intergovernmental Conference. This procedure would allow the establishment of a core group of willing and capable Member States “with a view to the most demanding missions” in the framework of the Common Security and Defence Policy, which could then advance more rapidly than the other Member States on certain security and defence matters. It seems remarkable that the authorisation to launch a cooperation of this kind (or to join an existing cooperation) would have to be granted by a decision of the Council of Ministers acting by a qualified majority after consulting the High Representative of the Union for Foreign Affairs and Security Policy, i.e. it would be possible to actually bypass the veto right in the Common Foreign and Security Policy/Common Security and Defence Policy (Missiroli 2008: 15). The participating states are to fulfil certain criteria and commit themselves to more binding military engagements, which are set out in a protocol (No. 10) annexed to the TEU-L and the TFEU.

As far as the supranational institutions of the EU are concerned, the role of the Commission in the Common Security and Defence Policy remains very limited. With regard to Common Security and Defence Policy decisions, including those initiating a mission, Art. 42(4) TEU-L provides that “[t]he High Representative may propose the use of both national resources and Union instruments, together with the Commission where appropriate”. Further points of contact exist with regard to the European Defence Agency (see below), which “shall carry out its tasks in liaison with the Commission where necessary” (Art. 45(2) TEU-L), as well as with regard to the solidarity clause, as “[t]he arrangements for the implementation [...] of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative” (Art 222(3) TFEU). As in earlier treaties, the European Court of Justice has virtually no jurisdiction with respect to the Common Security and Defence Policy provisions and the Lisbon Treaty does not strengthen the competences of the European Parliament in this field. Art. 36 TEU-L merely states that the

High Representative “shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration.”

Regarding institutional innovations in the field of security and defence policy, the TEU-L envisages an “Agency in the field of defence capabilities development, research, acquisition and armaments” (European Defence Agency) (Art. 42(3) and 45 TEU-L), in order to improve and rationalize Member States’ military capabilities. The establishment of the European Defence Agency corresponds to the intention stated in Art. 17 TEU-N asserting that the progressive framing of a common defence policy will be supported by cooperation between the Member States in the field of armaments (also see Algieri/Bauer 2008: 142f.). Although the European Defence Agency does not have authority to issue Directives for the Member States, it is meant to function as a central organ for the coordination and evaluation of the implementation process of the Headline Goal 2010 (Algieri/Bauer 2008: 144). The European Defence Agency “shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities” (Art. 42(3) TEU-L).

As far as potential shifts between the “pillars” are concerned, although the three-pillar structure is abolished in the Lisbon Treaty, a de facto separation between the Community powers and procedures and the Common Foreign and Security Policy remains in place (see above). The Common Foreign and Security Policy, including the Common Security and Defence Policy, remains in the Lisbon Treaty the last policy field in the EU which is intergovernmentally institutionalised. As mentioned above, it would still be emphasised in Art. 24(1) TEU-L that the Common Foreign and Security Policy “is subject to specific rules

and procedures”. In this sense, not much has changed in comparison to the Maastricht Treaty, when the Common Foreign and Security Policy was established as a ‘second pillar’ with individual provisions and in which the roles of the European Commission, the European Parliament and the European Court of Justice were heavily circumscribed.

## 5.5. Justice and Home Affairs (Florian Trauner)

In the Maastricht Treaty, the EU's cooperation in Justice and Home Affairs was based on the intergovernmental decision-mode. The Treaty of Amsterdam brought about the first major shift towards *Communitarisation* in the Justice and Home Affairs field. The policy fields of asylum, immigration, external border controls and civil law matters were transferred to the Community first pillar under Title IV TEC-A, whereas police cooperation and cooperation in criminal matters were left within the remit of the intergovernmental third pillar (Title VI TEU-A). For a transitional period of five years, however, EU Member States refrained from applying all aspects of the Community method in the newly established Title IV TEC-A.<sup>27</sup>

The Lisbon Treaty ceases the division of competences between the first and third pillar and subsumes all Justice and Home Affairs matters under Title IV TFEU called the “area of freedom, security and justice”. There remain only a few exceptions which cannot be decided with the ordinary legislative procedure. Accordingly, the most significant changes of the Lisbon Treaty concern judicial cooperation in criminal matters and police cooperation, the two policy fields where decision-making has so far remained intergovernmental. The Lisbon Treaty defines the ordinary legislative procedure as the standard method also for judicial cooperation in criminal matters and police cooperation, even if some exceptions are kept with regard to the establishment of the European Public Prosecutor's Office (Art. 86, par. 1 TFEU), to measures concerning operational cooperation between police authorities (Art. 87, par. 3 TFEU) and to cross-border police action (Art. 89 TFEU). Another special arrangement is that acts in these policy fields shall be adopted either on a proposal of the Commission or on an initiative of a quarter of the Member States (Art. 76 TFEU). Therefore, the Commission does not have exclusive right of initiative. Moreover, the Commission and the European Court of

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<sup>27</sup> The powers of the Commission were restrained, the Council kept unanimity voting and ECJ had strict limits of competence. In 2004, when the transitional period ended, Member States agreed that qualified majority voting should be extended to all areas of visa, asylum and immigration with the exception of legal migration and family law. Moreover, since 1 January 2005, the Commission has enjoyed the exclusive right of initiative.



Justice have only limited competence for a transitional period of five years with regard to all acts that have been adopted before the new treaty enters into force. After five years, this provision will automatically cease to have an effect, with the exception of the UK, which has the right to decide separately whether the new powers of the institutions shall be applicable in the country (Art. 10, Protocol on Transitional Provisions).

Regarding the policies on border checks, asylum and immigration, the EU Member States will keep their right to decide on the volume of admission of economic migrants (Art. 79, par. 3 TFEU) and may only consult the European Parliament if they take decisions for the benefit of a state that faces an emergency asylum situation (Art. 78, par. 3 TFEU). There are a few other exceptions to the ordinary legislative procedure in the area of freedom, security and justice, including the adoption of legalisation for passports, IDs or any other such document (Art. 77, par. 3) and of measures “concerning family law with cross-border implications” (Art. 81 par. 3).<sup>28</sup> In addition to a strengthened role of the European Parliament, the Lisbon Treaty foresees a stronger involvement of national parliaments in EU policy-making. They will have a greater say in the control of Europol und Eurojust and new competences with regard to the protection of civil liberties and fundamental rights. The European Parliament will be fully involved in the definition of Europol and Eurojust’s structure, operation, field of action and tasks and shall become, together with national Parliaments, an enhanced role in scrutinising the agencies’ activities. In general, national parliaments will be among the “winners” of the Lisbon Treaty reform by attaining new legal means to ensure the principles of subsidiary and proportionality (see Chardon, 2008).

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<sup>28</sup> Other exceptions concern administrative cooperation between Justice and Home Affairs departments of Member States (Art. 74) the definition of “specific aspects of criminal procedures” for which the Council has established minimum rules (Art. 82 par. 2d), the extension of the definition of serious crime with a cross-border implication (Art. 83, par. 1), and the adoption of “minimum rules with regard to the definition of criminal offences and sanctions”, if these rules were adopted according to the special legislative procedure (Art. 83, par. 2). For a detailed analysis see Bauer (2008: 109) and Monar (2008: 383).

In terms of treaty architecture, the Lisbon Treaty therefore brings a shift between the EU pillar structure with regard to the policy field of Justice and Home Affairs. Under the current treaty framework, Justice and Home Affairs matters are split between the Community first pillar (Title IV TEC-N asylum, immigration, border controls and judicial cooperation in civil matters), and the intergovernmental third pillar (Title VI TEU-N police cooperation and cooperation in criminal matters). The Lisbon Treaty ends this division and reunifies the EU policies in Justice and Home Affairs under the common legal framework Title V TFEU 'area of freedom, security and justice'. The third pillar of the EU ceases to exist.<sup>29</sup>

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<sup>29</sup> As emphasised by Jörg Monar (2008: 381), the legal reunification concerns the first and third pillar, but not the first and second pillar. The articles on the operational cooperation in the area of freedom, security and justice are still separated from the operational cooperation in the EU's external relations, which may create problems in view of the linkages between EU Justice and Home Affairs and foreign policy (see section 3.5.)

## 6. THE IMPORTANCE OF THE LISBON TREATY FROM THE POLICY PERSPECTIVE

### 6.1. Energy policy (Johannes Pollak, Peter Slominski)

The introduction of a new energy chapter into the Treaty will probably be of modest importance from a policy perspective. However, it reflects the growing importance of the field of energy policy in general and a certain political commitment by the Member States to work towards a more coherent European energy policy in the future. That said, it seems likely that the new provisions may increase EU activities in the field. In particular they may stimulate the adoption of new Directives as well as an abundance of additional communications, declarations, Action Plans and the like. Since the European Commission now has the possibility to base its proposals on the broad competences of Art. 194 and is thus less dependent on requests by the European Council, it seems fair to assume that the Commission will increase its policy entrepreneurship in the field (Inglis 2008). With the increased density of secondary legislation we will probably also witness an increased role of the European Court of Justice in adjudicating controversial regulatory issues. However, it remains unclear whether the Lisbon Treaty has mostly codified the status quo of the Energy acquis in explicit terms or if it has indeed added to the EU's powers in this field.

Even if we assume both a minor growth in EU competences and in qualified majority voting, it seems to us that if the Member States will continue to disagree in principle over such fundamentally important issues such as the liberalisation of the energy market, the Lisbon Treaty will probably not make much of a difference, in practice. However, it is clear from the history of the EU's attempts to formulate an energy policy that external events largely shape the EU's willingness to create a common energy policy. In recent times those external events include the sharp rise of the oil price in summer 2008, the fight against climate change as laid

down in the Kyoto emission targets, and the unstable political environment in Eastern Europe (esp. Russia, Ukraine) as well as the Middle East. Thus, it can be expected that energy issues, mainly in terms of supply security, will remain top on the EU's agenda even without the implementation of the Lisbon Treaty.

## 6.2. Social policy (Andreas J. Obermaier)

The Lisbon Treaty codifies and formalises a number of already existing practices. First, the Open Method of Coordination is currently in place in several social policy areas (health and long-term care, pensions, and social exclusion). The Lisbon Treaty codifies the cornerstones of these processes, such as guidelines, indicators, best practice, monitoring and evaluation; for social policy (Art. 156 TFEU) as well as for public health (Art. 168 TFEU). Second, social dialogue already takes place at the EU level, and the Tripartite Social Summit for Growth and Employment is held every year in spring. The dedication of a particular treaty article to social dialogue and the summit is thus only the formalisation of existing practices. Third, the new EU competence regarding social security provisions for self-employed migrant workers and their dependants (Art. 48(1) TFEU) codifies the case law of the European Court of Justice, which has found its way into secondary EC law (see e.g. Regulation 1408/71).

From a social policy perspective, the assessment of the Lisbon Treaty is rather ambivalent. On the one hand, it enhances the social dimension of the EU by introducing new elements on different levels: new objectives, new competences, new rights, new contents, and new decision modes. Various new and regrouped goals in Article 3 TEU-L make clear that social objectives are being strengthened through the Lisbon Treaty. There are several signs for this new weight of social policy. Economic, employment and social policy coordination are mentioned for the first time in the same article (Art. 5 TFEU). The current Title XI “Social policy, education, vocational training and youth” is changed to Title X “Social policy”. In addition, qualified majority voting for social security for migrant workers could mean a smoother passing of new EU laws in this area. The horizontal social clause could mean in practical terms that every new legislative draft has to be checked against social objectives. EU law that is contrary to these objectives could be declared void by the European Court of Justice.

On the other hand, the enhancement of the social dimension is for the most part of a rather symbolic nature and a number of “red lines”, which are meant to preserve Member State control over social protection systems, have been inserted. Concrete instruments to fill broad objectives with life, such as “full employment” and “social market economy”, are missing in the Lisbon Treaty. It can be assumed that these objectives will be reflected in EU laws one day, but this is far from guaranteed. What is more striking are the “red lines”. The safeguard procedure regarding social security for migrant workers could be an instrument to prevent further harmonisation, sealing again the status quo. Furthermore, the protocol on services of general interest could possibly have an effect on the European Court of Justice jurisprudence concerning the intrusion of internal market freedoms into the organisation of the fundamental principles of social protection systems and health systems. However, the protocol does not define services of general interest.<sup>30</sup> It only refers to Article 14 TFEU in which a definition is also absent. It remains thus unclear to what extent social services are subordinated to the internal market and competition law. Therefore, it will be the task of the European Court of Justice to weigh the internal market provisions and the protocol and to decide what these provisions mean in practice.

There is an ongoing debate at the EU level whether or not the social dimension of the EU should be strengthened and if yes, to what degree. Some Member States support a recalibration of the internal market/competition provisions and social policy considerations, whereas others are strictly opposed to this. At the moment, it seems unlikely that these opposing camps will agree on further social policy integration. The social policy innovations in the Lisbon Treaty were as far-reaching as possible, given diverging Member State interests.

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<sup>30</sup> The European Commission defined social services of general interest in two communications (2006, 2007) and the Biennial Report on social services of general interest (2008). The Commission distinguishes between services of general economic interest (telecommunications, electricity, gas, transport, postal services, public service broadcasting, waste management, water supply, waste water treatment) and non-economic services (police, justice, statutory social security schemes). According to the interpretation of the Commission, the latter group of services is not subject to specific EU legislation and is not covered by the internal market and competition rules. However, some aspects of these services may be subject to treaty principles such as non-discrimination (2007: 4-6).

In many areas, it will ultimately depend on the European Court of Justice whether the Lisbon Treaty means a recalibration or reconciliation of economic and social policy objectives.

If the Lisbon Treaty does not enter into force, a number of social policy innovations will not come into being. First, the horizontal social clause cannot be applied. Even though the practical significance of this clause is unclear, it could potentially mean that all EU policies and activities have to be assessed against the background of their impact on the level of employment, social protection, social exclusion, education and human health. Second, based on the current TEC-N, provisions on social security or social protection regarding the right of EU citizens to move freely and to choose their place of residence freely have no explicit legal basis. Third, the Charter of Fundamental Rights, including its basic social rights, cannot become legally binding unless the Lisbon Treaty enters into force.<sup>31</sup> Fourth, qualified majority voting regarding social security for migrant workers cannot replace the current requirement of unanimity.

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<sup>31</sup> However, ECJ judges and advocates general base their reasoning already today on the Charter of Fundamental Rights. Advocate General Ruiz-Jarabo Colomer in *Stamatelaki* reasons as follows: „However, although the case-law [the patient mobility case-law, AJO] takes as the main point of reference the fundamental freedoms established in the Treaty, there is another aspect which is becoming more and more important in the Community sphere, namely the right of citizens to health care, proclaimed in Article 35 of the Charter of Fundamental Rights of the European Union, since, ‘being a fundamental asset, health cannot be considered solely in terms of social expenditure and latent economic difficulties’. This right is perceived as a personal entitlement, unconnected to a person’s relationship with social security, and the Court of Justice cannot overlook that aspect“ (Case C-444/05). Therefore, it is unlikely that the coming into force of the Lisbon Treaty and the then legally binding character of the Charter will change much in the Court’s jurisprudence.

### 6.3. Foreign policy (Jozef Batora)

In the current system, the Commission controls the funds as the most commonly used instruments of Common Foreign and Security Policy; the Council controls the political decision-making – there is a need for more coherence to enable more effective operative decisions. Following Avery (2008), one can point out at least three types of contribution that the Lisbon Treaty would bring about.

First, the Treaty does not abolish the pillars and their specific modes of decision-making, but it brings them under the umbrella of one organizational structure in the field of external relations, which can bring about more coherence in the policy-making processes. This would be helpful also in facilitating the work of Common Foreign and Security Policy -missions and EU Special Representatives on the ground in crisis regions around the world. There, the ‘double-hatting’ is a regular practice already, and the Treaty of Lisbon would merely standardize such practices.

Second, the Union is currently represented externally by a number of actors (EC President, High Representative Common Foreign and Security Policy, the Presidency etc). The Treaty would create a strong focal point for external representation of the EU. External actors would engage with the EU in a more effective manner. A key challenge is determining to what extent the High Representative of the Union Foreign Affairs and Security Policy would be in the position to attend to all the duties that this ‘double-hatted’ position would require. Possibly, s/he would need to be supported by a number of permanent secretaries, who would be in charge of particular portfolios.

Third, national and European diplomacy often work in parallel with unclear relations between the two levels. The Treaty would clarify relations and enable staff-rotation between the national MFAs and the European External Action Service, so that expertise could be developed and applied in a complementary fashion in national and European diplomacy.



However, a number of issues remain to be clarified regarding career-paths and other personnel issues.

A number of practices currently under way in the realm of the EU's foreign relations indicate that even if the Lisbon Treaty is not adopted, we might still see institutional developments formalizing some of the elements that it contains. This concerns, for instance, the European External Action Service, which could possibly be established based on an inter-institutional agreement. Preparatory work for the integration of the external services has been under way since the signing of the Constitutional Treaty in 2004. There was an 'Issues Paper' by Barroso and Solana in 2004, and later a 'Progress Report' in May 2005. These documents also envisioned the creation of a form of European diplomatic training (possibly a network of diplomatic academies throughout the EU). This process was, however, slowed down following the French and Dutch referendums on the Constitutional Treaty.

In terms of budget, the Council and Commission staff are already financed by the EU budget, so the only additional expenditure would be the national officials seconded from the national foreign services.

The practice of 'double-hatting' in Common Foreign and Security Policy missions is already a matter of fact. For instance the EU Special Representative in Macedonia is also the Head of the Commission's Delegation. This, though, leaves some of the competences and procedures ambiguous, and it creates problems in relation to effective cooperation with Brussels-based institutions, where turf-battles between the Commission and the Council on matters of external affairs are still commonplace. It would hence be more effective if an inter-institutional arrangement based on the relevant articles of the Treaty of Lisbon would be adopted (Crowe 2008, Duke 2009).

#### 6.4. Security and defence policy (Nicole Alecu de Flers)

Although the Common Security and Defence Policy received a significantly extended presence in the Lisbon Treaty, this does not necessarily mean that revolutionary changes have been achieved in this policy field (Whitman 2008: 5). So far, the European Security and Defence Policy has largely developed outside the EU treaties and many of the changes in the Lisbon Treaty would codify existing practice and informal developments which have already taken place (Dagand 2008: 4; Duke 2008: 17).

The updated Petersberg tasks referred to in Art. 43(1) TEU-L have already been part of the daily European Security and Defence Policy business and have also been referred to in the European Security Strategy (ESS) adopted by the European Council in December 2003. The European Defence Agency (EDA) was established in July 2004 by a joint action in the framework of the Common Foreign and Security Policy and has started working. It is tasked with “developing defence capabilities in the field of crisis management, promoting and enhancing European armaments co-operation, strengthening the European defence industrial and technological base and creating a competitive European defence equipment market”.<sup>32</sup>

Moreover, the European Council already invoked the solidarity clause with immediate effect following the terrorist attacks on Madrid in March 2004, and the idea to entrust groups of Member States with the implementation of European Security and Defence Policy operations is already real today as has become visible in particular with regard to operation Artemis in the Democratic Republic of Congo. As far as permanent structured cooperation is concerned, the Member States have already pursued such flexible arrangements outside the treaties in the past, e.g. through the Western European Union (WEU) or bilaterally. Such forms of structured cooperation would not be hindered if the Lisbon Treaty is not ratified and if there would thus not be formal mechanisms to determine permanent structured cooperation.

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<sup>32</sup> Council of the European Union. 2004. General Affairs and External Relations, 2597. Council Meeting, Brussels Press Release, 11105/04 (Presse 216).

Furthermore, the provisions in the Lisbon Treaty contain several general and obscure formulations, as this was sometimes the only way to reach consensus. For example, although the arrangements for the functioning of permanent structured cooperation are specified in an additional treaty protocol, many of the provisions are still vague and questions remain regarding its entry criteria, initial participants and ultimate goals (Mölling 2008: 2).

Overall, it is also true for the Lisbon Treaty that treaty provisions do not substitute for the political will of the Member States. Also illustrative of the lacking willingness of EU Member States to give up sovereignty was the addition of two ‘Declarations concerning the common foreign and security policy’ (with the numbers 13 and 14) to the final act of the Intergovernmental Conference, which adopted the Lisbon Treaty. Among other things, both declarations say that “the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States”.

## 6.5. Justice and Home Affairs (Florian Trauner)

The changes that the Lisbon Treaty brings about in Justice and Home Affairs are significant. Brendan Donnelly, for instance, argues that the changes are “a major milestone in the evolution of the European Union’s legal order” and “the culmination of an institutional journey which has lasted fifteen years, the decade and a half since the signing of the Treaty of Maastricht” (Donnelly, 2008: 20; see also Bauer, 2008: 111-113; Monar, 2008).

The Lisbon Treaty reinforces the objective of providing European citizens with an area of freedom, security and justice. The treaty objective is strengthened by shifting several new competences to the EU level, by *communitarising* judicial cooperation in criminal matters and police cooperation, and by defining the ordinary legislative procedure as the standard decision mode for the area of freedom, security and justice. The EU policies in Justice and Home Affairs divided under the Nice treaty framework between the first and third pillar are reunified under the Title V TFEU “area of freedom, security and justice” and defined as a “shared competence”. The EU’s competences, however, are limited in the UK, Ireland and Denmark, which preserve their opt-in/opt-out options to all measures based on the Schengen acquis. The improved judicial control and the strengthened role of both the European Parliament and the European Commission will help to improve the democratic accountability and transparency of EU Justice and Home Affairs cooperation, in particular regarding the policy fields of police cooperation and of criminal justice where decision-making has so far remained intergovernmental. However, with respect to the different legal systems and traditions, the Lisbon Treaty introduces several special arrangements and red lines for these fields. Legislative acts may be initiated either by the Commission or by a quarter of the Member States, thus bypassing the Commission’s exclusive right of initiative. Moreover, if a member state perceives that a draft Directive affects fundamental aspects of its criminal justice system, it can block a decision and refer it to the European Council. To avoid permanent blockage, the emergency break is softened with the possibility of at least nine Member States

proceeding with the draft Directive in an “enhanced cooperation”, if the European Council lacks consensus. Other provisions on enhanced cooperation exist in the field of operational police cooperation and with regard to the establishment of the European Public Prosecutor Office.

Regarding policy instruments, EU cooperation in Justice and Home Affairs builds upon two sets of instruments: legislative action and operational cooperation. The operational cooperation between national law enforcement bodies, often in conjunction with Europol and Eurojust or other specialised agencies, comes in the Treaty of Lisbon under closer scrutiny from the European and the national parliaments. However, the articles on the operational cooperation in the area of freedom, security and justice continue to be separated from the operational cooperation in the EU’s external relations, which may create problems in view of the increasingly closer linkages between EU Justice and Home Affairs and foreign policy (see Monar, 2008: 381-382).

Since the changes that the Lisbon Treaty brings about are considerable, it does make a difference for the policy field whether or not the treaty enters into force. It will be the decisive factor for the restructuring of competences and the upgraded role of the European Parliament, the European Commission and the European Court of Justice. Some of the provisions of the Lisbon Treaty, however, only codify existing practices. The provisions on an “enhanced cooperation” of several Member States provide a legal backing for what has been practised since the beginning of EU cooperation in Justice and Home Affairs. The latest examples are the ‘G6’, an informal form of cooperation of the ministers of Justice and Home Affairs of the biggest six Member States (Germany, Italy, France, Spain, Poland and the UK) and the Prüm cooperation, a data-sharing initiative among national police services launched by seven Member States (Austria, the Benelux countries, Germany, France and Spain). The Prüm Convention was signed outside the EU’s legal framework in May 2005 yet pursued right from the start the objective to become part of the EU’s legal framework (see Prüm

Convention, 2005: Art. 1, par. 4). This objective was realised two years later, when under German presidency, in June 2007, it was agreed that the Prüm Convention should become EU law.

Also, it is worth mentioning that the Lisbon Treaty's entering into force is not the sole factor determining the future scope and pace of European integration in Justice and Home Affairs. The basic rationale for the creation of an EU internal security regime has been a changing conception of security (see e.g. Huysmans, 2000) and a perception that transnational security threats cannot be dealt with at a national level alone (Monar, 1999: 3).<sup>33</sup> Changing threats scenarios are therefore of particular relevance for EU cooperation in Justice and Home Affairs and have caused several integration leaps. In the aftermath of 9/11 and the Madrid and London terrorist bombings, a wide range of anti-terrorism measures was adopted including the European arrest warrant and enhanced tasks and resources for Europol (see Dittrich, 2005). Unexpected external events and changing threat scenarios may therefore be an important factor of influence for the future development of EU policies in Justice and Home Affairs.

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<sup>33</sup> Another driving factor for the rapid development of EU policies in Justice and Home Affairs has been the efforts of different Member States to 'europeanise' certain national problems (Monar, 2001: 756-758). In doing so, European government hoped to find new ways to solve their domestic problems or simply to reduce the pressure in the political debate by hiding "behind the weighty screen of collective EU action (or non-action)" (Ibid: 756).

## 7. CROSS-POLICY COMPARISON: REFORM POTENTIALS AND LIMITATIONS (GERDA FALKNER<sup>34</sup>)

The above chapters have shown that there are significant differences between EU policies when it comes to the (potential) impact of the Lisbon Treaty. All fields studied in this paper show some relevant changes. At the same time, these are variegated in terms of degree of innovation and of practical importance.

While the previous chapters offered a detailed discussion of the reforms in the Lisbon Treaty for each of the policies, we offer an overview on the meta-level here. Table 1 highlights that the Lisbon Treaty brought new objectives, improved policy instruments, additional regulatory competences and more qualified majority voting options. Each of these innovations occurs in at least two of the fields studied here.

**Table 1: Innovations in the Lisbon Treaty, five policy areas**

<b>POLICY</b>	<b>New explicit objectives</b>	<b>Improved policy instruments</b>	<b>Additional regulatory competences</b>	<b>More qualified majority voting</b>
<b>Justice &amp; Home Affairs</b>		yes	yes	yes
<b>Social</b>	yes		yes	yes
<b>Foreign</b>	yes	yes		
<b>Security &amp; Defence</b>	yes	yes		
<b>Energy</b>	yes		yes	Legally unclear, yes in practical terms

<sup>34</sup> On the basis of the expertise provided by the team members.

Regarding, in more detail, the responsibilities of the EU and its powers to adopt and enact binding regulatory policy, the comparative angle including our five policy areas suggests that the most significant changes occurred in the policy field of Justice and Home Affairs. Several new competences in different Justice and Home Affairs policies were transferred to the EU level and police and judicial cooperation in criminal matters brought under the Community pillar. Two further fields have seen at least some minor extensions of EU competences, social affairs and energy. In the case of energy, there is now an specific chapter with an explicit mandate to adopt a proper policy. In the case of social policy (in a wide sense), the category of self-employed migrant workers and their dependants was included when the Treaty regulates social security for intra-EU migrant workers in order to guarantee free movement. In addition, the Lisbon Treaty provides for the possibility to enact social security and social protection measures in order to guarantee the basic right of EU citizens to move and reside freely within the EU. In both of these issue areas, however, it seems that these competences are not indeed innovative in the strict sense, but that they include issues covered by less explicit or indirect community competence before. The degree of innovation below the level of explicit competences therefore remains to be debated by specialist lawyers, taking also into consideration the relevant ECJ case law.

In both the foreign policy and the security/defence fields, the Lisbon Treaty brings no major change insofar as the Lisbon Treaty reformulates the Common Foreign and Security Policy, including the Common Security and Defence Policy, as a competence of the Union, but it also perpetuates the distinct character of these policy fields in terms of intergovernmental decision modes. Most importantly, the adoption of legislative acts is explicitly excluded.



**Table 2: The Lisbon Treaty across policy areas: More competences for regulative action?**

<b>POLICY</b>	<b>Additional regulatory competences?</b>
<b>Energy</b>	Yes, as far as explicit EU competences (shared with the Member States) are concerned (so far, the EU based its energy policy on general EC provisions mainly with regard to the Common Market and – to a lesser extent – on those articles which include an explicit reference to energy policy (Art. 154 and 175 TEC-N). It is unclear if the Lisbon Treaty brings additional powers or only codifies legally pre-existing competences.
<b>Social</b>	Yes, additional shared competences for social security of self-employed migrant workers and their dependants (Art. 48(1) TFEU) and for social security and social protection in order to guarantee the basic right of EU citizens to move and reside freely within the territory of the Member States (Art. 21(3) TFEU).
<b>Foreign</b>	No.
<b>Security &amp; Defence</b>	No.
<b>Justice &amp; Home Affairs</b>	Yes, additional shared competences for different Justice and Home Affairs policies including for promoting the integration of third country nationals residing legally in the EU (Art. 81, par. 3 TFEU) and for creating a European Public Prosecutor Office (Art 86, par.1 TFEU). Yet, the EU's competences in the area of freedom, security and justice are not applicable in all Member States.

A second matter of interest is the question if it will be easier to adopt EU policies after the Lisbon Treaty comes into force. The answer is that yes, this is true for at least two of the five fields studied. Justice and home affairs will have significantly less unanimity requirements. Also in one sub-field of the social realm, at large, additional qualified majority voting will be possible after the Lisbon Treaty comes into force, i.e. social security of intra-EU migrant workers. In energy policy, qualified majority voting is now explicitly established as the ordinary legislative procedure throughout the field with the exceptions of taxation. As a corollary, this procedure will probably replace the unanimity requirement of Article 308 TEC-N which was frequently used in the past, notably adopting (multiannual) programmes. In the fields of foreign and security policy, there are only very limited openings in favour of decisions by qualified majority voting and the principle of unanimity is kept for all essential questions of foreign, security and defence policy.

**Table 3: The Lisbon Treaty across policy areas: Increased decision-making capacity?**

<b>POLICY</b>	<b>Less unanimity requirements?</b>
<b>Justice &amp; Home Affairs</b>	Yes, in particular regarding police cooperation and judicial cooperation in criminal matters.
<b>Social</b>	Yes, qualified majority voting for social security of migrant workers (but safeguard procedure).
<b>Foreign</b>	No.
<b>Security &amp; Defence</b>	No. <sup>35</sup>
<b>Energy</b>	No (but probably in practical terms where formerly, the residual power clause Article 308 TEC-N was needed which asks for unanimity).

Combining the two dimensions of extended regulatory competences and facilitated decision-making capacity, as included in the two previous tables, indicates the Lisbon Treaty's potential in terms of strengthening the classic "community method". There is an interesting split between the policies studied, with innovations on both levels only in the fields of social affairs and of Justice and Home Affairs. Energy occupies a middle ground under such consideration. On the opposing end of the continuum, there are the foreign and security policy fields with hardly any changes on the two dimensions.

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<sup>35</sup> An exception can be seen in the fact that the Council shall act by a qualified majority, after consulting the High Representative of the Union for Foreign Affairs and Security Policy, when adopting a decision establishing permanent structured cooperation (or confirming the participation of a further Member State or suspending the participation of a Member State in permanent structured cooperation).

However, such a kind of comparison is necessarily superficial because the more or less encompassing character of the innovations is not grasped on a more qualitative level. Taking into consideration in-depth knowledge about the individual policies, qualifications are needed when judging the Lisbon Treaty's innovation capacity in terms of the "community method". This is true both (a) with regard to the relative significance of the innovations in the two progressive fields and with regard to the role of the "community method" in the overall Lisbon reform treaty (b).

a) At a closer look, the significance of the reforms in Justice and Home Affairs is without doubt greater than those in social policy. The latter field is a classic shared competence between the EU and Member States and has, despite many expectations to the contrary, shown impressive regulative activity in form of minimum standards (labour law, anti-discrimination) and coordination of social security rules for migrant workers. However, it is a field where the Member States consider their individual systems and practices of major relevance and worthy to be protected. Not least because this is so, the relevant provisions in the EU's primary law are nowadays quite detailed in explaining in which sub-fields the EU may or may not act, and under which voting requirements. This has been developing most importantly since the Maastricht Treaty, with its very specific social provisions embedded originally in the Agreement between the Member States without the UK, and only later incorporated into the EC Treaty itself with the Amsterdam Treaty. In other fields, the specification of detailed rules within the policy area has not progressed to a similar extent. At the same time, there are even fields explicitly "off limits" for EU social policy and the Lisbon Treaty even sets some more "red lines" and a "safeguard procedure" allowing to refer issues of special importance to governments to the European Council. They may be seen as a kind of countervailing development to the increase in competences and decision-capacity outlined before, a counterbalance that does not exist in other policy areas. Finally, but maybe most importantly, the additional social policy competences concern rather limited issue areas. These issue areas are broader and more significant in EU Justice and Home Affairs, yet it

should be mentioned that also in this domain, a number of competence limitations and special arrangements have been set up. A major difference to the safeguard procedure in EU social policy is that in Justice and Home Affairs, it has been accompanied by facilitating provisions on “enhanced cooperation”.

To conclude with, differences below the level expressed in Tables 2 and 3 above are of interest when it comes to evaluating the reforms in the field of the “community method”. Furthermore, it seems a crucial development in the Lisbon Treaty that in parallel to extended competences and “deepened” decision modes, there are often explicit restrictions of the EU’s competences and/or safeguard mechanisms introduced as well. This seems an aspect worthwhile studying in depth and with regard to further policy areas covered in the Lisbon Treaty.

b) A further indispensable addition to the look at the “community method” is taking innovation on other levels into consideration. These may be outside the regulative realm but nonetheless important. Most importantly in the fields of the EU’s external action (foreign, security and defence policies), it is crucial to focus on the level of structures, instruments and overall EU ambitions when considering the importance of the Lisbon Treaty. Otherwise, the significance would without any doubt be underestimated.

The following table will therefore highlight, in a nutshell, the most crucial developments on all relevant levels, for each of the policies studied, under the Treaty of Lisbon. It indicates that the foreign, security and defence fields are more affected by changes under the Lisbon Treaty than the previous sections may have suggested.

**Table 4: Most important innovations under the Lisbon Treaty**

<b>POLICY</b>	<b>INNOVATIONS</b>
<b>Justice &amp; Home Affairs</b>	Communitarisation of police cooperation and judicial cooperation in criminal matters; upgraded role for European Parliament, Commission and ECJ by defining the ordinary legislative procedure as the standard decision mode for the European area of freedom, security and justice; however, several emergency breaks and possibilities for “enhanced cooperation” may result in an increased fragmentation of EU Justice and Home Affairs.
<b>Social</b>	Strengthening of social dimension (new objectives, competences, rights, decision modes); however, essentially symbolic enhancement and insertion of “red lines”.
<b>Foreign</b>	Establishment of the “triple-hatted” post of the High Representative of the Union Foreign Affairs and Security Policy; establishment of the European External Action Service.
<b>Security &amp; Defence</b>	Individual section on “Provisions on the Common Security and Defence Policy” (Art. 42-46 TEU-L); extension of the “Petersberg tasks”; treaty basis for the European Defence Agency; possibility of flexible arrangements (permanent structured cooperation); introduction of a mutual defence clause and a solidarity clause.
<b>Energy</b>	New energy chapter (Art. 194 TFEU).

## **8. CONCLUSION: PUTTING THE LISBON TREATY INTO PERSPECTIVE**

**(GERDA FALKNER<sup>36</sup>)**

To put the Lisbon Treaty into perspective and allow for some conclusions regarding the development of the EU's policies over time, the following overview includes reform developments in the five areas studied also beyond the most recent Treaty, covering all major reforms of the EU and the European Community.

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<sup>36</sup> On the basis of the expertise provided by the team members.

**Table 5: Widening and deepening of policy-making capacities in Treaty reforms over time, five policy areas**

<b>TREATY (signed)</b>	<b>Justice &amp; Home Affairs</b>	<b>Social</b>	<b>Energy</b>	<b>Foreign</b>	<b>Security &amp; Defence</b>
<b>Lisbon (2007)</b>	^ + ++	° + ++	° +	° ^ +	° ^ +
<b>Nice (2001)</b>	+	+ ++			
<b>Amsterdam (1997)</b>	° ^ + ++	° + ++		^	
<b>Maastricht (1992)</b>	°	° + ++	+	° +	° +
<b>Single European Act (1986)</b>		° ++			
<b>Rome (1957)</b>		° +			

° new objectives

^ improved policy instruments

+ new explicit competences (re development of an EU policy, regardless if exclusive or shared competence, or parallel action EU/Member States)

++ competences without unanimity requirement



Table 5 suggests that regarding the fields studied in this paper, only the Maastricht Treaty can be compared to the Lisbon Treaty to some extent, in terms of its significance for policy reform on the meta-level of EU primary law. Focussing on new competences only, the Lisbon Treaty with its innovations for Justice and Home Affairs, social and energy policies, but also in the field of foreign and defence policy, is more progressive than all earlier EU reforms. Next in rank is the Treaty of Maastricht with additional explicit competences in four of our policy areas, plus with one area affected by less unanimity requirements (in the Treaty of Lisbon: two). On the level of new objectives and of improved policy instruments, too, the Lisbon Treaty is first in line, equalled only by the Maastricht one in terms of new explicit objectives for joint EU policies.

However, a word of caution is needed. First, our paper is no overall assessment of the Treaty of Lisbon but only takes into consideration its policy reforms, comparing sectors on a specific meta-level.<sup>37</sup> It is neither a legal expertise<sup>38</sup> nor a political assessment<sup>39</sup>, but a political science analysis based on policy-related expertise and the comparative approach. Even as such, it is limited in scope for the topic itself would deserve a book-length analysis. Second, this comparison on a meta-level cannot grasp all qualitative developments and it excludes further dimensions that may be of interest and relevance as well (see the previous chapter 7). Third, and considering our findings in the overall context including all of the Lisbon Treaty's scope, our limited number of policy areas begs consideration. Further research is needed to cover all fields of the EU's policy range, or at least all areas with changes in the Treaty of Lisbon. However, the fields discussed in this paper include crucial developments under the Lisbon Treaty, be it institutional/procedural ones (like in foreign policy), be it regarding competences

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<sup>37</sup> There was no space to cover all important extra-Treaty developments, either.

<sup>38</sup> Indeed, many issues discussed in this paper beg important further questions to be tackled by experts in EU law, as we indicate in some places throughout the text.

<sup>39</sup> It is also not a discussion of potential future developments which may or may not occur if this Treaty comes into force.

and decision modes (in Justice and Home Affairs most importantly, but also in energy and social policy).

In any case, the Institute for European Integration Research at the Austrian Academy of Sciences plans to further broaden the array of its expertise in various EU policy areas soon. In the future, we will therefore be in a capacity to compare across a larger set of fields and, by doing so, to gather even further-reaching insights into issues such as the differential ways of the EU's progress towards enhanced potentials for political cooperation and integration.

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## 10. ANNEX

**Table 6: Growing social policy objectives, by successive treaty reforms**

EEC Treaty:

- Non-discrimination of workers regarding employment, remuneration and other conditions of work and employment (Art. 48 EEC Treaty);
- social security for migrant workers and their dependants (Art. 51 EEC Treaty);
- improved working conditions and an improved standard of living for workers (Art. 117 EEC Treaty);
- promotion of close cooperation between Member States in the social field (i.a. employment, labour law and working conditions, social security, the right of association and collective bargaining between employers and workers) (Art. 118 EEC Treaty);
- equality between women and men regarding pay (Art. 119 EEC Treaty);
- maintenance of the existing equivalence between paid holiday schemes (Art. 120 EEC Treaty)

Single European Act:

- Improvement and harmonisation of the conditions of health and safety of workers (Art. 118(a) EEC Treaty);
- development of the dialogue between management and labour (Art. 118(b) EEC Treaty);
- strengthening of economic and social cohesion (Art. 130(a) EEC Treaty)

Treaty of Maastricht:

- Promotion of balanced and sustainable economic and social progress through the strengthening of economic and social cohesion (Art. B TEU);
- Promotion of “a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States” (Art. G TEU)

Treaty of Amsterdam:

- Promotion of coordination between employment policies of the Member States with a view to enhance their effectiveness by developing a coordinated strategy for employment (Art. 3 TEC-A)

Treaty of Nice:

- No new objectives

Treaty of Lisbon:

- Well-being of its peoples (Art. 3(1) TEU-L);
- “sustainable development of Europe based on (...) a highly competitive social market economy, aiming at full employment and social progress” (Art. 3(3) TEU-L);
- fight against “social exclusion and discrimination”, promotion of “social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”, and promotion of “economic, social and territorial cohesion, and solidarity among Member States” (Art. 3(3) TEU-L);
- Promotion and enhancement of social partners and social dialogue (Art. 152 TFEU)



**Table 7: Growing social policy competences and decision modes, by successive treaty reforms**

EEC Treaty:

- Social security for migrant workers (Art. 48) (unanimity)

Single European Act:

- Minimum requirements (Directives) in order to improve and harmonise health and safety of workers (Art. 118(a)) (QMV)

Treaty of Maastricht (Agreement on social policy) (opt-out for the UK, until Treaty of Amsterdam 1997):

- Social security and social protection of workers (unanimity);
- protection of workers where their employment contract is terminated (unanimity);
- representation and collective defence of the interests of workers and employers, including co-determination (unanimity);
- conditions of employment for third-country nationals legally residing in Community territory (unanimity);
- financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund (unanimity) (Art. 2, Agreement on social policy);
- Improvement in particular of the working environment to protect workers' health and safety (QMV);
- working conditions (QMV);
- information and consultation of workers (QMV);
- equality between men and women with regard to labour market opportunities and treatment at work (QMV);
- integration of persons excluded from the labour market (QMV) (Art. 2, Agreement on social policy);
- Member States may entrust management and labour with the implementation of Directives (Art. 2, Agreement on social policy);
- Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties, Commission shall consult management and labour on the possible direction of Community action (Art. 3, Agreement on social policy)

Treaty of Amsterdam:

- Inclusion of social policy competences of the “Agreement on social policy” in Article 137 TEC-A (end of opt-out for UK);
- New mandates: action against discrimination (added: racial and other origins, religion or belief, disability, age or sexual orientation) (Art. 13 TEC-A) (unanimity);
- “measures” combating social exclusion (Art. 137(2)) (QMV);
- “measures” ensuring equal opportunities and equal treatment of women and men in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value (Art. 141(3)) (QMV);
- employment policy co-ordination (new Title VIII, Arts. 125-130 TEC-A) (QMV)

Treaty of Nice:

- New QMV mandates: combating of social exclusion (Art. 137(1)(j) TEC-N); modernisation of social protection systems (Art. 137(1)(k) TEC-N);
- “Measures” to improve transnational co-operation (Art. 137) (QMV);
- “incentive measures” to combat discrimination (Art. 13) (QMV);
- Council may decide to render QMV applicable to protection of workers where their employment contract is terminated, representation and collective defence of the interests of workers and employers and conditions of employment for third-country nationals (Art. 137) (unanimity)

Treaty of Lisbon:

- Social security for self-employed migrant workers and their dependants (Art. 48(1) TFEU) (QMV);
- “measures” regarding social security and social protection in order to guarantee the basic right of EU citizens to move and reside freely within the territory of the Member States (unanimity, special legislative procedure) (Art. 21(3) TFEU).