
Chapter 19

THE EU AS A BLACK WIDOW: DEVOURING THE WEU TO GIVE BIRTH TO A EUROPEAN SECURITY AND DEFENCE POLICY

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Summary

The Treaty of Nice will finally turn the European Union into a security and defence organisation. Alongside its tasks in all other areas the Union will be given the competence to strengthen its contribution to the maintenance of international peace and security in accordance with the UN Charter. This Chapter deals with the development of a European Security and Defence Policy (ESDP) over the past few years with particular focus on the international legal aspects of the relationship of the EU with the Western European Union (WEU). The EU courted the WEU for ten years. This finally seems to have paid off with the birth of an early and fragile European Security and Defence Policy, albeit at the price of sacrificing the WEU.

Keywords

ESDP; CFSP; European Defence Policy; WEU.

1. INTRODUCTION

After 50 years of regular attempts by some Member States to extend the scope of the European Community/Union to issues of military security and defence, it seems that these days we are witnessing a final breakthrough. Since the end of 1998 the European Union has been actively developing a European Security and Defence Policy (ESDP). Ever since the attempts in the 1950s to increase defence cooperation between the Western European States in a manner surpassing pure intergovern-

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mental cooperation and independent from the Northern American partners, the issue has reappeared on the political agenda from time to time. The 1992 Treaty on European Union (TEU, modified in 1997) was an important phase in this ongoing quest to consolidate Western European defence cooperation. According to this Treaty a closer defence cooperation is planned to take place in three stages: 1. the Union avails itself of the Western European Union (WEU) to elaborate and implement decisions and actions of the Union which have defence implications (Article 17, paragraph 3); 2. a progressive framing of a *common defence policy* (paragraph 1) is to take place; and 3. this may lead to a *common defence*, should the European Council so decide (paragraph 1). In the event of a decision on the establishment of a common defence the European Council shall recommend to the Member States that such a decision be adopted in accordance with their respective constitutional requirements. The establishment of a common defence thus seems to have become dependent on an agreement between the EU Member States, although it is already enshrined in the Treaty on European Union.

Nevertheless, to date, defence issues have for the large part still been omitted from the powers of the European Union. During the Intergovernmental Conference (IGC) in 1991 the Western European Union was rediscovered as a means of overcoming the unwillingness of certain Member States to add defence cooperation to the range of new issues the European Union is allowed to deal with.¹ The WEU's reaction to the sudden elevation of its status can be found in a Declaration annexed to the 1991 Final Act:² 'WEU is prepared, at the request of the European Union, to elaborate and implement decisions and actions of the Union which have defence implications'. The same Declaration provides the objective to build up the WEU in stages as the defence component of the European Union. Despite the fact that the Treaty reveals no obligation for the WEU to positively react to a request made by the Union and that every request needs to be dealt with on a case by case basis, the WEU Declaration adopted by the 1997 IGC confirmed WEU's willingness to positively react to a decision by the Union: 'When the Union avails itself of WEU,

¹ See in general on the Western European Union: A. Bloed and R.A. Wessel, *The Changing Functions of the Western European Union: Introduction and Basic Documents* (Kluwer Law International, The Hague, 1994); M. Fleuß, *Die operationelle Rolle der westeuropäischen Union in den neunziger Jahren* (Peter Lang, Frankfurt am Main, 1996); A. Deighton (ed.), *Western European Union 1954-1997: Defence, Security, Integration* (European Independent Research Unit, Oxford, 1997); G.W. Rees, *The Western European Union at the Crossroads. Between Trans-Atlantic Solidarity and European Integration* (Westview Press, Oxford, 1998); A. Dumoulin and E. Remacle, *L'Union de l'Europe Occidentale: Phénix de la Défense Européenne* (Emile Bruylant, Bruxelles, 1998); and A. Deighton and E. Remacle (eds.), *The Western European Union, 1948-1998: From the Brussels Treaty to the Treaty of Amsterdam*, published as 1-2 *Studia Diplomatica* (1998). The present Chapter is partly based on R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International, The Hague, 1999).

² Declaration on the role of WEU, adopted in Maastricht, December 1991, in Bloed and Wessel, op. cit. n. 1, Document 28.

WEU will elaborate and implement decisions and actions of the EU which have defence implications'. In addition 'WEU will act consistently with guidelines established by the European Council'. Despite the fact that this reaction is not too surprising – bearing in mind the fact that all ten WEU members are members of the EU as well – this Declaration in conjunction with the text of Article 17 TEU indeed seems to have established an obligation for the WEU to respond positively to requests made by the European Union. In practice the WEU indeed took over some tasks of the Union in the field of military security policy when it was requested to do so.

The question, however, was how long this situation would last. The EU decisions that have been taken since the European Council in Helsinki in December 1998 all reveal the firm intention of the EU to develop its own 'defence policy'. Indeed, the Treaty of Nice, adopted in December 2000, implies that the WEU construction will become superfluous and the Union will become an international organisation which also handles issues of military security.³ The present Chapter deals with the legal aspects of the competences of the Union that are included in the TEU concerning the development of a common defence policy, as well as with the consequences of the decisions that have been taken over the last few years up to the modifications that will be made by Nice Treaty. Section 2 will investigate the somewhat pragmatic cooperation between the European Union and the WEU. Section 3 looks at the consequences of the new ESDP for the legal relations of the Union in the international legal order.

2. COOPERATION BETWEEN EU AND WEU

2.1 Living apart together

Ever since the 1991 Intergovernmental Conference on the Treaty on European Union, the relationship between the European Union and the Western European Union has been somewhat ambiguous. Where a full integration of the WEU into the Union proved to be impossible, two things were clear from the outset, however: 1. the Union was unable to attain the goals it had set itself regarding the development of a common defence policy without close cooperation with the WEU; and 2. the WEU, while *de jure* still being a separate international organisation, had *de facto* lost much of its autonomy.

The provision in the Luxembourg Draft of the EU Treaty of 19 June 1991 that 'the Union shall pursue its common foreign and security policy objectives [...]' included an objective on '*a common defence policy*, which might in time lead to a

³ See the Treaty of Nice, provisional text approved by the Intergovernmental Conference on institutional reform, Brussels, 12 December 2000.

common defence'.⁴ However, this objective was deleted in the final version and retained only in Article B of the Common Provisions of the 1992 Treaty. In the 1997 Article 2 – listing the general objectives of the Union – this provision returned as '[a CFSP] including the progressive framing of a common defence policy, which might lead to a common defence [...]'. This leads to the somewhat strange situation that the *CFSP* means as phrased in Article 12 – which are related to the *CFSP objectives* in Article 11 only⁵ – are not directed at achieving a common defence (policy), because this is not one of the objectives in Article 11. This assertion is confirmed by references in the listing of *CFSP* means (Article 12) to Joint Actions and Common Positions (Articles 14 and 15) – and not to Article 17, the Article on common defence policy. Thus it seems that, in a strict legal sense, the development of a common defence (policy) is not a part of the overall common foreign and security policy. Nevertheless, a common defence (policy) remains one of the objectives of the Union and a separate legal basis while a related decision-making procedure can be discovered in Article 17, which is part of the *CFSP* provisions. The confusion regarding the objectives and means is most probably due to carelessness on the side of the drafters of the Treaty.

The past decade not only revealed the wish of the EU to develop a broad defence policy. In June 1992 the WEU Council of Ministers already adopted the 'Petersberg Declaration',⁶ in order to redefine WEU's objectives and possibilities. In this declaration the WEU stresses its possibilities to implement conflict prevention and crisis management measures taken within the framework of the OSCE or the United Nations. The necessary strengthening of its operational role is reflected in the fact that military units operating in the framework of the WEU could be employed for 'humanitarian and rescue tasks, peace keeping tasks, and the tasks of combat forces in crisis management, including peace-making'. The question of whether the WEU, in extending its original collective defence task to completely new functions is not acting *ultra vires* has not been the subject of much debate,⁷ and the 'Petersberg

⁴ F. Laursen and S. Vanhoonacker (eds.), *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community* (EIPA, Maastricht, 1992), at p. 399 [emphasis added].

⁵ The reference to 'the objectives set out in Article 11' in Art. 12 indicates that the means are related to the *CFSP* objectives in the preceding para. – and not to the general Union objectives in Art. 2 TEU.

⁶ Bloed and Wessel, op. cit. n. 1, Document 29.

⁷ I have dealt with this question elsewhere: see R.A. Wessel, 'The Legality of the New Functions of the Western European Union: The Attribution of Powers Reconsidered on the Occasion of the 50th Anniversary of the Brussels Treaty', in Deighton and Remacle, op. cit. n. 1, pp. 15-28. While the modified Brussels Treaty does not seem to provide any explicit or implicit powers for WEU to engage in the Petersberg tasks, there are reasons to assume that these tasks can be regarded as customary powers of the organisation. See also Fleuß, op. cit. n. 1, who argued that the WEU operational tasks to date are fully covered by Art. VIII, para. 3 of the modified Brussels Treaty, because the Council has only been used as a forum for consultation. Along the same lines: M. Saalfeld, *Entwicklung und Perspektiven der Westeuropäischen Union: Völkerrechtliche und sicherheitspolitische Überlegungen zu einer künftigen Revision des WEU-Vertrags* (Inaugural Dissertation, Tübingen, 1992).

tasks' finally found their way into the Treaty of Amsterdam. These tasks may now officially be the subject of a decision of the European Union (in which case the Union will avail itself of the WEU for further elaboration and implementation).

These provisions in Article 17 TEU reveal a close relationship between the EU and the WEU. While in a material sense this relationship may almost look like an *internal* relationship, in fact it takes place on the basis of an agreement between two organisations, based on the Treaty on European Union and the Declarations of the WEU attached to it. The WEU is a legal person and the relationship with the EU must be seen as a legal relationship between two international organisations; all the more so because this relationship finds its basis in a treaty.⁸ In addition, the 1993 document on the 'Relations between the Union and the WEU',⁹ adopted by the General Affairs Council on 26 October 1993 and accepted by the WEU Council on 22 November 1993, further regulates the relations between the two organisations. Since, on the basis of this document, both organisations are under the clear obligation to work together in explicitly indicated areas, it does not seem too far-fetched to consider this document as an international agreement.¹⁰ The Treaty text clearly hints at a future intensification of this relationship, and a partial merger of the two

⁸ See also Chr. Trüie, *Verleihung von Rechtspersönlichkeit an die Europäische Union und Verschmelzung zu einer einzigen Organisation – deklaratorisch oder konstitutiv?* (Universität des Saarlandes, Vorträge, Reden und Berichte aus dem Europa-Institut, No. 357, 1997), at p. 46, on Art. J.4 (now Art. 17): 'Eine derartige Zusammenarbeit der EU mit der WEU aber setzt letztlich Rechtsbeziehungen voraus [...] Dies erfordert zumindest ein informelles Übereinkommen der EU mit der WEU.'

⁹ Annex IV of Chapter IV of the document on the implementation of the Maastricht Treaty, Brussels European Council, 29 October 1993, Conclusions of the Presidency. Also published as Document 1412 of the Assembly of the Western European Union, 8 April 1994.

¹⁰ See Art. 2 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986) in which a 'treaty' is defined as 'an international agreement governed by international law and concluded in written form [...] between international organisations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation.' It is indeed generally held that there are no substantive requirements as to form; see for instance I. Brownlie, *Principles of Public International Law* (Clarendon Press, Oxford, 1990), p. 606. J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, The Hague, 1996), p. 46, pointed to the fact that a draft of the 1969 Vienna Convention on treaties between States included a separate definition of 'treaty in simplified form', by which was meant 'a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other document concluded by any similar procedure.' However, the juridical differences with 'regular' treaties were thought to be negligible and it proved difficult to come up with a precise definition. Hence, the International Law Commission decided to dispense with a separate definition. See also J.A. Frowein, 'Die Europäische Union mit WEU als Sicherheitssystem', in O. Due et al., (eds.), *Festschrift für Ulrich Everling* (Nomos Verlagsgesellschaft, Baden-Baden, 1995) pp. 315-326 at 323: 'Das [...] Dokument muß als eine völkerrechtliche Vereinbarung zwischen der Europäischen Union und der Westeuropäischen Union gewürdigt werden.' See also Trüie, op. cit. n. 8, p. 55. *Contra* N.A.E.M. Neuwahl, 'A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and CJA after Amsterdam', 2 *EFA Rev.* (1998), pp. 177-196 at p. 180.

organisations has become possible on the basis of the Nice Treaty.¹¹ The WEU members are even allowed to denunciate the Brussels Treaty. In that regard one may point to Article XII of the modified Brussels Treaty, which provides that:

‘[a]fter the expiry of the period of fifty years, each of the High Contracting Parties shall have the right to cease to be a party thereto provided that he shall have previously given one year’s notice of denunciation to the Belgian Government.’

The contents of this provision – that was included as Article X in the original Treaty of 1948 – were not modified by the Paris Protocols in 1954, which means that Member States have been free to leave the WEU as of 25 August 1998 (50 years after the entry into force of the Brussels Treaty), provided that they inform the Belgian Government of their intention one year beforehand.¹² None of the present WEU members have announced their denunciation. For the past decade, this has left us with a complex decision-making procedure, in which the EU Council of Ministers has had to rely on another organisation for the implementation of parts of its policy. The WEU, as an autonomous organisation, had to deal with the implementation of a request by the Union according to its own decision-making procedures. However, taking into account the fact that all WEU members were involved in making the request in the first place, it was hardly conceivable that a negative reaction would follow. It has not proved to be possible to set up a standard procedure for interlinking the decision-making processes of both organisations. According to the *modus operandi* adopted by the EU Council on 10 May 1999,¹³ the reason is to be found in ‘the specific features of each crisis situation’ and ‘the need to facilitate very rapid action.’ Attached to the *modus operandi* is a flowchart,

¹¹ See on the merger between the EU and WEU some of my other publications: R.A. Wessel, ‘Gemeenschappelijk defensiebeleid via een achterdeur. Een fusie van de Westeuropese Unie en de Europese Unie?’, *Transaktie* (1995), pp. 340-355; ‘Merging WEU into EU – A Necessary Step Towards an Ever Closer Union?’, in *Contemporary International Law Issues: Conflicts and Convergence*, Proceedings of the Third Joint ASIL-NVIR Conference (T.M.C. Asser Instituut, The Hague, 1995), pp. 347-352; and ‘De EU en de WEU op weg naar een Europese defensie-identiteit’, *Militair Rechtelijk Tijdschrift* (1996), pp. 353-358.

¹² The WEU Assembly held the strong opinion that the first possibility for Member States to leave WEU would be in 2004 (50 years after 1954, the date of the *modified* Brussels Treaty). See in particular the report *Interpretation of Article XII of the Modified Brussels Treaty*, Assembly of the Western European Union, Doc. 1369, 24 May 1993. The modified Brussels Treaty indeed forms the basis for WEU, but the accession of Germany and Italy in 1954 only called for some additional safeguards. There is no reason to assume that the Protocols in 1954 brought an end to the original Brussels Treaty; as the first Protocol clearly indicates, it modified and completed the Brussels Treaty. This was confirmed by the Council in a reply to the Assembly: ‘the period of 50 years specified in Article XII of the modified Brussels Treaty, formerly Article X of the treaty signed in Brussels on 17 March 1948, runs from the date on which the treaty [...] came into force i.e. 25 August 1948, date of the deposit of the last instrument of ratification [...]’

¹³ Annex I to Council Decision 1999/404/CFSP, *OJ* [1999] L 153/1.

containing a model for EU/WEU interaction in crisis management under Article 17, paragraph 3 TEU.¹⁴

The Union has only made use of Article 17 (or its forerunner Article J.4) to a very limited extent. The first cooperation between the EU and the WEU dates back to October 1994 and concerned the administration of the Bosnian town of Mostar. WEU's task was to contribute to the organisation and the recruitment of a unified police force for the city. However, this cooperation was not based on Article J.4 (since no defence issues were involved) and the request of the General Affairs Council was not presented in an official decision.¹⁵ A formal request to the WEU on the basis of Article J.4, paragraph 2 can for instance be found in Council Decision 96/670/CFSP of 22 November 1996 on the Joint Action of the Union in the African Great Lakes Region. Article 1 of that Decision provides:

'The European Union hereby requests the WEU to examine as a matter of urgency how it can, for its part, contribute to the optimum use of the operational resources available.'

It is clear, however, that this is not a request to implement a Union decision with defence implications; it is merely a request to the WEU to examine in what way it could contribute to the EU's Joint Action. An even more remote use of Article J.4 can be found in decisions in which the Council states that the Union 'shall retain the option of having recourse to the Western European Union'¹⁶ or where the Union only announces that it will forward a request to the WEU when defence implications become apparent.¹⁷ It must be assumed that the inclusion of these last paragraphs in CFSP Council decisions is of a political nature. After all, they seem to be legally superfluous since it already follows from the Treaty that the Union will avail itself of the WEU in case a decision has defence implications.

However, more recent developments have reflected a willingness on the part of the Union to implement Article 17, paragraph 3 in a more substantial way. Thus, the WEU has for instance been requested to implement a Decision by the Union concerning mine clearance in Croatia.¹⁸

Despite the somewhat slow *rapprochement* between the EU and the WEU in the

¹⁴ The flowchart reflects three phases (as well as the individual steps within those phases): 1. emergence of a crisis situation and evaluation of the crisis; 2. decision on action and development of operational plan; and 3. execution, monitoring and termination of the operation. The chart lists the tasks of the organisations involved (as well as the sequence of these tasks), although it was agreed that the Union maintains responsibility for the overall policy.

¹⁵ See also J.-F. Paganon, 'Western European Union's Pivotal Position between the Atlantic Alliance and the European Union', in Deighton, *op. cit.* n.1, pp. 93-102 at p. 97.

¹⁶ See for instance Joint Action 96/588/CFSP of 1 October 1996, *OJ* [1996] L 260/1, and Joint Action 97/817/CFSP of 28 November 1997 on anti-personnel landmines, *OJ* [1997] L 338/1.

¹⁷ See Common Position 97/356/CFSP of 2 June 1997 on conflict prevention and resolution in Africa, *OJ* [1997] L 153/1.

¹⁸ Council Decision 98/547/CFSP of 22 September 1998, *OJ* [1998] L 263/1.

early years after 'Maastricht', it was clear from the outset that they were condemned to each other. The text of the Treaty on European Union and the subsequent Declarations issued by the WEU reveal a strong legal relationship. Practice has never convincingly supported WEU's function as the defence arm of the Union, but the attempts to consolidate the working relations in terms of a number of practical measures at all levels of decision-making (not only including the Member States, but also the institutions) certainly contribute to the perception of the Union as an organisation which is well on its way to taking its objectives in the field of military security seriously. One of the problems regarding the cooperation between the two organisations concerned the complex system of membership. Ten EU members are also members of the WEU; Denmark, Ireland, Austria, Finland and Sweden have observer status. In addition, the WEU introduced an associate membership for non-WEU NATO members (Turkey, Norway, Iceland, the Czech Republic, Hungary and Poland) and an 'associate partnership' for states having an association agreement with the Community (Slovakia, Bulgaria, Romania, Lithuania, Latvia and Estonia). Observers may attend the meetings of the WEU Council, may be invited to meetings of working groups, and may be invited, on request, to speak. Associate members may participate fully in the meetings of the WEU Council, as well as in the working groups and subsidiary bodies. They have the same rights and responsibilities as the full members in case functions are transferred to the WEU from NATO. They have a right to speak but may not block a decision that is the subject of consensus among the Member States. They may associate themselves with the decisions taken by member states and will be able to participate in their implementation unless a majority of the Member States, or half of the Member States including the Presidency, decide otherwise. Finally, associate members may take part in WEU military operations, they are connected to WEUCOM (the telecommunications system), and they have a right to be associated with the WEU Planning Cell through a permanent liaison arrangement.¹⁹ The flip-side is that they are asked to make a financial contribution to the WEU budget.²⁰ Associate *partners*, finally, may also take part in discussions in the WEU Council (and may also not block a decision that is the subject of consensus among the Member States). They may be invited to working groups on a case by case basis and may have a liaison arrangement with the WEU Planning Cell. Furthermore, they may associate themselves with decisions taken by Member States related to 'Petersberg tasks'. Under the

¹⁹ The WEU Planning Cell is responsible for the planning and preparation of WEU military operations. See for instance B. Rosengarten, 'The Role of the Western European Union Planning Cell', in Deighton, *op. cit.* n. 1, pp. 157-168.

²⁰ See Petersberg Declaration, Bonn, 19 June 1991, reproduced in Bloed and Wessel, *op. cit.* n. 1, Document 29.

same conditions as associate members they may participate in the implementation of decisions as well as in relevant exercises and planning.²¹

According to Article 17, paragraph 3 TEU *all* EU Member States shall be entitled to participate fully in the operations the WEU is requested to elaborate and implement. The same provision calls on the Council to ‘adopt the necessary practical arrangements to allow all member states contributing to the tasks in question to participate fully and on an equal footing in planning and decision-taking in the WEU.’ On 10 May 1999 these practical arrangements were approved by the Council in a text constituting the ‘*Arrangements for Enhanced Cooperation between the European Union and the Western European Union under the Protocol on Article 17 of the Treaty on European Union*’.²² These arrangements include a range of measures in the following fields:

- improving the coordination of EU/WEU consultation and decision-making processes, in particular in crisis situations;
- the holding of joint meetings of the relevant bodies of the two organisations;
- the harmonisation, as far as possible, of the sequence of the Presidencies of WEU and the EU, as well as of the administrative rules and practices of the two organisations;²³
- close coordination of the work of the staff of the Secretariat-General of the WEU and the General Secretariat of the Council of the EU;²⁴
- allowing the relevant bodies of the EU, including its Policy Planning and Early Warning Unit, to draw on the resources of the WEU’s Military Staff, Satellite Centre and Institute of Security Studies;
- cooperation in the field of armaments, as appropriate;
- ensuring cooperation with the European Commission;²⁵ and
- security arrangements.²⁶

It is in fact these measures that paved the way for the partial integration of the two organisations.

²¹ See Kirchberg Declaration, Luxembourg, 9 May 1994, in Bloed and Wessel, *op. cit.* n. 1, Document 43.

²² Council Decision 1999/404/CFSP of 10 May 1999, *OJ* [1999] L 153/1.

²³ See for the sequence of the EU and WEU Presidencies the WEU Council Decision of 12 September 1997, annexed to EU Council Decision 1999/404/CFSP of 10 May 1999.

²⁴ See Annex III to Council Decision 1999/404/CFSP.

²⁵ See Annex IV to Council Decision 1999/404/CFSP.

²⁶ See Annex V to Council Decision 1999/404/CFSP. See also Council Decision 1999/321/CFSP of 10 May 1999. This decision was taken rather energetically, taking into account the Amsterdam Protocol on Art. J.7 of the Treaty on European Union, in which the European Union promised to draw up, together with the Western European Union, arrangements for enhanced cooperation between them, within a year from the entry into force of the Treaty of Amsterdam.

2.2 Legal institutional questions concerning Article 17 TEU

The EU procedure concerning defence issues originally found its basis in paragraph 2 of Article J.4 of the 1992 TEU. This provision stated that ‘[t]he Union requests the Western European Union (WEU) [...] to elaborate and implement decisions and actions of the Union which have defence implications.’²⁷ The Article further provided that ‘[t]he Council shall, in agreement with the institutions of the WEU, adopt the necessary practical arrangements’. At first glance this was a clear provision, reflecting the traditional policy of the European Communities not to be involved in defence issues. After all, defence issues had already been omitted from the Single European Act, which only provided that the High Contracting Parties were ‘ready to coordinate their positions more closely on the political and economic aspects of security.’²⁸ In realising that it is increasingly difficult to completely exclude decisions on defence issues from the decision-making in a European Union with a CFSP, their transfer to the WEU, which is ‘an integral part of the development of the Union’ (Article J.4, paragraph 2 and the current Article 17, paragraph 1), seemed to be a workable compromise.²⁹

From a legal institutional point of view, however, this provision evoked a number of questions. The WEU was to elaborate and implement *decisions and actions* of the Union which would have defence implications. The imperative character of the provision (‘the Union requests’, and not ‘the Union may request’), could lead to the conclusion that whenever a decision of the Union had defence implications, a request for elaboration and implementation by the WEU should follow. Article J.4 neither indicated the nature of the ‘decisions and actions’, nor the type of ‘request’.

The 1997 Article 17 almost entirely repeats this provision, but modifies the possibility of a request. These days, ‘[t]he Union *will avail itself of WEU* to elaborate and implement decisions and actions of the Union which have defence

²⁷ The Luxembourg Draft Treaty of 18 June 1991 provided in Article L of the CFSP provisions that ‘Decisions of the Union on security matters which have defence implications may be wholly or partly implemented in the framework of the Western European Union, insofar as they also fall within that organisation’s sphere of competence.’ Although this provision boils down to the same notion, the final choice in the 1992 TEU for a formal ‘request’ to the WEU was certainly more correct from a legal point of view. After all, the decision to implement decisions of the European Union is up to the WEU and not to the EU.

²⁸ Single European Act (1986), Art. 30, para. 6(a).

²⁹ The complex formula in Art. J.4, para. 1 was proposed by the Belgian delegation in order to reconcile the opinions of those who were in favour of a common defence (France in particular) and those who considered a common defence policy already to be a step too far (the United Kingdom in particular); see E. Remacle, ‘La politique étrangère et de sécurité commun de l’Union européenne après Maastricht’, in M. Telò (ed.), *Vers une nouvelle Europe?* (Etudes Européennes, Bruxelles, 1992), pp. 239-252 at p. 242.

implications.³⁰ This change was made possible due to the positive reaction by the WEU to the provision in the 1992 Treaty. The Treaty revealed no obligation for the WEU to positively react to a request by the Union,³¹ but in a Declaration attached to the TEU, WEU Member States declared:

‘The objective is to build up WEU in stages as the defence component of the European Union. To this end, WEU is prepared, at the request of the European Union, to elaborate and implement decisions and actions of the Union which have defence implications.’³²

While this Declaration certainly implies a strong commitment by the WEU, it seems clear that in this arrangement every request by the European Union was to be dealt with by the WEU Council on a case by case basis. However, keeping in mind the fact that all WEU members were part of formulating the request in the first place, a negative answer (under unchanged circumstances) was highly unlikely.

Since most CFSP Council decisions of the Union take the form of either a Common Position or a Joint Action (including follow-up decisions), the reference to ‘decisions and actions’ in both Article J.4 and Article 17, paragraph 3 is somewhat peculiar. Obviously, both may entail defence implications. However, a complication in this regard was found in Article J.4, paragraph 3 which provided that issues having defence implications should not be subject to the procedures set out in Article J.3 on the adoption of Joint Actions. Should one therefore conclude that the decisions and actions refer to Common Positions only? An affirmative answer to this question would render superfluous the reference to ‘actions’. Moreover, Article J.4, paragraph 3 did not entirely rule out defence implications as being part of Joint Actions, since it only mentioned *issues* that were not to be subject to the *procedures* in Article J.3. Joint actions may contain issues having defence implications, but those issues were not to be subject to the Article J.3 procedures. The possibility of qualified majority voting in Article J.3 was no doubt the main reason for the explicit inclusion of this provision.

Nevertheless, in May 1995 the Council adopted a Joint Action (on anti-personnel mines), which obviously has defence implications, and through which the conditions for implementing specific action by the European Union could be defined with qualified majority voting.³³ A request to the WEU was not deemed necessary in this case; the Union merely ‘reserve[d] the right to ask the Western European Union to contribute to the definition and implementation of specific actions.’ In that case, ‘the Council shall act unanimously’ (Article 7). While in this

³⁰ Emphasis added.

³¹ See also L. Münch, ‘Die Gemeinsame Außen- und Sicherheitspolitik (gasp): ein Schaf im Wolfspelz?’, *ZÖR* (1997), pp. 389-417 at p. 410; and Th. Jürgens, *Die gemeinsame Europäische Aussen- und Sicherheitspolitik* (Carl Heymanns Verlag, Köln, 1994), p. 369.

³² Bloed and Wessel, op. cit. n. 1, Document No. 28.

³³ Art. 6, para. 3 of Council Decision 95/170/CFSP of 12 May 1995, *OJ* [1995] L 115/1.

case Article J.4 was not explicitly referred to, the Decision on anti-personnel mines of October 1996 for the first time mentioned this article as the basis for the possible involvement of the WEU in this action.³⁴ However, in both cases a request to the WEU did not prove to be necessary.

The second question which emerged from Article 17, paragraph 3 concerns the nature of the decision to 'avail itself of WEU'. Is this procedure to be seen as leading to another type of decision, alongside the already mentioned instruments? Article 17 reveals no compelling reasons for this conclusion. The decision to make use of the WEU may very well be a part of a Common Position or Joint Action. The request will only concern issues with defence implications, which will then be handed over to the WEU. It is clear that the issues themselves are excluded from being decided upon by qualified majority voting, but it seems equally clear that the decision to make a request to the WEU is subject to the general rule of unanimity, since Article 23, paragraph 2 (on the possibility of qualified majority voting) at the end clearly states: 'This paragraph shall not apply to decisions having military or defence implications.'

Nevertheless, practice has shown examples of Article J.4/17 being used as an autonomous legal basis.³⁵ The first decision based on Article J.4 was taken as a *sui generis* Decision that has not been published in the Official Journal.³⁶ The Decision was taken by the Council on 27 June 1996 and is explicitly based on Article J.4, paragraph 2. It deals with the evacuation of EU nationals whenever they are in danger in third countries. In those cases the Council may request the WEU to work out the operational plan for the evacuation. According to the practical regulations, the WEU can either implement the decision itself or it can contribute to actions by one or more Member States.

A second request on the basis of Article J.4, paragraph 2 was formulated by the Council on 22 November 1996³⁷ as a 'Decision of the Council adopted on the basis of Article J.4, paragraph 2'; hence, as a separate decision on a separate legal basis.³⁸

³⁴ Council Joint Action 96/588/CFSP, *OJ* [1996] L 260/1.

³⁵ The possibility of Art. 17 being used as a separate legal basis was also acknowledged by R.H. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Kluwer, Deventer, 1999), p. 349.

³⁶ Doc. 8386/96, *Décision de Conseil du 27 juin 1996, relative aux opérations d'évacuation de ressortissants des Etats membres lorsque leur sécurité est en danger dans un pays tiers*.

³⁷ The first actual cooperation between the WEU and the European Union concerned the administration of the city of Mostar. But as this cooperation was based on the initial Decision on humanitarian transports in Bosnia and Herzegovina (93/603/CFSP) no reference was made to Art. J.4, para. 2.

³⁸ Decision 96/670/CFSP, *OJ* [1996] L 312/3. Contrary to the text of the Treaty, which stipulates that the Union shall avail itself of WEU 'to elaborate and implement decisions and actions of the Union', the request of 22 November 1996 ('only') 'calls on the WEU to urgently examine the way in which it can contribute, in what concerns it, to the maximum use of the operational means available.' One could question the legality of such a request, since it deviates from the text of the Treaty. However, when one would follow the principle that whoever requests the greater must also be satisfied with the lesser, there seems to be no reason to question the validity of the particular decision.

The J.4 decision was taken together with a Joint Action to support the delivery of humanitarian aid to Eastern Zaire and to facilitate the return of refugees to their country of origin.³⁹ In the view of the Council this Joint Action had defence implications and it could require the use of military means. The reason to separate this request from the Joint Action – and not to take a decision with a dual legal basis – may be found in the fact that Denmark decided not to participate in the Council Decision requesting the WEU to elaborate and implement the action of the Union.⁴⁰ Obviously, the Council prefers to detach the request to the Western European Union from the actual decision having defence implications. As we have seen, the Treaty text does not seem to require this procedure. The accompanying Joint Action on the Union's actions in the African Great Lakes region⁴¹ refers to the Article J.4 Decision in its preambular provisions only. The Decision contains a request to the WEU to investigate the possibilities for its possible involvement in this operation. Ironically, the ten WEU members did not succeed in responding to the short term on this very first formal request.⁴²

More recent decisions include the request to the WEU to complete a study on the feasibility of possible options for international police operations in Albania in order to assist the Albanian authorities to restore law and order in that country, and a request to implement a Union mine clearance action in Croatia.⁴³

Another observation concerns the question of whether the use of the WEU on the basis of Article 17, paragraph 3 in the 1997 Treaty only relates to decisions and actions of the Union which have 'defence implications' – as the text of the provision states – or also implications for a defence *policy*. The German translation of Article 17 hints at the latter interpretation, since it reads: '*Die Union wird die WEU in Anspruch nehmen, um die Entscheidungen und Aktionen der Union, die verteidigungspolitische Bezüge haben, auszuarbeiten und durchzuführen*'.⁴⁴ Bearing in mind the absence of a Union defence policy to date, this interpretation is

³⁹ Joint Action 96/669/CFSP of 22 November 1996, *OJ* [1996] L 312/1.

⁴⁰ Statement by Denmark attached to Joint Action 96/669/CFSP.

⁴¹ Joint Action 96/669/CFSP.

⁴² See S. Keukeleire, *Het buitenlandse beleid van de Europese Unie* (Kluwer, Deventer, 1998), p. 296.

⁴³ Council Decision 98/547/CFSP of 22 September 1998, *OJ* [1998] L 263/1, and Council Decision 98/628/CFSP of 9 November 1998, *OJ* [1998] L 300/2, respectively.

⁴⁴ Emphasis added. This seems to be the opinion of the former Secretary-General of WEU, Mr. Van Eekelen, as well, looking at a speech he delivered in April 1994: 'WEU is requested to "elaborate and implement decisions and actions of the Union which have implications in the area of defence policy"'. It is essential therefore that the Union itself does not conduct the defence policy but uses WEU for this purpose, since the "defence policy" of the European Union falls within WEU's area of responsibility'. Quoted in *WEU in the process of European Union – reply to the thirty-ninth annual report of the Council*, Assembly of Western European Union, Doc. 1417, 10 May 1994 (Ferrari Report), at p. 8.

the most logical. After all, ‘defence implications’ necessarily comprise a preparatory policy.⁴⁵

A final point concerns the competences of the Union regarding the so-called Petersberg tasks. It had long been unclear what issues were supposed to be covered by the common security policy of the Union (which would make them subject to the CFSP arrangements) and what was to fall under ‘decisions having defence implications’ (which are to be referred to the WEU). The 1997 Treaty to some extent clarified this issue by stipulating: ‘Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking’ (Article 17, paragraph 2). This formula has been adopted from the WEU 1992 Petersberg Declaration, in which the WEU redefined its own tasks,⁴⁶ and seems to exclude these issues from the EU’s own policy. This would mean that no CFSP Decisions can be taken on the ‘Petersberg tasks’, other than requesting the WEU to elaborate and implement them.

After the entry into force of the Nice Treaty, the references to the cooperation with the WEU will be deleted from Article 17. Thus the Union will not only decide on actions which have defence implications, but it will also elaborate and implement these actions itself.

2.3 Special arrangements with respect to some Member States

The previous section revealed that until the entry into force of the Nice Treaty the Union is not competent to deal with defence issues itself. Nevertheless, Article 17 contains some special arrangements concerning the possibility of the non-participation of Member States in decisions and actions of the Union having defence implications. The first provision in that respect can be found in the third part of paragraph 1:

‘The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States [...]’

⁴⁵ It has been argued that decisions and actions by the Union having implications for a common defence policy could also include the deployment of military-related units in actions for reasons other than to repel an attack (including the deployment of police or ‘*gendarmerie*’ units). See Münch, loc. cit. n. 31, p. 398; see also G. Burghardt and G. Tebbe, ‘Die gemeinsame Aussen- und Sicherheitspolitik der Europäische Union-Rechtliche Struktur und politischer Prozess’, 1-2 *EuR* (1995), p. 1 at 15.

⁴⁶ See Bloed and Wessel, op. cit. n. 1, p. 142. The Petersberg Declaration for the first time officially acknowledged WEU’s tasks beyond its original collective defence function. Para. II.4 states: ‘Apart from contributing to the common defence in accordance with Article V of the Washington Treaty and Article V of the modified Brussels Treaty respectively, military units of WEU member States, acting under the authority of WEU, could be employed for: humanitarian and rescue tasks; peacekeeping tasks; tasks of combat forces in crisis management, including peacemaking.’

The origin of this provision is to be found in Ireland's desire to preserve its traditional policy of neutrality, but it seems possible to also use this provision for the 'neutral' States that have acceded at a later stage (Austria, Finland and Sweden), since the text of the provision did not exclude this at all and even used the plural 'Member States'.⁴⁷ Moreover, the provision was not explicitly restricted to the *neutrality* policy of some Member States; it was of a more general nature and did not exclude, for instance, France and the United Kingdom continuing to pursue their specific nuclear policy.⁴⁸

The second part of Article 17 continues by stating:

'[The Union] 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.'

Again the reference to 'certain Member States' is surprising, since at the time of the signing of the Maastricht Treaty all the Member States except Ireland had obligations under the North Atlantic Treaty. Moreover, it is difficult to imagine how a policy of the European Union that does not include a common defence policy, nor a common defence, could come into conflict with the key obligation under the North Atlantic Treaty to collectively defend the North Atlantic area. In that respect the last part of the provision makes more sense in requiring that the Union's policy be compatible with the security and defence policy within the framework of NATO. It seems no more than logical to prevent a Union policy from developing in complete isolation from the new security policy that has emerged within the framework of NATO since the end of the Cold War.⁴⁹ In particular, keeping in mind the explicit reference to the WEU (and to the 'Petersberg tasks') and the designation of this organisation as an 'integral part of the development of the Union', the treaty text nevertheless seems to indicate a priority for established NATO policy in the event of a conflict between norms.⁵⁰

The position of Denmark in the formulation of a common defence (policy) deserves to be mentioned separately. The reference to the eventual framing of a

⁴⁷ Also Münch, loc. cit. n. 31, pp. 402-403. Art. 17, para. 1, makes it clear that it only holds true as far as 'the policy of the Union in accordance with this Article' is concerned. This is in line with the Declaration of Austria, Finland and Sweden annexed to the Final Act adopted on the occasion of their accession, that they are willing and capable to fully commit themselves to the CFSP. See also F. Fink-Hooijer, 'The Common Foreign and Security Policy of the European Union', *EJIL* (1994), pp. 173-198 at p. 197.

⁴⁸ See also Münch, loc. cit. n. 31, at pp. 403-404 and the references therein.

⁴⁹ See on this new policy the Alliance's Strategic Concept, adopted by the NATO Council in Washington on 23 and 24 April 1999.

⁵⁰ See also Münch, loc. cit. n. 31, p. 404, who asserted: 'Damit wird der NATO-Politik Vorrang eingeräumt.' See also *infra* section 3.3.

common defence policy in the Treaty was one of the reasons for the Danish population on 2 June 1992 voting 'No' in the national referendum that would permit the Danish Government to ratify the Treaty on European Union.⁵¹ A way out of this difficult situation was found at the European Council Summit in Edinburgh on 11-12 December 1992. Part B of the Edinburgh Conclusions is entitled 'Denmark and the Treaty on European Union' and includes a 'Decision of the Heads of State and Government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union', three European Council Declarations and two unilateral Declarations by the Danish Government.⁵² For the purpose of the present Chapter, Section C of the Decision is of particular importance, since it contains the following provision:

'The Heads of State and Government note that, in response to the invitation from the Western European Union (WEU), Denmark has become an observer to that organisation. They also note that nothing in the Treaty on European Union commits Denmark to become a member of the WEU. Accordingly, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications, but will not prevent the development of closer cooperation between Member States in this area.'

The legal nature of the Decision became the subject of intense legal scrutiny. Conclusions as to this legal nature varied from a qualification of the Decision as 'a clarification agreement',⁵³ or 'an international agreement in simplified form',⁵⁴ to a 'reservation' in the sense of Article 19 of the Vienna Convention on the Law of Treaties.⁵⁵ The main reason behind these conclusions was that the Decision could

⁵¹ Other reasons were reflected by the 'national compromise' that was subsequently adopted (30 October 1992) by the most important Danish political parties. See *Agence Europe* (5 November 1992).

⁵² *Bull. EC* 12-1992. Part B was also published in the *OJ* [1992] C 348/1.

⁵³ See for instance the view of the British Government, which described the Decision as 'a clarification agreement' and 'an agreement, in the sense of Article 31 of the Vienna Convention on the Law of Treaties.' Replies by Prime Minister John Major, referred to in D. Howarth, 'The Compromise on Denmark and the Treaty on European Union: A Legal and Political Analysis', *CML Rev.* (1994), pp. 765-805 at p. 772.

⁵⁴ See for instance D.M. Curtin and R.H. van Ooik, 'Denmark and the Edinburgh Summit: Maastricht without Tears', in D. O'Keeffe and P.M. Twomey, *Legal Issues of the Maastricht Treaty*, (Wiley Chancery Law, London, 1994), pp. 349-365 at p. 356. However, these authors also label the Decision as an 'implementation agreement' and in that sense refer to Art. 31 of the Vienna Convention to stress the importance of the 'context' of a Treaty (at pp. 357-358). The qualification as an 'implementation agreement' (with no need for Parliamentary approval) was also used by the State Secretary for European Affairs in comments made before the Dutch Parliament (Documents of the Second Chamber of 16 December 1992, No. 2842).

⁵⁵ See for instance Münch, *loc. cit.* n. 31, p. 405. Münch concludes that this reservation blocks the legal effects of the Union Treaty with respect to Denmark as far as questions of defence policy are concerned.

not be seen as a decision of the European Council, since it was clearly presented as the outcome of an intergovernmental meeting of the Heads of State and Government. Regardless of these conclusions, the fact remains that all Member States denied that the Decision had ‘treaty’ status requiring parliamentary approval.⁵⁶ At least as far as the provision on defence is concerned, the conclusion can be no other than that the Decision does not deviate from the text of the Treaty. Despite the presentation of the WEU in the Treaty as an integral part of the development of the Union, the Treaty text nowhere obliges Denmark to become a member of the WEU and, accordingly, Denmark does not participate in the elaboration and implementation by the WEU of Union decisions which have defence implications.

The somewhat ironic conclusion regarding the nature of the Decision might therefore very well be that it reflects the ability of the Heads of State and Government to read a Treaty text, since it does not state anything that was not already included in the Treaty. Nevertheless, the last sentence of the provision seems to highlight an important understanding. The full participation of Denmark in all CFSP matters would allow this State to use its veto whenever a request to the WEU in the sense of Article 17, paragraph 3 would be on the agenda. One could argue that the agreement that Denmark will not prevent the development of closer cooperation between Member States suggests that it loses its right to use a veto in the Council of Ministers or the European Council whenever a proposal for a decision on the basis of Article 17 is on the table.⁵⁷ This interpretation seems to be justified, but is of little practical value, since there would be no reasons anyway for Denmark to block a decision the implementation and elaboration of which it would not participate in. It is interesting to note that the possibility of using a veto in this respect has not been affected as far as the other non-WEU member states, Ireland, Austria, Finland and Sweden, are concerned. The same holds true for the understanding that Denmark will renounce its right to exercise the Presidency of the Union in each case involving the elaboration and implementation of decisions and actions of the Union which have defence implications.⁵⁸

On the basis of this analysis – which only concerns a small part of the Edinburgh Decision – a legal qualification of the Decision would probably come closest to what the Vienna Convention on the Law of Treaties calls a ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ (Article 31, paragraph 3(a)).⁵⁹ According to the Vienna Convention these agreements shall be taken into account, together with the context, but are not

⁵⁶ See Howarth, *loc. cit.* n. 53, p. 771.

⁵⁷ See also Howarth, *loc. cit.* n. 53, p. 778 and Münch, *loc. cit.* n. 31, p. 405.

⁵⁸ See Declaration of the European Union in Annex 2 of the Edinburgh Conclusions. In that case the normal rules for replacing the President, in case the President is indisposed, shall apply.

⁵⁹ Howarth, *loc. cit.* n. 53, p. 772, reaches the same conclusion while taking all sections of the Decision into account.

to be seen as forming part of the treaty. Hence, they are comparable to declarations and other interpretative statements that are adopted in connection with the conclusion of a treaty.⁶⁰ However, the Amsterdam IGC placed the Edinburgh Decision in Article 6 of the Protocol on the Position of Denmark. In this way one could argue that we are now facing with an official reservation. The practical relevance can only be found in the fact that Denmark shall not be obliged to contribute to the financing of operational expenditure arising from decisions in which the Union avails itself of the WEU.

While one could have gained the impression that the Edinburgh Decision and the Amsterdam Protocol merely affirm that Denmark has no obligations under the modified Brussels Treaty of 1954 (the WEU Treaty), practice has shown that decision-making on the basis of Article J.4/17 is indeed also an issue. In Decision 96/670/CFSP the Council decided on the basis of Article J.4, paragraph 2 to request the WEU to examine how it could contribute to the Union's action in the African Great Lakes region. This Decision was accompanied by a formal Statement by Denmark, in which this country not only underlined that in accordance with the Edinburgh Decision it would not participate in the elaboration and implementation of the CFSP Decision (by the WEU), but that it also did not participate in the Council decision itself, in which the WEU was requested to elaborate and implement the action of the Union. Denmark furthermore stressed that this did not prevent the adoption of the Council Decision. Similar statements were made by Denmark in relation to other CFSP Decisions.⁶¹ No such statements were made by the other non-WEU Member States, Ireland, Austria, Finland and Sweden.

It is obvious, however, that the provision on the specific character of the security and defence policy of certain Member States will become important after the entry into force of the Nice Treaty. At that time the current EU non-WEU Member States will need to make use of this provision to point to traditional reserved attitudes they may have concerning military defence cooperation once they do not want to actively participate in a certain action.

As a final remark in this section, attention should be drawn to paragraph 4 of Article 17, which allows for the development of closer cooperation between two or

⁶⁰ Nevertheless, Art. 31 of the Vienna Convention suggests a certain hierarchy in separating agreements that were made in connection with the conclusion of a treaty (in para. 2) from those that are not. The latter category (in para. 3) includes – apart from subsequent agreements – ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’; and ‘any relevant rules of international law applicable in the relations between the parties.’

⁶¹ It is difficult not to suspect Denmark of being somewhat paranoid in this respect. See for instance Common Position 97/356/CFSP of 2 June 1997, in which the Council merely echoed the Treaty by stating that ‘Where any Union initiative [...] has defence implications, the Council shall request the Western European Union to elaborate and implement this initiative [...]’. See also Joint Action 96/588/CFSP of 1 October 1996, in which the Council simply retains the option of having recourse to the Western European Union.

more Member States on a bilateral level, within the framework of WEU and NATO, as long as such cooperation does not run counter to or impede CFSP. This provision brings multilateral defence cooperation frameworks like the ‘Euro Corps’ or the bilateral Dutch-German corps within line with the Union Treaty.⁶²

3. EU/WEU IN THE INTERNATIONAL LEGAL ORDER

3.1 The European Union as a security and defence organisation

For the development of a European Security and Defence Policy, the past few years have meant more than the 50 years that preceded them. In a political sense, the most important development was the change in the traditional British attitude concerning an intensification of European defence cooperation. On 4 December 1998 the British and French Governments meeting in Saint-Malo *inter alia* concluded that ‘[t]he 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.’⁶³ This simple sentence – which according to political commentators *inter alia* finds its basis in Britain’s wish to take the lead in a major European development as well as in the possibility to ‘sell’ Europe back home – triggered a number of subsequent decisions by the European Union. In addition, recent WEU and NATO Declarations could also be interpreted as reflecting an emerging consensus on the establishment of a direct link between the EU and NATO. In that event the WEU as the intermediate organisation between the EU and NATO would become obsolete.⁶⁴

The Saint-Malo declaration was followed by a number of decisions of the European Council in Cologne on 3 and 4 June 1999 concerning the strengthening of the common European policy regarding security and defence.⁶⁵ The European Council decided to establish an autonomous operational capacity supported by credible means and decision-making institutions. It was furthermore decided that the Council will be given the competence to use military instruments alongside the

⁶² See on the Euro Corps for instance D. Mahncke, ‘Toward a Common European Defence: The European Corps’, 1 *CFSP Forum* (1995), p. 5.

⁶³ Joint Statement by the British and French Governments, Franco-British Summit, Saint-Malo, France, 4 December 1998. See also the Presidency Conclusions of the Cologne European Council, 3 and 4 June 1999.

⁶⁴ See the Washington Declaration issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C. on 23-24 April 1999 (‘We applaud the determination of both EU members and other European Allies to make the necessary steps to strengthen their defence capabilities’). See also the Bremen Declaration adopted by the WEU Council of Ministers in Bremen on 10-11 May 1999.

⁶⁵ European Council, Conclusions of the Presidency, Cologne, 3-4 June 2000, annex.

already existing political and economic ones. The Declaration further refers to a number of WEU institutions that would be needed in the EU as well (a Military Committee, a Military Staff, a Satellite Centre and an Institute for Security Studies). In November 1999 the WEU Council demonstrated that it would accept its fate and decided to 'prepare the WEU legacy and the inclusion of those functions of the WEU, which will be deemed necessary by the EU to fulfil its new responsibilities in the area of crisis-management tasks.'⁶⁶ The Union will have to decide, on a case by case basis, whether or not additional NATO assets need to be used.

On 15 November 1999, for the first time in its history, the Council of the European Union met in the composition of Ministers for Foreign Affairs and Ministers of Defence.⁶⁷ While this may seem a logical step in the current developments, it highlights the revolution that has taken place within the European Union during the past few years. Previously, formal meetings of Defence Ministers were unthinkable. During this meeting France and the United Kingdom launched their plan for a Rapid Reaction Force, an idea that was adopted by the European Council in Helsinki in December 1999 when it decided to develop an autonomous military capacity.⁶⁸ Probably to reassure (the parliaments of) certain Member States, the somewhat ambiguous sentence was added that this does not imply the creation of a European army. Nevertheless, all developments point in the direction of a sincere attempt on the part of the EU to create a military force. The European Council formulated a 'headline goal' and decided that by the year 2003 Member States must be able to develop rapidly and then sustain forces 'capable of the full range of Petersberg tasks, including the most demanding, in operations up to corps level; up to 15 brigades, or 50,000-60,000 persons.' These forces should be self-sustaining with the necessary command and control and intelligence capabilities, logistics, and other combat support services and, additionally, appropriate naval and air elements. The readiness requirement is 60 days, with some units at very high readiness, capable of deployment within days or weeks.⁶⁹

These developments found their way into the Treaty of Nice that was adopted in December 2000. According to that Treaty, Article 17 of the Treaty on European Union will be modified as follows: the second subparagraph of paragraph 1 on the relationship with the WEU will be deleted; the same holds true for the first three subparagraphs of paragraph 3 on the role of the WEU in the implementation of EU decisions with defence implications. This means that the Union will be given the

⁶⁶ WEU Ministerial Council, Luxembourg Declaration, 23 November 1999, para. 4.

⁶⁷ Conclusions of the General Council of 15 November 1999, Council Press Release No. 12642/99 (*Presse* 344).

⁶⁸ European Council, Conclusions of the Presidency, Helsinki, 10-11 December 1999.

⁶⁹ See on the feasibility of this headline objective for instance R. de Wijk, 'Convergence Criteria: Measuring Input or Output', 5 *EFA Rev.* (2000), pp. 397-417; as well as the NATO Parliamentary Assembly Interim Report entitled 'Building European Defence: NATO's ESDI and the European Union's ESDP', Rapporteur Van Eekelen, 5 October 2000.

competence to operate within the full range of the Petersberg tasks: ‘humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking’ (Article 17, paragraph 2).

3.2 Institutional adaptations

Despite the fact that the original Treaty on European Union already included the possible framing of a defence policy, the Union was not yet equipped to deal with this new area of interest. Apart from the decision taken in Helsinki in December 1999 to allow the Ministers of Defence to attend the General Affairs Council meetings each time the Council discusses issues related to the European Security and Defence Policy, the European Council decided to create a number of new organs to deal with ESDP issues: 1. an interim Political and Security Committee (PSC), composed of national representatives at ambassador or equivalent level, dealing with all aspects of CFSP, including ESDP; 2. an interim EU Military Committee (EUMC), composed of the Chiefs of Defence, represented by their military delegates, which will give advice and make recommendations to the PSC, as well as providing military direction to the EU Military Staff (*infra*); the Chairman of the EUMC would be a four-star officer who would act exclusively in an international capacity and whose authority would stem from the Military Committee; and 3. an interim EU Military Staff (EUMS), within the Council’s structures, which will provide military expertise and support to the ESDP, including the conduct of EU-led military crisis management operations. The interim committees were installed on 1 March 2000, following a Council decision of 14 February 2000. The decision was formally endorsed by the European Council in Feira (Portugal) in June 2000. In December 2000, the Council decided to make the interim committees permanent in the year 2001.⁷⁰

The legal basis of the PSC is Article 25 of the EU Treaty, the basis of the current Political Committee.⁷¹ Indeed, the Nice Treaty modifies Article 25 in the sense that it will refer to a Political and Security Committee instead of the currently existing Political Committee. In addition to these committees in the field of ‘hard security’, the Council on 22 May 2000 decided to establish a Committee for the Civilian Aspects of Crisis Management as well.⁷² This committee will coordinate the civil crisis management of the European Community. It functions as a working group of the Council and reports to the Committee of Permanent Representatives (Coreper). In addition, it supplies the PSC and other competent organs with information, recommendations and opinions. The committee had its first meeting on 16 June

⁷⁰ See the Presidency Report on the European Security and Defence Policy, Brussels, 4 December 2000, Press Release 14056/2/00.

⁷¹ Decision 2000/143/CFSP of the Council of 14 February 2000, *OJ* [2000] L 49/1.

⁷² Decisions 2000/354/CFSP of the Council of 22 May 2000, *OJ* [2000] L 127/1.

2000. Next to this committee a coordination mechanism was installed within the Council's Secretariat to coordinate a databank on available police capacity. This has led to the creation of a European Security and Intelligence Force (ESIF), which is, in time, to consist of 5,000 well-armed police, 1,000 of them to be deployable within 30 days, able to carry out preventive as well as repressive actions in support of global peacekeeping missions. This force will be under the control of the PSC, with effective control being in the hands of the CFSP High Representative, Mr. Solana.

3.3 Relations with other security organisations

The (future) legal relationship with some organisations in the field of international security deserves to be analysed in more detail, since on the basis of the current arrangements the Union depends on these organisations in realising two of the primary CFSP objectives: 'to strengthen the security of the Union' and 'to preserve peace and strengthen international security.' The most obvious organisation in this respect is of course the already mentioned Western European Union, which according to Article 17 – and until the entry into force of the Nice Treaty – is 'an integral part of the development of the Union.' Developments within the WEU, however, cannot be isolated from the relations of this organisation with the North Atlantic Treaty Organisation (NATO). According to the WEU Declaration attached to the Final Act of the 1991 IGC, the WEU will not only be developed as the defence component of the European Union, but also as a means to strengthen the European pillar of the Atlantic Alliance. The same Declaration states that an eventual common defence will be compatible with that of NATO. EU security and defence issues thus have to be approached with this institutional triangle in mind. Both the EU Treaty and a number of WEU and NATO statements have closely tied the security policies of the three organisations together.

The original absence of a defence policy of the EU itself may explain why the Union has not established formal relations with NATO during the 30 years that they have existed side-by-side. However, the days of splendid isolation are over and intensive policy coordination has occurred (ranging from formal consultations in the case of the enlargement policies of both organisations to the weekly breakfast meeting between the two SGs).⁷³ Nevertheless, the Treaty text still limits itself to the provision (not modified by the Nice Treaty) that the policy of the Union:

⁷³ Examples of concrete cooperation include the first joint meeting between the North Atlantic Council and the EU's Political and Security Committee in September 2000 and the meetings of four joint working groups on information security, access to NATO assets, EU military capabilities, and the permanent arrangements for EU-NATO relations.

'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' (Article 17, paragraph 1).

There is only a remote chance that Union policy could come into conflict with NATO policy, but in that case this provision calls for the compatibility of the EU decision with NATO policy, and thus for the precedence of an earlier NATO decision over an EU decision. Theoretically, this provision could in that respect have an influence on the request of the Union towards the WEU, but when the overlapping memberships of the three organisations are kept in mind,⁷⁴ conflicting policies are indeed hardly conceivable.

The 1991 Maastricht Declaration of the ten WEU/EU Member States provides:

'The objective is to develop WEU as a means to strengthen the European pillar of the Atlantic Alliance. Accordingly WEU is prepared to develop further the close working links between WEU and the Atlantic Alliance and to strengthen the role, responsibilities and contribution of WEU Member States in the Alliance. This will be undertaken on the basis of the necessary transparency and complementarity between the emerging European security and defence identity and the Alliance. WEU will act in conformity with the positions adopted in the Atlantic Alliance.'⁷⁵

To be able to attain this objective, it was decided that WEU Member States will intensify their coordination on Alliance issues; that, where necessary, dates and venues of meetings will be synchronised and working methods harmonised; and that a close cooperation will be established between the Secretariats-General of WEU and NATO.

It was made clear in this Declaration, as well as in all subsequent WEU communiqués and the 1997 WEU Declaration adopted at the Amsterdam IGC, that NATO remains the essential forum for transatlantic consultations and that the developments in the WEU will in no way harm the Atlantic cooperation. Policy coordination takes place at various levels.⁷⁶ At the highest level, the working relationship between WEU and NATO entails cross-representation at ministerial meetings. The WEU/EU Secretary-General regularly attends the North Atlantic Council ministerial meeting. Moreover, the Permanent Councils of NATO and WEU often meet jointly. In addition, the Alliance member which holds the rotating WEU Presidency gives a weekly briefing to the two Councils on decisions taken at

⁷⁴ 11 out of the 19 NATO Members are also Members of the EU. Ireland is the only EU Member that has no relationship at all with NATO; Austria, Finland and Sweden participate in NATO's Partnership for Peace.

⁷⁵ See Bloed and Wessel, *op. cit.* n. 1, Document 28.

⁷⁶ See also Paganon, *loc. cit.* n. 15, p. 94.

the respective Council meetings. On a working level, there are regular staff liaison meetings between the two Secretariats, cross-representation of the Secretariats as well as military to military contacts. Finally, documents are exchanged in many fields of interest. A number of arrangements were laid down in a Security Arrangement between WEU and NATO, which came into force on 6 June 1996, following the NATO ministerial meeting on 3 June 1996 in Berlin.⁷⁷ One of the most important arrangements agreed on in this Agreement concerns the introduction of the so-called Combined Joint Task Forces (CJTFs), which will 'permit the creation of military coherent and effective forces capable of operating under the political control and strategic direction of the WEU.' The CJTF concept will allow (W)EU to engage in larger-scale Petersberg operations without a duplication of NATO's military infrastructure, by making use of NATO's operational military infrastructure. It was agreed that NATO would adapt itself to a new European Security and Defence Identity (ESDI).⁷⁸ In that respect the following steps were taken:

- the DSACEUR would command a WEU-led operation and WEU-led operations would require 'double-hatting' of appropriate personnel within the NATO command structure;
- the operational framework for such an operation would be the Combined Joint Task Forces (CJTF) concept;
- for WEU-led CJTF operations 'seperable but not separate' NATO assets and capabilities, including headquarters, elements of headquarters and command positions could be used. Consequently, NATO allies were invited to provide a list of 'double-hatted' forces answerable to the WEU (FAWEU);
- NATO would at the request of and in coordination with the WEU, conduct military planning and exercises for illustrative WEU missions identified by WEU.⁷⁹

In view of the planned and gradual transfer of WEU competences and institutions to the EU, both the EU and NATO are currently considering the transfer of all arrangements between NATO and WEU to the EU. This would of course need a replacement of the WEU signature by an EU signature under the NATO-WEU Framework Document that was concluded at the 1996 Berlin Summit.⁸⁰

With regard to the relationship with the United Nations, the inclusion of the Petersberg tasks in the Treaty on European Union and the competences of the European Council and the Council of Ministers to take decisions on these issues

⁷⁷ *Ibid.*, p. 95.

⁷⁸ Where ESDP is commonly used to describe the developments in the (Western) European Union, ESDI is the abbreviation used by NATO to refer to its own adaptations.

⁷⁹ See also De Wijk, *loc. cit.* n. 69, p. 400.

⁸⁰ See also NATO Parliamentary Assembly Interim Report, 5 October 2000.

brings about an additional question. The Treaty on European Union now foresees the possibility for the WEU to engage in peace-making operations (Article 17, paragraph 2). The Charter of the United Nations is quite clear on the prohibition on using force (Article 2, paragraph 4). Exceptions can be found in the provisions on (collective) self-defence (Article 51) and in actions by the Security Council on the basis of Article 42. In addition, Chapter VIII (Article 53) allows the Security Council to 'utilize [...] regional arrangements or agencies for enforcement action under its authority.' The question is then whether the EU can be seen as a 'regional arrangement' in this sense.⁸¹ An affirmative answer would also explain the way in which the Union intends to attain the CFSP objective 'to preserve peace and strengthen international security'. However, the TEU at this moment in time does not provide any clues for the EU itself to function as a regional arrangement⁸² and in fact refers to the WEU as the organisation responsible for its operational security actions.

The problem is that there are no indications that the WEU was intended to be a 'regional arrangement'. The references in the modified Brussels Treaty to the UN Charter relate to collective defence only.⁸³ On the other hand, the concept of 'regional arrangements' is not defined by the Charter and it seems to be up to the regional organisations to proclaim themselves as a 'regional arrangement' – as was for instance done by the Organisation of American States in 1948 and the Arab League in 1945.⁸⁴ According to the (former) UN Secretary-General this situation was intended by the Charter:

'The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal

⁸¹ See more extensively on this issue: Fleuß, op. cit. n. 1, pp. 104-276 and V. Kronenberger, 'La dimension institutionnelle de la Politique Européenne Commune de Sécurité et de Défense de l'Union européenne' 10 *Europe* (2000), p. 3 at pp. 5-8.

⁸² Ibid., p. 196: '[...] daß die Ausgestaltung der Gemeinsamen Sicherheitspolitik der Europäischen Union im Vertrag von Maastricht zum gegenwärtigen Zeitpunkt noch nicht den Anforderungen des Kapitels VIII der UN-Charta an regionale Einrichtungen genügt'. The planned integration of WEU into the European Union would of course form a reason to reconsider this starting point.

⁸³ Indeed, the history of the Brussels Treaty makes it clear that WEU was originally not intended to be a regional arrangement in the sense of the UN Charter. See for instance: W. Krieger, 'Gründung und Entwicklung des Brüsseler Paktes', in N. Wiggerhaus and N.G. Foerster (eds.), *Die westliche Sicherheitsgemeinschaft 1948-1950: gemeinsame Probleme und gegensätzliche Nationalinteressen in der Gründungsphase der Nordatlantischen Allianz* (Boldt, Boppard am Rhein, 1988).

⁸⁴ Nolte pointed to the fact that in the OAS a multinational force to deal with an internal conflict was only based on the general purposes of the treaty. There existed a new situation that could not have been foreseen at the time of the conclusion of the treaty. Similarly, the Arab League based troops in Lebanon from 1977-1983, the Organisation of African States in Chad from 1981-1982 and the Economic Community of Western African States did the same in Liberia (from 1990). See G. Nolte, 'Die "neuen Aufgaben" von NATO und WEU: Völker- und verfassungsrechtliche Fragen', *ZaöRv* (1994), pp. 95-110 at p. 107.

with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional organizations for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of concern.⁸⁵

The Secretary-General even explicitly hinted at the possible ‘emergence’ of new regional arrangements in Europe:

‘[F]or dealing with new kinds of security challenges, regional arrangements or agencies can render assistance of great value. [...] This presupposes the existence of the relationship between the United Nations and regional arrangements envisaged in Chapter VIII of the Charter. The diffusion of tensions between States and the pacific settlement of local disputes are, in many cases, matters appropriate for regional action. The proviso, however, is that efforts of regional agencies should be in harmony with those of the United Nations and in accordance with the Charter. This applies equally to regional arrangements in all areas of the globe, including those which might emerge in Europe.’⁸⁶

It would thus be too easy to deny the WEU (or for that matter the EU) a new identity as a regional arrangement solely on the basis of its own constitution. In fact, the WEU has already been active in assisting the United Nations in a number of operations, including the 1988 ‘Operation Cleansweep’ (a mine-hunting operation to clear the Gulf waters) and ‘Operation Sharpguard’ (aimed at enforcing sanctions against the Federal Republic of Yugoslavia). Regardless of the fact that the WEU to date has operated much more as a *coordinator* of the actions of its Member States than as an organisation which was itself involved in international actions,⁸⁷ the implications of the acceptance of a new role for the (W)EU as a ‘Chapter VIII organisation’ are not to be disposed of too easily. According to Article 52 of the UN Charter, the activities of regional arrangements or agencies are to be consistent with the purposes and principles of the United Nations. Moreover, regional arrangements have a primary function in the pacific settlement of local disputes; they shall make every effort in that respect before referring the dispute to the Security Council.⁸⁸ Neither Article VIII.3 nor Article X of the modified Brussels Treaty

⁸⁵ An Agenda for Peace (1992). See on the concept of regional arrangements also Th.J.W. Sneek, ‘The OSCE in the New Europe: From Process to Regional Arrangement’, 1 *Indiana International & Comparative Law Review* (1994), pp. 1-73.

⁸⁶ Report of the Secretary-General on the Work of the Organisation. *Secretary Gen. Rep. 21*, 1990, at p. 21.

⁸⁷ See also Fleuß, *op. cit.* n. 1, p. 331.

⁸⁸ Local disputes are commonly understood as disputes exclusively involving States which are parties to the regional arrangement or agency. Compare in that respect also Arts. 34 and 35 of the Charter. See also Sneek, *loc. cit.* n. 85, p. 52.

seems sufficient to enable the WEU to fulfil this task in an effective manner.⁸⁹ It could however be claimed that this task could be performed by the EU after the transfer of the WEU competences to the EU. After all, the Presidency Report on ESDP of December 2000 clearly states: 'The development of the European Security and Defence Policy strengthens the Union's contribution to international peace and security in accordance with the principles of the UN Charter.' Through the requirement of systematic cooperation between the Member States the EU may be in a position to serve as a forum for the pacific settlement of disputes. But even then additional procedural arrangements seem to be required for the Union to fulfil this task effectively.

A second consequence of accepting the identity of the (W)EU as a regional arrangement should always be kept in mind. Article 53 of the UN Charter presents regional arrangements as entities that may be utilised by the Security Council for enforcement action *under its authority*. Even for regional arrangements an authorisation of the Security Council to take enforcement action is necessary.⁹⁰

Article 54, finally, provides that the Security Council shall at all times be kept fully informed of activities which are undertaken or are being contemplated under regional arrangements by regional agencies for the maintenance of international peace and security.

This leads to the conclusion that the modified Brussels Treaty in combination with the TEU at this moment does not reflect all the characteristics of the (W)EU to be regarded as a fully-fledged regional arrangement.⁹¹ The Nice Treaty does not change this situation. The lack of any procedures to secure internal security is in particular a serious shortcoming in that respect. Nevertheless, practice has demonstrated a number of examples in which the WEU has functioned as the regional arm of the United Nations in coordinating the actions of its Member States. Future developments may further strengthen the functions of the Union in this respect and hence its need to adapt its purposes and competences accordingly.

⁸⁹ According to Art. XIII, para. 3, the Council may discuss any situation which may constitute a threat to peace, in whatever area this threat should arise, or a danger to economic stability. Art. X refers to the determination of the High Contracting parties to settle disputes only by peaceful means, but does not contain a procedural role for WEU in this respect. On the other hand, one of WEU's original functions was the arms control of its own members. See Protocol No. III on the Control of Armaments, Signed in Paris on 23 October 1954. Bloed and Wessel, *op. cit.* n. 1, Document 4. Compare also Protocol IV on the Agency of WEU for the control of armaments (Document 5).

⁹⁰ Art. 53 mentions one exception: measures against renewal of aggressive policy on the part of an enemy State (that is: any State which during the Second World War was an enemy of any signatory of the present Charter). However, the definition of 'enemy State' already points to the outmoded nature of this provision.

⁹¹ *Contra* L. Vierucci, 'WEU: A Regional Partner of the United Nations?', 12 *Chaillot Papers*, WEU Institute for Security Studies (1993).

4. CONCLUDING OBSERVATIONS: THE 'FINALITÉ' OF AN ESDP

After numerous compromises on the degree of security and defence cooperation within the framework of the European Community/Union – ranging from a reference to the 'economic aspects of security' in the 1986 Single European Act to the inclusion of the Petersberg tasks in the 1997 Amsterdam Treaty – we are now witnessing consensus among the Member States to actively develop a European Security and Defence Policy (ESDP). Nevertheless, the term may be misleading. 'Security' policy already forms part and parcel of the Common Foreign and Security Policy that was introduced by the 1992 Treaty on European Union. After all, according to Article 17 'The Common Foreign and Security Policy shall include all questions relating to the security of the Union [...].' In addition, 'defence' policy is obviously not to be regarded as a defence policy in the strict sense, since it explicitly does not include a common defence of the territory of the European Union, but merely refers to what one may call military cooperation in actions 'out-of-area'.

The Marseilles Declaration of the WEU Ministerial Council of 13 November 2000 somewhat clarified the confusion.⁹² The Declaration implies a transfer of some WEU institutions (such as the Satellite Centre and the Institute for Security Studies) to the EU, since it is noted that the EU agrees to the setting up of these institutions which 'would incorporate the relevant features of the corresponding WEU subsidiary bodies.' In line with these developments, the WEU decided to suspend the application of the routine consultation mechanisms in force between the WEU and the EU and between WEU and NATO. The European Union, for its part, agreed to take over the WEU Satellite Centre and the Institute for Security Studies (in the form of agencies) as well as the WEU activities that are still running (such as the MAPE mission on police cooperation with Albania).⁹³

Is this the end of the WEU? No, because no consensus could be reached on the transfer of the original core function of the WEU to the EU, the collective assistance agreement laid down in Article V of the modified Brussels Treaty, which reads:

'If one of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.'

⁹² WEU Ministerial Council, Marseilles Declaration, 13 November 2000.

⁹³ See the Presidency Report on ESDP of 4 December 2000. Although the report mentions the setting up of new agencies, it is expected that the current WEU institutions will be relabelled as EU institutions. The Demining Assistance Mission to the Republic of Croatia will be continued under the responsibility of Sweden until 9 May 2001 when its present mandate expires.

In Marseilles the WEU decided to have the WEU residual functions and structures in place by 1 July 2001 at the latest so as to enable the Member States to fulfil the commitments arising from Articles V and IX (on the WEU Assembly). This means that the WEU is essentially returned to the organisation that was originally set up to deal with collective defence matters between the Benelux countries and the United Kingdom and France in 1948: the Brussels Treaty Organisation. Although the 1948 Brussels Treaty was also intended to intensify the economic, social and cultural collaboration between the Member States,⁹⁴ the collective self-defence paragraph (at that time Article IV) soon proved to be the key provision. The 1954 Paris Protocols modified the original Treaty by introducing the WEU as the successor to the Brussels Treaty Organisation and allowing Germany to enter the Western European security cooperation through a strict control of its rearmament. After a minimal use of the provisions of the modified Brussels Treaty, the WEU was reactivated in 1984 and allowed to serve as a coordination framework for the Western European States in the field of military security cooperation (on the basis of Article VIII, paragraph 3).⁹⁵ It is in fact this new function which culminated in the creation of the Petersberg tasks that is being handed over to the European Union. This explains why no modifications to the WEU Treaty are necessary.

The Treaty on European Union, on the other hand, does need to be revised in the light of these developments. Whereas a future transfer of the common ('collective') defence provision from the WEU to the EU is made dependent on a decision by the European Council only (which may nevertheless need to be adopted by the individual Member States in accordance with their respective constitutional requirements – Article 17), the references to the WEU need to be deleted and the new institutions require a more explicit Treaty basis. Apart from explicit references to the EU Military Committee and the EU Military Staff, the Treaty of Nice takes care of these modifications. After the entry into force of this Treaty the Union will finally have the competence to develop a further part of its foreign and security policy and to attain the goals that were already set in the Treaty ten years ago. While the WEU returns to the dormant position it occupied during the first 30 years of its existence, the European Union may reveal itself as an international organisation that not only plays a major economic role in the international legal order, but also a major role where the maintenance of peace and security is concerned.

Two questions remain, however. The first is the following: who will implement the decisions of the Union which have defence implications once the WEU has been reduced to a paper organisation and the Nice Treaty has not yet entered into force?

⁹⁴ The official name of the WEU Treaty is still: Treaty of Economic, Social and Cultural Collaboration and Collective Defence.

⁹⁵ Art. VIII(3) reads: 'At the request of any of the High Contracting parties the Council shall be immediately convened in order to permit Them to consult with regard to any situation which may constitute a threat to the peace, in whatever area this threat should arise, or a danger to economic stability'.

While the practice and quantity of the ‘defence decisions’ to date do not allow for too many sleepless nights on this issue, the question is nevertheless of theoretical importance. There may be a long period (depending on the speed of the ratifications of the Nice Treaty) in which the Treaty on European Union for the implementation of decisions of the Union refers to an organisation that is no longer capable of doing the job. The second question concerns the refusal of the EU Member States to transfer the collective defence obligation in Article V of the Brussels Treaty to the EU Treaty. In this way the EU has not devoured all of the WEU, which results in a somewhat handicapped ESDP. The inclusion of the collective defence clause in the Union Treaty is not only in line with the established defence policy, but also with the goals the EU has set for itself: ‘to organise, in a manner demonstrating consistency and *solidarity*, relations between the member states and between their peoples’ (Article 1); ‘to safeguard the common values, fundamental interests, independence and integrity of the Union...’ and ‘to strengthen the security of the Union in all ways’ (Article 11).