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The Institutional Matrix  
of European Foreign Policy  
under the Constitutional Treaty

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ANALYSIS OF THE PROVISIONS GOVERNING EUROPE'S COMMON FOREIGN AND SECURITY POLICY  
IN THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE  
SIGNED IN ROME ON 29 OCTOBER 2004

## The Institutional Matrix of European Foreign Policy in the Constitutional Treaty

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*There seems to be a political understanding that the European Union should play a more proactive role in foreign policy to serve European interests and to promote common values such as democracy, sustainable development, free trade and human rights. To the great surprise of many observers the much lamented absence of a common European response to the issue of Iraq did not prevent the European Convention and the Intergovernmental Conference to agree on an ambitious reform of the constitutional foundations of European foreign policy. This article examines to what extent the changes enshrined in the Constitution establishing a Constitution for Europe have the potential to remedy the deficiencies of the Treaties' existing foreign policy regime. It has to be evaluated in how far the Convention and the Intergovernmental Conference have met the original goal set by the Laeken European Council to consider reform steps to strengthen the Union's ability to "shoulder its responsibilities in the governance of globalisation."*<sup>1</sup>

The reform of the constitutional foundations of European Foreign Policy featured prominently on the agenda of the European Convention under the presidency of Valéry Giscard d'Estaing. After some initial arguments, the Convention established a working group on "external action" which submitted its report just before Christmas 2002 and whose findings were complemented by the results of two other working groups on the issues of defence and legal personality.<sup>2</sup> But it took another seven months of intense negotiations until a final agreement was reached in July 2003.<sup>3</sup> Of course, the Intergovernmental Conference (IGC) had the power to modify the proposal and the politically sensitive field of foreign policy was indeed particularly likely to be subject to some changes. But the numerous informal consultations between the Convention's Presidium and national governments in the final stages of the Convention's deliberations had eased most tensions and thus the Convention's Draft Constitution reflected a basic compromise from which the governments did eventually not depart. The Treaty establishing a Constitution for Europe (hereafter: ConstEU) signed on 29 October 2004 in Rome

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<sup>1</sup> Laeken Declaration on the Future of the European Union, Annex I to the Presidency Conclusions, Laeken European Council, 15 December 2001 <[ue.eu.int/en/info/eurocouncil](http://ue.eu.int/en/info/eurocouncil)>, section I.

<sup>2</sup> Working Group VII "External Action", Final Report, 16 December 2002, doc. CONV 459/02; Working Group VIII "Defence", Final Report, 16 December 2002, doc. CONV 461/02; Working Group III "Legal Personality", Final Report, 1 October 2002, doc. CONV 305/02.

<sup>3</sup> European Convention: Draft Treaty establishing a Constitution for Europe, 18 July 2003, doc. CONV 850/03.

largely follows the Convention proposals. Its renumbered final version shall be the basis of this article.

This contribution explores the new institutional balance of European foreign policy in three steps: After some preliminary remarks on the constitutional foundations of European foreign policy (1), the article examines the reform proposals to enhance the formulation of collective policy preferences in the decision-making process which ideally result in “a single mind” supporting a common foreign policy (2). On this basis, the single most important reform step shall be considered: the creation of the post of a “Union Minister for Foreign Affairs” (UMFA) which converges the existing concert of various foreign policy representatives into “a single voice” responsible for the external representation of European foreign policy (3).

## **1. Constitutional Foundations**

The article deliberately adopts a lawyer’s perspective by focusing on procedural and institutional issues. Certainly, the success of any reform ultimately depends on the ability and will of the political actors to agree and implement a common foreign policy. But the history of European integration shows that the Treaties’ institutional rules are an important framework and catalyst for the progressive realization of common policies. Institutional design and questions of substance go hand in hand and the experience of external Community policies suggests that this applies to foreign and “domestic” European policies alike. It is therefore assumed that the European Constitution – contrary to most national counterparts which generally do not contain detailed rules on foreign policy – should continue to regulate the formulation and articulation of European foreign policy legally. An effective and efficient institutional framework provides the necessary groundwork and foundation upon which European foreign policy can be built.

It is well known to any European lawyer that under the present legal regime the European Union is founded upon three pillar, one of which concerns the Common Foreign and Security Policy (CFSP).<sup>4</sup> The legal status of the European Union (second and third pillar) has been the subject of lively academic debates and fierce criticism.<sup>5</sup> Although the “troubled personality”<sup>6</sup> of the European Union did not

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<sup>4</sup> See Article 11-28 TEU.

<sup>5</sup> See exemplarily the debate on the legal personality of the European Union summarized in the articles by Ramses A. Wessel, “Revisiting the International Legal Status of the European Union”, *EFA Rev.* 5 (2000) 507-37 and the general discussion of the problems of the pillar structure by Deirdre Curtin, “The Constitutional Structure of the Union: A Europe of Bits and Pieces”, *CML Rev.* 30 (1993), 17-69 and Bruno de Witte, “The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?”, in: Heukels/Blokker/Bruns (eds.): *The European Union after Amsterdam* (1998), p. 51.

<sup>6</sup> Nanette Neuwahl, “A Partner With a Troubled Personality”, *EFA Rev.* 3 (1998), 177-95.

necessarily impede its political development,<sup>7</sup> the decision to establish a single and undisputed legal personality of the European Union should be welcomed. By simply stating that the Union “shall have legal personality” (Article I-7 ConstEU) the new Treaty eliminates the lack of clarity stemming from the pillar structure and thereby facilitates its comprehensibility in the eyes of its citizens – including the academic community. In this context, it should be remembered that the single legal personality as such does not extend the powers of the European Union. The legal personality of the Union does clearly not create a European state.<sup>8</sup> Indeed, the merger of the present pillars does not even entail a harmonisation of the different legal instruments and decision-making procedures of the present pillars. Articles I-40 and III-294-313 ConstEU rather continue a specific regime for CFSP within the single framework of the new Constitution. Even the term “Common Foreign and Security Policy” will be maintained as the heading of its Part III, Title V, Chapter 2.<sup>9</sup>

Moreover, European foreign policy is not confined to the CFSP but comprises the external activities of the European Community. It is actually a great potential strength of European foreign policy that it covers a wide range of policy instruments under all three present pillars: from commercial, environmental, development and association policies over justice and home affairs law to classical diplomatic activity and military action. Since the rules governing external Community policies under the EC Treaty can be largely qualified as successful, the Convention decided to concentrate on the reform of CFSP. Nonetheless, some minor changes also occurred to the external activities under the present EC Treaty and the general reform of the European institutions in the foreign policy field affects the present external Community policies as much as CFSP. Therefore, it is at certain points necessary to adopt a comprehensive approach covering the external action of the European Union in general. This also allows us to take a closer look at the pivotal challenge of coherence and consistency arising from the necessary

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<sup>7</sup> One should remember that the Court of Justice has no jurisdiction over the second pillar; see Article 46 TEU. Thus, the political actors could develop CFSP rather pragmatically on political grounds without taking legal issues too seriously.

<sup>8</sup> To the contrary, one might argue that Article I-7 ConstEU implicitly confirms that the European Union is an international organization, since it continues the drafting technique of international treaties establishing international organizations; but see Tiilikainen, “To Be or not to Be? An Analysis of the Legal and Political Elements of Statehood in the EU’s External Identity”, *EFA Rev.* 6 (2001), 223-41.

<sup>9</sup> CFSP even evades the categorisation of competences in Article I-11-18 ConstEU and is simply referred to as “the CFSP” with a rather opaque intra-constitutional delimitation clause in Article III-308 ConstEU (hitherto Art. 47 EU). Against this background, Marise Cremona, “The Draft Constitutional Treaty: External Relations and External Action”, *CML Rev.* 40 (2003) 1348 at 1354 rightly describes CFSP as “something special or *sui generis*”.

convergence of the different foreign policy fields and instruments of the European Union and its Member States.

The new constitutional Treaty shows that – despite the ambition to render European foreign policy more effective – the overall “federalization” of European foreign policy with an exclusive European competence for foreign policy is a political non-option. Instead, national and the Union’s foreign policies will continue to complement each other; comparable to the interaction of most external Community policies such as development cooperation or international environmental policy under the present EC Treaty. The infamous mixed agreements are the probably most renowned expression of this complementary parallelism.<sup>10</sup> Besides CFSP, the Member States will continue to have a foreign policy of their own where no European position exists: either because no agreement could be reached or because there is no need for European action.<sup>11</sup> It seems that this complementary mixity is no interlude paving the way for a comprehensive and exclusive Community competence for foreign policy.

Mixity may rather be regarded as a protection of the Member States’ legitimate interests and autonomy by preventing a gradual usurpation of their external competencies by the Community without weakening the strength inherent in united action.<sup>12</sup> The European Union is not about to become a classical federal state with a single foreign policy, but constitutes a non-statal entity *sui generis*. From the point of view of European constitutional theory, mixity of foreign policy action can be regarded as a building block of the concept of a “European constitutional federation” (*Verfassungsverbund*) developed by Ingolf Pernice: the European constitutional federation is no federal constitution with a centralized responsibility for foreign policy but Europe’s framework of multilevel constitutionalism within which the European and national constitutional orders co-exist on an equal and non-hierarchical footing.<sup>13</sup> In this respect, the creation of the post of a Union Min-

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<sup>10</sup> On mixed agreements, *inter alia*, the contributions in O’Keeffe/Schermer (Eds.), *Mixed Agreements* (1983) and Bourgeois/Dewost/Gaiffe (Eds.), *La Communauté européenne et les accords mixtes* (1997) as well as MacLeod, Hendry, Hyett, *The External Relations of the European Communities* (1996) at 142 et seq.

<sup>11</sup> See also the thorough deliberations on the relationship between national foreign policies and CFSP by Ramses A. Wessel, “The Multi-Level Constitution of European Foreign Relations”, in: de Witte (Ed.), *The Emerging Constitution of the European Union* (2004, forthcoming), sections 2.2. and 3.

<sup>12</sup> See Joseph H.H. Weiler, “The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle”, in: *ibid.*, *The Constitution of Europe* (1999), pp. 130-87 at 185.

<sup>13</sup> For details of this concept see Ingolf Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?”, *CML Rev.* 36 (1999) 703-50, Ingolf Pernice, “Europäisches und nationales Verfassungsrecht”, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 60 (2001) 148-93; *ibid.*, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?”, *CML Rev.* 36 (1999) 703-50 and Daniel

ister for Foreign Affairs (Article I-28 ConstEU) should not be confused with an overall federalisation of foreign policy. Legally, the powers of the minister are not omnipotent, but rather limited to the instructions of the Council in the field of CFSP or the Commission and the other institutions in areas of present EC powers.<sup>14</sup>

## 2. A Single Mind?

The Treaty establishing a Constitution for Europe lays down ambitious goals for European foreign policy. It shall, *inter alia*, contribute to “safeguard (the Union’s) common values, fundamental interests, security, independence and integrity (and) consolidate and support democracy, the rule of law, human rights and international law.”<sup>15</sup> The Union’s actual capacity to achieve these goals depends on its ability to translate the Treaty’s grand declaration in specific foreign policy actions. Against this background, this section examines the reform of decision-making procedures which ideally result in “a single mind” supporting a truly common foreign policy: what role for qualified majority voting in an enlarged European Union (2.1), may asymmetry accommodate diverging interests of individual Member States with a majority-led Union action (2.2) and in how far will the challenge of coherence and consistency be met by the establishment of a European External Action Service (2.3)? Generally, it should be remembered that the evolving characteristics of the Community method sought to develop a new and original *sui generis* model of European governance by striking a balance between the legitimate interests of the Member States and the requirements of effectiveness, efficiency and legitimacy of European policy. We shall see that the reform of European foreign policy continues this path in line with the original compromises of the Community method and combines it with new and original features stemming from the specific requirements of foreign policy.<sup>16</sup>

### 2.1. *Qualified Majority Voting*

It is well-known to every European lawyer that qualified majority voting (QMV) in the Council is a pivotal, if not the most important, precondition for effective

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Thym, “European Constitutional Theory and the Post-Nice Process”, in: Andenas/Usher (Eds.): *The Treaty Of Nice, Enlargement and Constitutional Reform* (2003), 179-214. The concept is applied to European foreign policy by Wessel, *supra* note 11, section 1.

<sup>14</sup> See section 3 for more details.

<sup>15</sup> Article III-292(2)(a), (b) ConstEU. This corresponds, *mutatis mutandi*, to the present Article 11 TEU.

<sup>16</sup> It should be noted that the term “*Community way*” persists in Article 1(1) ConstEU despite the replacement of the European Community by the European Union with its single legal personality. This is due to British caveats concerning the original reference to the “federal basis” of the European Union; see the original proposal in doc. CONV 528/03.

European decision-making – not only in the prospect of the forthcoming enlargement as a result of which the unanimity rule will entail a right of veto for each of the 25 Member States. At present, Article 23(2) TEU provides for limited QMV in the second pillar in so far as the implementation of common positions and joint actions is concerned and whenever a measure is adopted on the basis of a common strategy; only decisions having military or defence implications always require unanimity. At first sight, this remains largely unchanged under the new Constitution, whose Article III-300 is clearly modelled upon the present Article 23 TEU and takes up most of its dominant features. Nonetheless, some reform steps have been undertaken, which have the potential of enhancing the efficiency of decision-making in the medium run by pragmatically extending QMV in accordance with the political developments in the years to come.

One first improvement of the efficacy of decision-making procedures is not directly linked to the Convention, since it already exists under the present Treaty regime. But it will maintain its potential importance under the future Constitution. It concerns the instrument of “common strategies” which will be – rather inelegantly – re-baptized “European decisions of the European Council on the strategic interests and objectives of the Union” (Article III-293(1) ConstEU). Whenever the Council adopts a position or action<sup>17</sup> on the basis of the strategic principles and objectives defined by the European Council the Treaty foresees QMV in the Council.<sup>18</sup> But in practice, the existing strategies contain a detailed catalogue of specific actions and ignore all questions on which the Member States disagree. They thereby fail to provide a strategic and visionary impetus to CFSP and limit the potential of strategies to result in more QMV on substantive policy issues which go beyond the technical fine-tuning. More specifically, the Common Strategy on Russia fell short of providing a general policy framework which enabled the European Union to react flexibly to the crisis in Chechnya and largely ignores the controversial and crucial relationship between the European Union and Russia concerning the future EU-enclave of Kaliningrad.<sup>19</sup>

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<sup>17</sup> Article III-294(3) ConstEU maintains the name of these CFSP instruments in principle, but eliminates the adjective “common/joint” (Article 14 & 15 TEU).

<sup>18</sup> See Article III-300(2)(a) ConstEU and Article 23(2) TEU.

<sup>19</sup> See Common Strategy 1999/414/CFSP of 4 June 1999 on Russia (OJ 1999 L 331/1), extended by Common Strategy 2003/471/CFSP of 20 June 2003 (OJ 2003 L 157/68) and its analysis by Haukka/Medvedev (Eds.), *The EU Common Strategy on Russia: Learning the Grammar of CFSP* (2001). See also the analysis of the Common Strategy 2000/458/CFSP of 19 June 2000 on the Mediterranean region (OJ 2000 L 183/5) by Spencer, “The EU and Common Strategies: The Revealing Case of the Mediterranean”, *EFA Rev.* 6 (2001) 31-51.

The attempt by the SG/HR Javier Solana to change this pattern in the case of the planned Common Strategy for the Western Balkans<sup>20</sup> and the proposal to adopt “thematic” strategies on non-geographical policy issues such as the European contribution to the fight against terrorism were met cautiously by the Member States and have been put aside for the moment. The entry into force of the constitutional Treaty may foster a new approach in this respect: First, the Treaty specifically foresees that the Union strategies “may be thematic in approach” (Article III-293(1) ConstEU). Second, the re-organisation of the European Council is streamlined with a new permanent President who together with the UMFA possibly exercises more political guidance and peer pressure over the national governments, thereby also supporting more “strategic” strategies.<sup>21</sup> This might ideally result in the better use of European decisions of the European Council on the strategic interests and objectives of the Union with more QMV in the Council when specific actions or positions are adopted.

In this context, it should be noted that the Constitution will continue the reform of the working methods of the Council, which could have an important practical impact on the formulation of European foreign policy. As laid down in Article I-23(2) ConstEU the Foreign Affairs Council will definitely be a separate and independent Council formation of its own. This builds upon the 2002 decision to create a new “General Affairs and External Relations Council” with separate meetings for general affairs and external action replacing the double-task of the former General Affairs Council to coordinate general EU policy and foreign policy at the same time.<sup>22</sup> Thus, the “impossibly busy foreign ministers”<sup>23</sup> can concentrate on the development of medium and long-term strategic orientations for European foreign policy. They might even be motivated to compensate their loss of influence on horizontal European policy issues – which had been their prerogative for decades – by rendering European foreign policy more effective, thereby creating a new sphere of influence for themselves. It would not be the first time in European politics that considerations of personal prestige facilitate an arguably rational policy choice.

The idea underlying the general maintenance of unanimity in the present and future Treaty regime governing CFSP (Article 23(1) TEU; Article I-40(6) ConstEU) is that the general foreign policy orientation shall be decided unanimously. Only after the consensual agreement on a common collective preference concerning a specific issue may implementing decisions be taken by QMV. Each Member

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<sup>20</sup> See Norman, “Solana Hits at EU-Strategies”, *Financial Times* 23 January 2001, p. 2; Zecchini, “Javier Solana dresse un bilan accablant des stratégies communes”, *Le Monde* 24 January 2001, p. 3.

<sup>21</sup> For the institutional re-arrangements see section 3.

<sup>22</sup> Presidency Conclusions, Seville European Council, 21/22 June 2002 <ue.eu.int/en/info/eurocouncil>, annex II.

<sup>23</sup> Ricardo Gomez/John Peterson, “The EU’s Impossibly Busy Foreign Ministers: ‘No One is in Control’”, *EFA Rev.* 6 (2001) 53-74.



State retains the full legal control over CFSP and the Member States' foreign policy minds are only merged on a case-by-case basis when a common European approach is adopted unanimously. This applies to QMV for the implementation of strategies set by the European Council as well as to the adoption of decisions implementing a Union action or position.<sup>24</sup> Any extension of QMV beyond this point would cover areas, in which a common collective preference has not yet been established by a strategy, position or action beforehand. One may regard this as a paradigm change, in which the consensus-based "international-style" cooperation among the Member States turns into the generalised will input into a supranational polity and political scientists might argue that national foreign policy preferences have not yet sufficiently converged to support the definition of a collective European preference by QMV. But one might also point at the experience of European integration which shows that institutional design and political convergence go hand in hand and that it has always been a characteristic feature of European integration that procedural reform facilitated political progress – and *vice versa*.<sup>25</sup>

When faced with the similar difficulty in the original areas of European integration, Europe's founding fathers decided to confer a monopoly of initiative upon the Commission, whose function and institutional design do not mirror national constitutional arrangements but rather "embodies and represents the pure Community interest."<sup>26</sup> It should be welcomed that the European Convention has now taken up this historic precedent and extended it to CFSP, albeit with some modifications. The UMFA's supranational right of initiative may serve as a procedural tool facilitating the convergence of national policy preferences into a collective European preference, thereby laying the groundwork upon which an extension of QMV can be built. Under the new system, the UMFA may individually or with the support of the Commission refer any question relating to CFSP to the Council and may submit proposals to it.<sup>27</sup> When this proposal follows a specific request from the European Council, the proposal by the UMFA even results in QMV in accordance with Article III-300(2)(b) ConstEU. Since the European Council tends to dis-

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<sup>24</sup> See Article III-300(2)(d) ConstEU and Article 23(2) TEU.

<sup>25</sup> See Ingolf Pernice/Daniel Thym, "A New Institutional Balance for European Foreign Policy?", *EFA Rev.* 5 (2000) 369-400 at 374-80 for more details.

<sup>26</sup> This characterization is given by its first President Walter Hallstein, *Der unvollendete Bundesstaat* (1969) at 56 (own translation).

<sup>27</sup> Under the present system, only the Commission – not the Secretary General/High Representative (SG/HR) – may "refer ... any question" to the Council under Article 22(1) TEU. Legally, this referral is no proposal in the meaning of Article 250 EC which the Council can only change unanimously – a rule which considerably reinforces the determinative impact of the proposals in the case of QMV. Article III-299(1) ConstEU seems to eliminate that weakness, if a proposal by the UMFA "with the Commission's support" entails the privileges of a "proposal from the Commission" under Article III-395(1) ConstEU.

cuss broad policy guidelines without getting entangled in the nitty-gritty of specific details, this new option for QMV may well facilitate the adoption of Common Positions and Actions on the basis on the general political agreements reached at the level of the European Council. The experience of the area of freedom, security and justice suggests that political pressure from the European Council can indeed speed decision-making in the Council and its various preparatory Committees.<sup>28</sup>

It is in the nature of QMV that Member States can be outvoted and are nonetheless obliged to follow and implement the European decision. Indeed, this possibility is the obvious reason why Member States are reluctant to concede more QMV in CFSP – even if Member States retain the “emergency brake” of preventing a Council vote by QMV for “vital and stated reasons of national policy” under Article III-300(2) ConstEU. Given the political resistance of some Member States, including the United Kingdom whose clear and unequivocal opposition was tacitly shared by other Member States, it was impossible to agree on a substantial extension of QMV in CFSP. It might therefore be a pragmatic and feasible compromise to defer the decision by introducing a review clause allowing the gradual extension of QMV. In accordance with Article III-300(3) ConstEU the European Council “may decide unanimously that the Council shall act by a qualified majority in cases” which do not yet allow for QMV. On the basis of this *passerelle* clause, the Union may at any time decide to proceed with more QMV below the legal threshold of a revision of the Constitution reflecting the gradual convergence of foreign policy preferences among the Member States.

The wording of Article III-201(3) ConstEU suggests that the *passerelle* is not limited to specific situations, but may cover themes of a general geographic or thematic nature, such as the promotion of democracy and human rights or concerning certain geographical areas, for example the European policy towards the Western Balkans or Africa. It therefore allows for an indefinite change from unanimity to QMV for certain policy areas which could eventually cover more and more parts of CFSP. The legal services of the institutions and the academic community should be able to resolve problems of delimitation related to such a differentiated regime of Union competencies and QMV. Only decisions “having military and defence implications” will continue to be exempted from QMV.<sup>29</sup> Since

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<sup>28</sup> See the references in my WHI-Paper 12/2004 in Section III.3 <[www.whi-berlin.de/afsj.htm](http://www.whi-berlin.de/afsj.htm)>. Moreover, it seems to be no disadvantage that the parallelism of national and supranational rights of initiatives has been maintained in Article III-299(1) ConstEU, although it is contrary to the orthodoxy of the Community way. The wide scope of CFSP arguably requires a continued proactive role for national diplomatic staff and civil servants, whose specific knowledge, contacts and strategic planning capacities are currently indispensable for European foreign policy.

<sup>29</sup> Article III-300(4) ConstEU. For the interpretation and scope of the term see Pernice/Thym, *supra* note 25. at 379 note 49.

these fields are generally regarded as being the “core” of national sovereignty, it was impossible to embark upon a more far-reaching reform in this respect.

Surprisingly, the IGC maintained a reform proposal which the Presidium of the Convention introduced at the very last moment into the Draft Constitution.<sup>30</sup> According to Article III-422(1) ConstEU the Council may decide with the unanimous agreement of all participating Member States to act by qualified majority in all areas in which “a provision of the Constitution which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously”. Thus, enhanced cooperation turns into a twofold instrument of flexibility: They allow progress of some Member States without the consent of the others and, moreover, allow the *avantgarde* thus established to extend the scope of QMV. The outs may not prevent the handover to QMV and if all non-participating Member States later join such the enhanced cooperation, QMV becomes the rule for the European Union as a whole. The increased importance of enhanced cooperation requires a closer look at the potential advantages and problems of asymmetric arrangements in the foreign policy.

## 2.2. Asymmetry

The proliferation of asymmetry in the European legal order in the past decade was originally confined to domestic European policies like monetary union, the Schengen law or the Amsterdam provisions on closer cooperation, which have only a corollary external dimension – such as the agreement between the Council of the European Union and Norway and Iceland on the latter’s association with the Schengen law.<sup>31</sup> The only asymmetric arrangement foreseen in the foreign policy field by the Treaty of Amsterdam was the specific institute of constructive abstentions, which the new Constitution upholds in Article III-300(1) subparagraph 2 ConstEU.<sup>32</sup> Constructive abstention is designed to prevent Member States from reverting to their right of veto, when they are not willing to support a CFSP measure by a positive vote or a “regular” abstention. Instead of hindering decision-making, a Member State “constructively” abstains by qualifying its abstention with a declaration under the said article as a result of which it shall “not be

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<sup>30</sup> Article III-328 ConstEU of the final, re-numerated version of the Convention’s Draft Treaty was first proposed as Article III-324a ConstEU in the text submitted to the Convention for its *last* working session on 9 July 2003 – one day before the text was solemnly adopted by consensus; see doc. CONV 847/03.

<sup>31</sup> See Article 7 Schengen Protocol and Council Decision 1999/439/EC of 17 May 1999 on the conclusion of the Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latter’s association with the implementation, application and the development of the Schengen *acquis* (OJ 1999 L 176/35).

<sup>32</sup> Article III-300(1) ConstEU and Article 23(1) TEU.

obliged to apply the European decision.” But it nonetheless accepts “that the latter commits the Union” and that it “shall refrain from any action likely to conflict with or impede Union action.”<sup>33</sup>

These limitations of the constructively abstaining Member State’s freedom of manoeuvre are characteristic for CFSP asymmetry and originate in the requirement of preserving the uniformity of “Union action” from an external perspective. If foreign policy is – contrary to domestic rule-making – primarily about political positioning in favour or against something, the emerging international actorship of the European Union could be seriously impeded, if the Member States were split into two groups openly pursuing divergent policy aims. Assuming that a constructively abstaining Member State respects the legal constraints laid down in the said article, the rationale underlying the rules may be regarded as the maximum of CFSP asymmetry which is politically desirable: the Union may proceed largely unrestricted and the constructively abstaining Member State refrains from any action hindering the effectiveness of CFSP. Its non-participation is largely formal and will generally stem from specific reasons of domestic policy.

This rationale was in principle maintained by the Treaty of Nice, which extended enhanced cooperation to CFSP. Its field of application is explicitly limited to the “*implementation* of a joint action or a common position” and excludes any asymmetry in areas “having military or defence implications”<sup>34</sup>. Even within its limited field of application it therefore requires the prior adoption of a common position or joint action binding all Member States (except for cases of constructive abstention). Thereby, Nice-style enhanced cooperation in CFSP not only attempts to preserve a basic uniformity of the Union’s external appearance similar to the legal regime of constructive abstentions. The Member States moreover positively share the political approach laid down in the common position or joint action agreed upon by all Member States. In practice, these provisions will mainly be used to specify “asymmetric” national contributions to operational Union action implementing a joint action with only some Member States providing the personnel or the necessary funding.<sup>35</sup> This “re-nationalization” of CFSP financing may be criticized for facilitating “free-rider” mentality and undermining solidarity among the Member States.<sup>36</sup> But for our purposes the decisive aspect is that the

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<sup>33</sup> For a more detailed analysis see Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (2004), at 151 et seq. (online information at <[www.thym.de/daniel/ungleichzeitigkeit](http://www.thym.de/daniel/ungleichzeitigkeit)>).

<sup>34</sup> Article 27b TEU (emphasis added).

<sup>35</sup> For more details on the Nice-style enhanced cooperation regime in CFSP see Thym, *supra* note 33, at 159 et seq.

<sup>36</sup> Elfriede Regelsberger, “Die Gemeinsame Außen- und Sicherheitspolitik nach ‚Nizza‘”, *Integration* 24 (2001), 156-66 at 161. Enhanced cooperations are financed by national contributions of the participating Member States in accordance with Article 44a TEU as amended by the Treaty of Nice; see for details Thym, *supra* note 33, at 233 et seq.

Treaty of Nice's rules on enhanced cooperation in CFSP only concern the implementation of an otherwise common policy agreed upon unanimously.

The European Convention (or rather its Presidium) at first sight fundamentally reversed the potential of CFSP asymmetry – and the way it proceeded with this change is no masterpiece of democratic decision-making which is so often rightfully associated with the work of the Convention. Neither did the Convention establish a working group on asymmetry nor did the working group on external action deal with the issue.<sup>37</sup> Nonetheless the Presidium of the Convention proposed a substantial change to the asymmetry regime in the field of CFSP on 14 May 2003 at a time when the Convention was entangled in a vivid political debate on the Presidency of the European Council and other questions of general institutional design. In the slipstream of this debate the question of enhanced cooperation was not discussed substantially in the plenary despite the relative importance of the issue.<sup>38</sup> By proposing to simply delete the limitation of CFSP asymmetry to the implementation of joint actions and common positions the Presidium effectively recommended to open the whole of CFSP to enhanced cooperation.

The explanatory note of the Presidium is not really convincing in trying to explain the reform. It argues that the limited scope of CFSP enhanced cooperation under the present Treaty regime does not leave much room for asymmetry in the foreign policy field and should therefore be widened by “not taking over” the limitations.<sup>39</sup> This description of the status quo is certainly correct, but it overlooks that the confinement of enhanced cooperation to implementation issues was a deliberate policy choice agreed upon in Nice. The present Article 27b TEU results from the personal intervention of Tony Blair who feared that possible enhanced cooperations clustering around the Franco-German axis would endanger the leadership role he aspires for Britain in the European Union.<sup>40</sup> It would have been desirable, if the Convention plenary or its working groups had discussed this issue in more detail and not only in the Presidium behind closed doors. But the British gov-

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<sup>37</sup> See the reference to its final report, *supra* note 2.

<sup>38</sup> See the Summary Report of the Plenary Session of 15 and 16 May 2003, doc. CONV 748/03 and the same on the plenary session of 9 and 10 July 2003, doc. CONV 853/03.

<sup>39</sup> Proposal by the Convention Presidium, Enhanced Cooperation, 14 May 2003, doc. CONV 723/03, p. 20: “has not been taken over”.

<sup>40</sup> On the negotiating history in Nice see Pons Rafols, “Las cooperaciones reforzadas en el Tratado de Niza”, *Revista de derecho comunitario europeo* 2001, 145 at 184. For the European policy of the British Labour government and its position in the post-Nice process see Daniel Thym, “‘A Superpower, not a Superstate’ – Der britische Beitrag zur europäischen Verfassungsdiskussion”, *Integration* 24 (2001), 356 at 358-9.

ernment didn't block an agreement in the IGC despite its earlier indication it might do so.<sup>41</sup> The extended scope of enhanced cooperation is therefore here to stay.

As mentioned at the outset, Article 27b TEU currently excludes asymmetry in areas "having military or defence implications". The general rules of European Security and Defence Policy (ESDP) rather include some practical or factual forms of asymmetry concerning the preparatory or implementing stages of EU-led military actions whose setting-up still requires a unanimous decision.<sup>42</sup> The working group on defence discussed the reform of the system extensively and proposed to maintain it in principle: Whereas the Council decides unanimously on the installation of an European military operation,<sup>43</sup> the preparation and implementation of military operations should be formalized and coordinated on the European level by specific forms of enhanced cooperation. They concern the conduct of military or civilian EU actions agreed upon by the Union as a whole,<sup>44</sup> the setting-up of the European Armaments, Research and Military Capabilities Agency<sup>45</sup> and structured co-operations on binding military capability criteria and commitments<sup>46</sup>. Thereby, the necessary uniformity of external Union action is maintained by guaranteeing that all Member States do in principle agree on the installation of an EU-led military action, while preparatory and accompanying issues of military organisation and armaments policy as well as the execution may be entrusted to some Member States.

But in its last proposals the Convention Presidium opted to change this regime by supplementarily allowing the general mechanism for enhanced cooperation in all other areas of ESDP by deleting the exclusion of enhanced cooperation in areas not covered by the specific forms of defence-style asymmetry developed by the working group.<sup>47</sup> Not even the far-reaching amendment tabled by the French and

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<sup>41</sup> News from the Italian Presidency taken from the ANSA news agency on 31 July 2003 <www.ueitalia2003.it>.

<sup>42</sup> For more details see Thym, *supra* note 33, at 167 e seq. and Pernice/Thym, *supra* note 25. at 383-5.

<sup>43</sup> Article III-309(2) ConstEU.

<sup>44</sup> Article I-41(5), III-310 ConstEU. The "asymmetric" implementation of EU military actions corresponds by and large to the *status quo* of the so-called Committee of Contributors; see Thym *ibid*.

<sup>45</sup> See Article III-311(2) ConstEU for the non-participation of all Member States. At present, the European Armament Organization OCCAR is already a *de facto* form of asymmetry of the participating Member States cooperating on the basis of classical international law; Thym, *supra* note 33, at 187-191.

<sup>46</sup> Article I-41(6), III-312 ConstEU. At present, the "Headline Task Force"-Goals of the capabilities conference are not binding; see Thym *ibid*.

<sup>47</sup> In the text submitted to the last working session of the Convention on 9 July 2003 the Presidium proposed to delete the exclusion of enhanced cooperations in ESDP hitherto set out in Article III-318 except for the specific forms mentioned above; see doc. CONV 847/03.

German foreign ministers had wished such a radical extension of asymmetry.<sup>48</sup> Again, the discussion in the IGC did not lead to a revision of the Constitution in this respect, therefore not limiting the scope of enhanced cooperation in ESDP to the specific forms developed by the working group. It seems as if the changes proposed by the Presidium are at least partly the result of a legal misunderstanding. In its explanatory note on its original proposals on enhanced cooperation the Presidium underlines the importance of securing the uniformity of European foreign policy in order not to undermine the emerging international actorness of the European Union:

“In general, the Treaty of Nice provides that enhanced cooperation in the CFSP field is aimed at ‘safeguarding the values and serving the interests of the Union as a whole’... It therefore seems that a group of Member States engaging in enhanced cooperation acts on behalf of the Union as a whole, with the result that the Union's unity of representation at international level is not affected. The fact that there is a right of veto over any such enhanced cooperation at the authorisation stage supports this view”<sup>49</sup>

The last assumption that every Member State has a veto on the initiation of enhanced cooperation in CFSP is not totally correct. Article 27c Subparagraph 2 TEU with its reference to Article 23(2) TEU must rather be understood as laying down the principle of QMV for the authorisation decision.<sup>50</sup> Of course, every Member State has a *de facto* right of veto under 23(2) Subparagraph 2 TEU explicitly referred to in Article 27c TEU, if it invokes “important and stated reasons of national policy”. But the procedural restraints of the clause defer an indiscriminate use of the veto.<sup>51</sup> The new Draft Constitution now lays down a “regular” veto for each Member State by simply saying that the Council decision authorising an enhanced cooperation requires unanimity in the Council.<sup>52</sup> This is probably the only case in which the Convention has opted for an (albeit minor) strengthening of

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<sup>48</sup> They rather proposed to continuously exclude “the initiation and conduct of crisis management” from the field of application; see Summary of proposed amendments concerning enhanced cooperation, 6 June 2003, doc. CONV 791/03, p. 2.

<sup>49</sup> Doc. CONV 723/03, *supra* note 39, p. 20.

<sup>50</sup> The wording of Article 27c TEU only refers to the limitations of QMV laid down in Article 23(2) Subparagraphs 2 and 3 TEU and does not mention the principle of QMV, which a logical interpretation of the provision nonetheless supports; Thym, *supra* note 33, at 159-163.

<sup>51</sup> Arguably, the obligation to state the reasons of national policy and the possible reference to the European Council guarantee that the Member States do not use this tool indiscriminately. National ministers will generally not want to ridicule themselves by stating unconvincing reasons in the Council or may give in to “peer pressure” in the European Council; see Thym *ibid.*

<sup>52</sup> Article I-39(7) ConstEU explicitly states that European decisions relating to CFSP shall be adopted unanimously. Article III-300(2) ConstEU does not list the authorisation of enhanced cooperations as a subject of QMV.

the decision-making procedures. Against this background, the extension of enhanced cooperation to all areas of CFSP and ESDP appears in a different light. The unanimity requirement prevents a fundamental divergence among the Member States with some proceeding with a military action on behalf of the European Union on the basis of asymmetry and others more or less openly pursuing a different policy. The unanimity requirement would have made it impossible for either “old” or “new” Europe to formalize its view on the war on Iraq on the basis of an asymmetric CFSP action or position.

The revision of the Constitution’s rules on asymmetry in the foreign policy field by the IGC – though without substantial change – was necessary, since the Convention had not discussed the reform proposals sufficiently enough in order to serve as a legitimate basis for a compromise among the Member States. The unanimity requirement for the initiation of an enhanced cooperation serves as a procedural safeguard for guaranteeing the necessary uniformity of the Union’s international appearance, since potential “outs” of an enhanced cooperation would veto its authorisation, if they fundamentally opposed the policy foreseen in the authorisation decision. Thereby, the Treaty establishing a Constitution for Europe prevents that the asymmetric differentiation does neither lead to political rupture nor damage the emerging international identity of the European Union. This has to be welcome, since in the foreign policy field asymmetric arrangements have the potential of inflicting severe rifts in the political solidarity among the Member States and undermining the Union’s credibility from the external perspective, if some Member States openly express a diverging view to the international community.

### *2.3. European External Action Service*

At present, European foreign policy comprises three legal and political arenas: external Community policies under the EC Treaty, CFSP within the scope of the EU Treaty’s second pillar and national foreign policy. The challenge of coherence and consistency stemming from the interaction and co-existence of these different layers has been analysed by various academic observers.<sup>53</sup> In this context, the role of civil servants on the national and European level should be emphasized. By providing strategic analysis and proposing specific policy decisions civil servants function as the “brain cells” for foreign policy decision-making by national governments, the Council and the Commission. The aspiration of developing a single mind elaborating a coherent and consistent European foreign policy therefore requires a harmonious horizontal coexistence and cooperation of civil servants in the Commission and the Council Secretariat and their vertical interaction with national foreign ministries and diplomatic staff.

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<sup>53</sup> See, *inter alia*, Antonio Missiroli, “European Security Policy: The Challenge of Coherence”, *EFA Rev.* 6 (2001) 177-96 and Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (2001).



The European Convention and the IGC well aware of the importance of the better cooperation of European civil servants and they even decided to lay the grand for potentially wide-ranging reform.<sup>54</sup> Since the coordination and reform of civil servants in Commission, the Council Secretariat and national diplomatic services requires wide-ranging practical deliberations and decisions, the Constitution adopts a rather pragmatic approach: Article III-296(3) ConstEU postulates that “in fulfilling his or her mandate, the Union Minister for Foreign Affairs shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States.” The Declaration on the creation of a European External Action Service (EEAS) attached to the Draft Constitution specifies that the EEAS shall be “one joint service ... composed of officials from relevant departments of the General Secretariat of the Council and of the Commission and staff seconded from national diplomatic services.” Union delegations provided from the EEAS shall represent the Union in third countries and to international organizations under the authority of the UMFA and in close cooperation with the Member States’ diplomatic missions (Article III-328 ConstEU).

If these proposals are implemented, the EEAS would ideally create a synergetic institutional momentum gathering strength from each of its three components (Council, Commission and national staff) without abolishing the existing institutional structures. In practice, the EEAS would primarily build upon the Commission’s reformed Directorates General and offices dealing with external relations as well as the Council Secretariat’s Directorate General E plus the various military and civil bodies established in recent years.<sup>55</sup> To what extent the two administrations will continue to be formally independent under the roof of the EEAS is currently being discussed in Brussels.<sup>56</sup> One might argue that is doubtful whether such a “double-hatted” EEAS will work smoothly without major frictional losses between its Council and Commission subdivisions – even if the experience of recent years suggests that the dualism has so far had the constructive effect of encouraging reform steps which partly remedied the undeniable implementation deficits in the past.<sup>57</sup> In any case, the solution chosen is in line with the general institutional design opted for by the Convention with the executive being split between the Commission and the (European) Council and the UMFA being the

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<sup>54</sup> Joschka Fischer, the German foreign minister, government representative in the Convention and at the time semi-official candidate for the post of UMFA is said to have been the driving force behind this crucial reform.

<sup>55</sup> For more details see the Commission’s external services portal <[www.europa.eu.int/comm/world](http://www.europa.eu.int/comm/world)> and the Council’s webpage <<http://ue.eu.int/pesc>>.

<sup>56</sup> See for more details Andreas Maurer/Sarah Reichel, “Der Europäische Auswärtige Dienst – Elemente eines Drei-Phasen-Plans”, SWP-Aktuell 53/November 2004 <[www.swp-berlin.org](http://www.swp-berlin.org)> and Annette Heuser, “Diplomaten für Europa”, Reform-Spotlight 2/05 <[www.eu-reform.de](http://www.eu-reform.de)>.

<sup>57</sup> Pernice/Thym, *supra* note 25, at 386-90 for more details.

umbrella institution which shall ensure the necessary consistency and coherence of European foreign policy.

Vertically, the EEAS will have to cooperate with national civil servants in foreign ministries and diplomatic and consular representations around the world with the details of their integration in the EEAS also being decided before its establishment. Since the Constitution does neither establish nor aspire an exclusive Union competence for foreign policy gradually replacing all national competences, the vertical interaction of European and national civil servants remains of great practical importance.<sup>58</sup> Given the virtually unlimited range of foreign policy issues, European civil servants are not in a position to analyse all political developments, represent the European position to the international community and maintain personal contacts and networks with politicians, civil servants, social groups and organisations around the globe. In this respect, national civil servants will continue to have an important part to play after the establishment of the EEAS. Indeed, national civil servants are integrated in the formulation, articulation and implementation of European foreign policy as advisers of national ministers in the Council, thereby acting as national civil servants and “European agents” at the same time. Article III-306 ConstEU emphasizes the importance of an improved cooperation of national and European civil servants “in ensuring that the European decisions relating to Union positions and actions ... are complied with and implemented. They shall step up cooperation by exchanging information and carrying out joint assessments.”

At the end of the day, the willingness to cooperate cannot be decreed and depends on the relationship between individual civil servants and diplomatic staff “in the field.” The initiative to establish a website concerning European activities at the United Nations may set a small, but symbolic example.<sup>59</sup> Much more important is the positive experience with the European Security Strategy, elaborated by the policy unit and Javier Solana in close co-operation with the Member States (without the usual drafting exercise involved in regular decision-making), at the time of deep frictions over the issue of Iraq.<sup>60</sup> It shows that strategic policy options elaborated by a supranational bureaucracy can make a difference in aligning the policy preferences of the different Member States, despite the lack of formal legal effects flowing from it (in particular, it is no strategy in the meaning of Article 13 EU and indeed no formal legal act at all). If the EEAS brings together the most ambitious and promising among Europe’s diplomats elaborating convincing strategies, this new institutional matrix may provide the necessary “single mind” elaborating a

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<sup>58</sup> See *supra* section 1 for the assumption that European foreign policy will not be “federalized” in the foreseeable future.

<sup>59</sup> See <[www.europa-eu-un.org](http://www.europa-eu-un.org)>.

<sup>60</sup> “A Secure Europe in a Better World – The European Security Strategy”, approved by the European Council on 12 December 2003, available online at <<http://ue.eu.int>>.

truly common foreign and security policy able to translate the Constitution's grand declaration on Europe's role in the world into concrete policy proposals.

### **3. A Single Voice?**

The claim that the European Union should speak with "a single voice" is the most often repeated demand in the political debate on the reform of European foreign policy. It generally refers to the present triumvirate or troika of external representation of European foreign policy by the Council Presidency, the Secretary General/High Representative of the Council and the Commissioner responsible for external relations, functions currently held by Javier Solana, Benita Ferrero-Waldner and the respective foreign minister of the Council Presidency. The debate usually takes up Henry Kissinger's (in)famous comment on Europe's missing telephone number. In order to establish a single voice speaking on behalf of the European Union the Constitution had to merge the three functions and to the surprise of many observers and participants in the debate the Convention it met the challenge and presented an institutional design which might well turn out to be one of the main achievements of the new Constitution – despite some persisting potential hurdles for the establishment of a single voice.

Of course, the importance of Europe's "single voice" should not be overemphasized. A single representative alone does not create a single policy, which rather requires the structural reforms facilitating the emergence of a collective policy preference or "single mind" as discussed in the sections above. Moreover, the wide range of foreign policy in the age of globalisation entails that specific policy issues are expressed and discussed by specialised representatives – reflecting a similar plurality of actors in third states like the United States. Thus, the Commissioner responsible for the Common Commercial Policy will continue to represent the European Union in trade issues within and outside the WTO framework and its colleague responsible for the environment will negotiate environmental aspects not only in the case of the Kyoto Protocol. In the case of CFSP, special representatives appointed in accordance with Article III-302 ConstEU allow permanent diplomatic contact and activities which the UMFA cannot manage due to obvious limitations of time and human capacities.

Nonetheless, the creation of a Union Minister for Foreign Affairs assuming the functions of the present troika and representing the main focus of European foreign policy is an important step forward. It gives a face to European foreign policy and thereby reinforces the European identity in the eyes of the international community. As foreign policy is not primarily about rule-making, but about positioning and arguing in favour or against something, the establishment of the UMFA personifying European foreign policy strengthens the political weight and influence of the European position. The present plurality of spokesperson is arguably costly in terms of negotiating power. Moreover, a single representative reinforces

the European identity in the eyes of the European citizens, thereby contributing to a common awareness as a precondition for accountability and democratisation of European politics and as a basis upon which a convergence of policy preferences can be built.

The reform is based upon the merger of the present troika and the conferral of its present functions on the UMFA which has a “double hat” as a Vice-President of the Commission and an integral part of the Council working mechanism.<sup>61</sup> Thus, the present functions of the Council Presidency have been given to the UMFA. He or she shall chair the Foreign Affairs Council and shall represent the Union for matters relating to CFSP, e.g. by conducting political dialogue on the Union’s behalf and expressing the Union’s position in international organizations and conferences (Article I-24(2), III-296 ConstEU). Even the most prestigious international forum shall under certain circumstances be handed over to the UMFA. When the Union has agreed upon a common policy being discussed in the UN Security Council “the Member States which sit on the Security Council shall request that the Union Minister for Foreign Affairs be asked to represent the Union’s position” (Article III-305(2) ConstEU). As mentioned above, the European External Action Service will also work under the political authority of the UMFA.<sup>62</sup>

The reform has many advantages in overcoming the inefficiency and incomprehensibility of the present troika system.<sup>63</sup> Its main achievement is its pragmatism which leaves undecided the question whether the Commission or the (European) Council shall be bedrock upon which the Union’s executive government shall eventually be built. Under the double hat solution opted for by the Convention the existing allocation of powers between the institutions is maintained in principle, thus preserving the existing institutional balance between the Member States, the Council and the Commission. Depending on the subject area concerned the UMFA gets its instructions either from the Council when acting within the scope of CFSP or from the competent Community institution, regularly the Commission, when acting under the present external EC policies, such as development cooperation, humanitarian aid or the Common Commercial Policy.<sup>64</sup>

But the pragmatism of the double hat solution also has a drawback. Its main disadvantage is that the allocation of power between the Commission and the Council is blurred. It creates a grey area of unclear political responsibility, in

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<sup>61</sup> Article I-28 ConstEU regulates the appointment and revocation procedure and the general relation between the UMFA and the Council and the Commission.

<sup>62</sup> See *supra* section 2.3.

<sup>63</sup> For a summary of the problems of the present system and the different options for reform debated in the past years see Pernice/Thym, *supra* note 25. at 391-9.

<sup>64</sup> See Article III-296(2) ConstEU for CFSP. In other fields of external action the Draft Constitution usually confers specific powers on the Commission which will then usually delegate it on the UMFA as its Vice-President; cf. Articles I-26(2), I-28(4) ConstEU.

which the UMFA may evade interinstitutional checks and balances. The potentially ambiguous and intransparent interaction of the Commission, the Council and the UMFA might even impede the gradual democratization of European politics with citizens and parliamentarians not knowing whom to hold accountable. Of course, the institutional setting need not necessarily result in such interinstitutional distortions. The European Parliament will have an important part to play in this context. The Parliament does not only have the formal right to confirm the appointment of the UMFA – and demand its resignation – as a member of the college of Commissioners in accordance with Article I-27 ConstEU. It may also lead a permanent and public political discourse on specific CFSP policies and activities under Article III-304 ConstEU and may influence the course of external Union action through its budgetary powers, although the Parliament's power in financing CFSP and ESDP have not been aligned with other Union policies.<sup>65</sup> One may of course regret that the Convention has not opted for further strengthening the role of the European Parliament in foreign policy. But with the support of the European public discourse the Parliament should be able to exercise a strict political control of the UMFA, if the political situation so requires.

The biggest potential hurdle for the establishment of a “single voice” under the institutional design proposed by the Convention will probably turn out to be the new President of the European Council who shall be elected for a term of two and a half years and whose responsibilities comprise the “at his or her level and in that capacity ... the external representation of the Union on issues concerning its Common Foreign and Security Policy” – albeit “without prejudice to the responsibilities of the Union Minister for Foreign Affairs” (Article I-22(2) ConstEU). The latter formulation rather describes than resolves the potential danger of the institutional (im)balance with a view to the division of labour between the President of the European Council and the UMFA. The role model which the Presidium probably bore in mind when drafting the provision was the distribution of responsibilities which can usually be found in international fora: When the “heads of state or government” meet, the Union's CFSP shall be represented by the President of the European Council. When the foreign ministers meet, the Union's Minister for Foreign Affairs shall speak and negotiate on its behalf. The reference to “his or her level and in that capacity” in Article I-22 (2) ConstEU clearly points in this direction.

But this does not resolve all potential conflicts. In most national constitutional settings, it is often a matter of time capacities and political prestige whether the head of state or government or the foreign ministers deals with an issue. Any conflict of powers between the two is usually resolved on the basis of the hierarchical

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<sup>65</sup> In accordance with Article III-313(1) ConstEU actions having military or defence implications continue not to be financed through the Union budget and also in all other situations the Council may opt for extra-budgetary procedures sidelining the role of the European Parliament under the regularly budgetary procedure.

supremacy of the head of state or government. But under the Constitution, the President of the European Council would not have the right to give instructions to the UMFA. Thereby, a grey area of potential overlaps and conflicts between the President of the Council and the UMFA is created. This dualism appears even more likely, when we remember that the competences of the President of the European Council under Article I-22(2) ConstEU are very limited. This might encourage him or her to focus on the external representation of the Union. Moreover, experience shows that “elder statesmen” such as Tony Blair or José Maria Aznar, whose names are often circulated as potential candidates for the first Presidency of the European Council, often prefer questions of world peace to the tickle-tackle of domestic policy-making or the sole preparation of European Council meetings.

The enhanced role of the President of the European Council could eventually motivate the President of the European Commission not to leave the foreign policy arena to its Vice-President and UMFA. The Constitution rather strengthens the President of the Commission by linking its appointment to the results of the European elections and reinforcing its role in choosing and supervising the work of the individual Commissioners.<sup>66</sup> Against this background, it is important to realize that the UMFA seems to be fully integrated into the working structures of the Commission insofar as he acts in the function of the Commissioner responsible for external relations<sup>67</sup> – including the power its President to set “political guidelines” (Article I-27(3) ConstEU). Only when the Treaty confers upon the UMFA individual and independent responsibilities by naming him or her as the addressee of specific Treaty articles, the UMFA is not bound by the internal decision-making in the Commission. Since this applies to CFSP mainly, the UMFA will have to work in close cooperation with the President of the European Council in this respect, whose powers are theoretically limited to issues of CFSP.<sup>68</sup> In all other areas, he will have to establish a smooth working relationship with the other Commissioners and the President of the Commission, whose supremacy he will have to respect.<sup>69</sup>

Against this background, it appears as if the goal of establishing a “single voice” has not been fully achieved. Although the “merger” of the present troika

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<sup>66</sup> See Article I-27 ConstEU.

<sup>67</sup> Insofar as he or she exercises responsibilities which the Treaty confers upon the Commission – “and only for these responsibilities” – Article I-28(4) ConstEU integrates the UMFA in the Commission.

<sup>68</sup> The wording of Article I-22(2) ConstEU suggests that the powers of the President of the European Council are in principle limited to CFSP, i.e. Article III-294-313. Of course, the border line is legally difficult to draw and politically even more difficult to convey.

<sup>69</sup> Important arguments for strengthening the role of the Commission President as head of the European executive may be found in Ingolf Pernice, “Multilevel Constitutionalism in the European Union, Multilevel Constitutionalism in the European Union”, *EL Rev.* 27 (2002), 511.

under the roof of the double-hatted UMFA is an important step forward, it remains to be seen how the UMFA will interact with the President of the European Council and the President of the European Commission in practice. The institutional balance thus created could resemble the pattern of the French constitution, according to which foreign policy is determined by the president (President of the European Council) in interaction with the prime minister (Commission President) and the foreign minister (UMFA). It is well known to any observer of French foreign policy in the past decades that the suitability of the system as a model is at least debatable with a view to the efficacy of external representation – at least at the time of “cohabitation” when the relation of the different actors are determined by political tensions and competitive pressures. It might therefore not be the worst-case scenario, if the IGC failed to reach to agree on the Presidency of the European Council and left the issue undecided by maintaining the status quo in this respect. By establishing the UMFA the European Union would nonetheless have a face representing its foreign policy to the outside world and a single voice speaking on its behalf.

#### **4. Conclusions**

The reform of European foreign policy has been one of the most controversial items on the agenda of the Convention and the IGC. It is therefore a great success that the Convention and the Member States in the IGC have agreed upon a proposal at all – despite the widespread fear that the political divisions of the Member States during the war on Iraq would have negative repercussions on the future of Europe’s foreign and security policy. The analysis of the foreign policy provisions in the Treaty establishing a Constitution for Europe suggests that the reform steps build a solid basis from which the political actors may embark upon the development of a more effective European foreign policy. Most reform steps such as the potential extension of QMV or the widening scope of application of enhanced cooperation and the prospect of an European External Action Service are no automatic guarantee for success, but constitute an offer which might be taken up and which might ideally result in a “single mind” supporting a truly common foreign policy. The merger of the present external representation troika into the post of the UMFA has the obvious advantage of giving European foreign policy a “single voice” and will probably be remembered as the single most important reform step – even if the possible dualism between the UMFA and the President of the European Council and the Commission President may compromise the efficiency of the future institutional balance of European foreign policy.