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Social Policy for Servicemen in Europe

Fundamental Principles of the European Security and Defence Policy subsequent to Nice

Publication no.1

Schedule
European Integration

9th May 1950	**Schuman Plan** providing for the establishment of the European Coal and Steel Community (ECSC).
18th April 1951	The **ECSC Treaty** is signed in Paris – start of European integration, first Member States are Belgium, Germany, France, Italy, the Netherlands and Luxembourg.
25th March 1957	The **Treaties of Rome** governing the EEC and the EAC are signed in Rome (EEC Treaty and EAC Treaty).
1st January 1973	**First enlargement stage**: Denmark, Ireland and the United Kingdom join the Communities.
1st August 1975	Establishment of CSCE/**OSCE**.
1st January 1981	**Second enlargement stage**: accession of Greece to the Communities.
1st January 1986	**Third enlargement stage**: accession of Portugal and Spain to the Communities.
28th February 1986	**Signature** of the **Single European Act** in Rome.
7th February 1992	**Signature** of the Treaty of **Maastricht**
1st November 1993	The EU Treaty **comes into force**.
1st January 1995	**Fourth enlargement stage**: Finland, Austria, Sweden join the EU; Norway rejects accession in referendum.
16th June 1997	**Governmental Conference**/**Amsterdam** Summit Meeting
2nd October 1997	**Signature** of the Treaty of **Amsterdam**
12th December 1997	Start of **enlargement process** by the Luxembourg European Council
1st May 1999	The **Treaty of Amsterdam comes into force**.
3rd/4th June 1999	**European Council** meeting in **Cologne**
10th/11th December 1999	**European Council** meeting in **Helsinki**
23rd/24th March 2000	**European Council** meeting in **Lisbon**
19th/20th June 2000	**European Council** meeting in **Feira**
7th–11th December 2000	**Governmental Conference**/**Nice** Summit Meeting
26th February 2001	**Signature** of the Treaty of **Nice**
15th/16th June 2001	**European Council** meeting in **Gothenburg**
19th October 2001	**European Council** meeting in **Ghent**
14th December 2001	**European Council** meeting in **Laeken, Brussels**

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Preface

The European Union faces a new era in the process of political unification. It has to uphold the Eastern expansion of the EU not only politically and economically, but also institutionally. It must empower itself to assume political responsibility in the world commensurate with its economic weight. It must grow into a constitution that renders it ready for action both internally and externally, deepens the democratic legitimisation of its resolutions, increases its acceptance with citizens and consolidates solidarity between its peoples.

The Treaty of Nice is by far not the institutional and political basis that gives form to a Union comprising 27 states with 470 million people. The debate concerning the future of Europe has recommenced. The Common Security and Defence Policy will play an ever important role in this. The heads of state and government have planned another reform of the Treaty for 2004. It will lead to a constitutional process. A European Convention will pave the way for this reform and it will be accompanied by broad discussion within the European public, in which EUROMIL will certainly participate.

Social policy is one of the EU's major pillars. Since 1961 this foundation has grown in strength: first of all within the scope of the European Social Charter, then in the Community Charter of Fundamental Social Rights, and lastly in the European Charter of Fundamental Rights. Fundamental rights and social rights belong to all citizens, including citizens in uniform. Restrictions may only exist in so far as they are required by the specific mission of servicemen and servicewomen. At a time of greater threat, in which armed forces are called upon to be ready for action in order to defend against, the European Union must be more aware of its responsibility towards European servicemen.

I welcome EUROMIL's endeavours to provide a forum for the social affairs of European servicemen and servicewomen and their families. It is positive that they have a strong voice in the form of EUROMIL. The analysis of the Treaty of Nice presented here is a useful contribution not only for information on the development of the Union in general, but also on the political dimension in particular. It is thus appropriate also to express recognition to EUROMIL, which is making a contribution to European development through its work.

Klaus Hänsch, MEP
Vice-Chairman of PSE Group
Former President of European Parliament

Foreword

"Armed forces in Europe: Political Mission and Social Dimension" – EUROMIL used this title for the 4th International Forum in Brussels to highlight an area of European social policy that had not been taken into consideration adequately to date:

The most significant fundamental rights of a democracy include freedom of association and assembly as well as freedom of opinion. These fundamental rights are generally recognised and are laid out in the European Convention on Human Rights, the European Social Charter and also the EU Charter for Fundamental Rights solemnly proclaimed at the Nice summit meeting. On the level of the European Community, the European Court of Justice already recognised the existence of fundamental rights at an early stage and developed them continuously. In accordance with ECJ jurisdiction these rights expressly include the freedom of association and free speech.

Nevertheless, many servicemen in Europe, who are also "citizens in uniform", are excluded from these recognised fundamental rights in different ways: some EU and NATO Member States therefore in principle prevent their servicemen from exercising the above stated fundamental rights. In other cases European legal systems provide for general exclusion for servicemen or leave such regulations up to the individual states. The right of association is especially concerned by this, i.e. the right of uniformed servicemen to organise themselves in associations with the objective of representing their interests vis-à-vis state institutions.

Today servicemen are required to protect and defend the rights and freedom of their co-citizens around the world – also risking their own lives. In return therefore the civil rights in the armed forces may only be restricted to the extent as required irrefutably by the military assignment.

Against this background EUROMIL has declared its objective to defend the social rights of all servicemen vis-à-vis the European Union and NATO. This also applies to the accession candidates to the EU and NATO as well as for Russia and the Ukraine.

All members of EUROMIL are aware that freedom is not unrestricted in democracy. Every serviceman is also particularly aware that rights also entail obligations. On the one hand EUROMIL foregoes the right to strike, on the other hand it reminds all of the right to co-responsibility, co-determination and co-expression of all servicemen.

The aim of this high-level publication for EUROMIL is to demonstrate the legal and

political bases as well as the background for social rights in the European armed forces and to make these accessible to a wider audience. The brochure aims to provide a basis and aid to decision-makers and their staff to come to a decision in the maze of laws within the EU. It also aims to act as a guide through the institutions and processes within the European Union and for lobbying in Brussels by giving precise and clear information. In addition rights of relevance for the armed forces from the Community treaties, the EU Fundamental Rights Charter or other legal sources, are analysed against the background of the Treaty of Nice. Opportunities and (preliminary) limitations for operative activities of all member associations are pointed out.

This publication is the prelude to a series of publications in which EUROMIL examines either independently or in collaboration with other institutions the European Security and Defence Policy in connection with socio-political issues. Impetuses are given and positions are expressed on current developments. In order to reinforce the social rights of servicemen and their families EUROMIL will also in this way influence permanently and in a success-oriented way the legislative processes in both Brussels and also in the capitals of the Member States. At the same time we urge all interested parties to contact EUROMIL. We welcome and will implement suggestions and tips for improvement.

We hope that this first edition of our series of publications will provide useful information for EU professionals and amateurs alike, that it will illustrate the specific interests of our servicemen in Europe and that it will also be of assistance to those, who are not close to the military, for work on a European level.

Ulrich A. Hundt	Jens Rotbøll
Secretary General	President
EUROMIL	EUROMIL

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List of abbreviations

Art.	*Article*
BDI	*Bundesverband der Deutschen Industrie*
CC	*Conciliation Committee*
Charter	*EU Charter of Fundamental Rights*
COM	*Commission*
COR	*Committee of the Regions*
DDR	*(Former) German Democratic Republic*
Doc. no.	*Document number*
EACT	*Treaty on the European Atomic Energy Community*
EAEC	*European Atomic Energy Community*
ECA	*European Court of Auditors*
ECB	*European Central Bank*
ECHR	*European Convention on Human Rights*
ECHR	*European Court of Human Rights*
ECJ	*European Court of Justice*
ECSC	*European Coal and Steel Community*
ECSCT	*European Coal and Steel Community Treaty*
EC Treaty / ECT	*Treaty on the European Community*
EEC	*European Economic Community*
EIB	*European Investment Bank*
EP	*European Parliament*
EEP-ED	*European People`s Party / European Democrats*
ERRF	*European Rapid Reaction Force*
ES	*Spain*
ESC	*Economic and Social Committee*
ESDI	*European Security and Defence Identity*
ESDP	*European Security and Defence Policy*
EU	*European Union*
EUMC	*European Military Committee*
EUMS	*European Military Staff*
EuR	*Europarecht (journal)*
EU Treaty / EUT	*Treaty on the European Union*
EuZW	*Europäische Zeitschrift für Wirtschftsrecht*
Fig.	*Figure*
Fn.	*Footnote*
i.a.	*inter alia*
NATO	*North Atlantic Treaty Organisation*
NJW	*Neue Juristische Wochenschrift*
No.	*Number*
n.v.	*new version*
OECD	*Organisation for Economic Co-operation and Development*
OJ	*Official Journal of the EU*
OSCE	*Organisation for Security and Co-operation in Europe*
o.v.	*old version*
P	*Portugal*
Para.	*Paragraph*
PES	*Party of European Socialists*
PRC	*Permanent Representatives Committee*
Sub-para.	*Sub-paragraph*
WEU	*Western European Union*
ZRP	*Zeitschrift für Rechtspolitik (journal)*

A. Fundamental principles of European jurisdiction

The establishment of the *European Union (EU)* in the form we know it today took place at the *Maastricht Summit* in 1992[1]. The *Treaty of Maastricht* is a so-called framework agreement, as the individual European treaties[2] were collated in this treaty to form a set of agreements. Art.1 Sub-para. 1 EUT manifests the establishment of the European Union. In addition the *Treaty of Maastricht* presented concrete stages for European unification by the year 2000. In retrospect it can be stated that this schedule has almost been respected.

The *Treaty of Amsterdam* simplified and codified the Treaties of Europe[3]. In Amsterdam essential areas of the treaties were successfully amended and adapted to the current challenges facing Europe. The major amendments referred to European protection of fundamental rights, co-operation in the fields of justice and home affairs, the Common Foreign and Security Policy and also the institutional decision-making processes.

In contrast, the outcome of the *Nice Summit* in December 2000 was less far-reaching[4]. The objective of this summit was specifically to resolve the urgent institutional reforms that had not been dealt with in Amsterdam in view of the imminent eastern enlargement of the EU (the *"Amsterdam left-overs"*, as they were called). In addition especially the institutions were to be prepared for new Member States and the decision-making mechanisms were to be simplified. However in Nice too there was only a partial break-through, as the Member States defended their own national interests as vehemently as ever. In its result the Treaty of Nice did bring about some changes, i.a. also in the area of decision-making mechanisms. Whether these steps can fulfil the demands of an extended Union with a total of 27 Member States, however, remains to be seen. In particular the course of the Nice Summit showed unequivocally that the form of governmental conferences to date is no longer suitable to cause heads of state and government to create a joint effort for Europe by setting aside exclusively national interests.

I. General remarks

The European Union is based on three pillars: the *European Community (EC)*, the *Common Foreign and Security Policy (CFSP)* and *co-operation in the fields of*

[1] The Treaty was signed in Maastricht on 7th February 1992.
[2] EUT, ECT, ECSCT, EACT
[3] The Treaty of Amsterdam was signed on 2nd October and came into force on 1st May 1999.
[4] The Treaty of Nice was signed in Nice on 26th February 2001.

justice and home affairs and/or *judicial and police co-operation in criminal matters*[5], each of which are legally independent. The EU thus acts as a joint umbrella for all three pillars. Merely the first pillar containing the EC Treaty, the *European Coal and Steel Community* Treaty *(ECSCT)* terminating after 50 years and the Treaty on the *European Atomic Energy Community (EACT)* is an integrated part of Community law. The first pillar is also referred to as the EU "Community area". The second (CFSP) and third pillars (judicial and police co-operation in criminal matters), on the other hand, are characterised by the *inter-governmental co-operation,* as it is known. This means that in this area the EU has not been granted any powers of its own by the Member States. Rather, the states co-operate on the basis of international treaties. Therefore, to be able to comprehend European jurisdiction, accurate allocation of the subjects into the three pillars and thus also knowledge about the responsible institutions and the procedures to be applied are required.

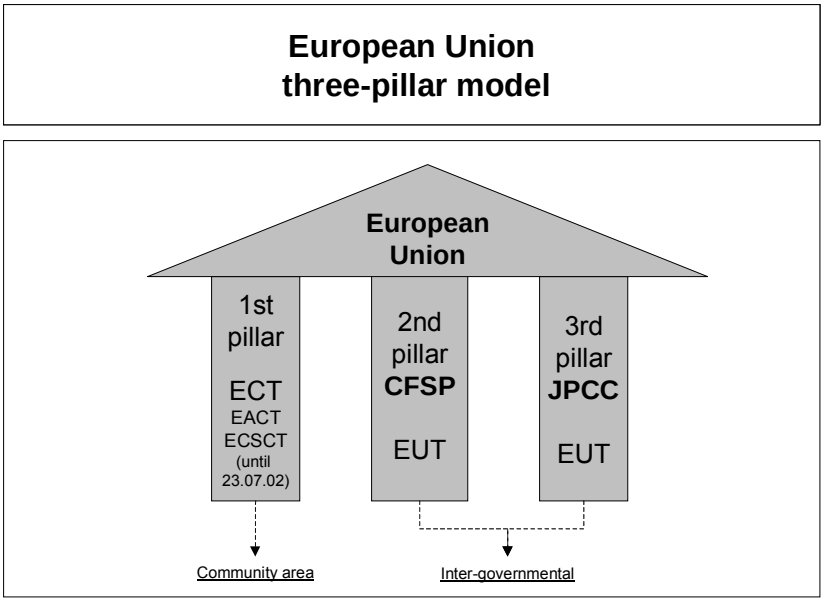

Fig. 1: Source: Lemor in BDI publication no. 327, p.15

1. Basic structures of jurisdiction

Basically three factors affect the decision-making mechanisms and therefore also legislation. A fundamental distinction must be made between the participating bodies, the legislative procedures to be applied in

[5] The original designation of the third pillar was "co-operation in the fields of justice and home affairs". The Treaty of Amsterdam transferred some areas from the third pillar into the Community area and thus to the first pillar. The third pillar merely contained "judicial and police co-operation in criminal matters". So today the third pillar can also be referred to as judicial and police co-operation in criminal matters.

each case and the form of each bill to be enacted arising from the treaties.

2. Bodies and institutions of the Union, Art. 7 ECT

In accordance with the EC Treaty the main bodies involved in the legislative procedure are basically the European Commission, the Council of the EU (Council) and the European Parliament (EP). In addition the *Economic and Social Committee (ESC)* and also the *Committee of the Regions (COR)* may participate in individual cases.

a. The European Commission, Art. 211 ff. ECT

The Commission has both initiative and also control and executive rights. Its main function is to ensure the proper functioning and development of the Common Market[6]. Within the framework of legislation it also has the so-called *monopoly of initiatives*, which states that apart from specially regulated individual cases solely the Commission can set the legislative process in motion. To initiate the process the Commission, as far as the EC Treaty does not prescribe any specific procedure, may freely select the form of procedure that it considers to be most suitable in order to apply the terms of the Treaty. One restriction is that it must select a procedure that does not restrict the rights of the other bodies. Otherwise, the bodies concerned may assert an infringement by way of *nullity action* before the ECJ in accordance with Art. 230 ECT[7]. The Commission exercises executive rights in accordance with Art. 211 ECT by the fact that it pronounces recommendations, submits positions and takes decisions[8]. The EC Treaty also equips the Commission with *control rights*, with which it can check observation and/or correct application of *secondary legislation*[9] in the Member States[10].

In accordance with Art. 213 ECT o.v. the Commission comprises 20 members, which are appointed for a period of office of five years by the Council at the proposal of the national governments and after the approval of the EP as per Art. 214 Para.1 ECT o.v. Traditionally the five largest Member States have two Commissioners[11], the others have one each. The Commission members elect the President of the Commission, who is the political leader of the Commission and thus

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[6] Cf. Art.211 1.HS ECT.

[7] In accordance with Art. 230 ECT, the ECJ is responsible for actions by which infringement of form requirements can be asserted. Such a form requirement would be infringed if the COM does not consult with the EP, ESC or COR against an endorsement standard.

[8] Cf. Art.211-4 ECT.

[9] Cf. under A., I., 4., p. 25.

[10] To this end the Commission has at its disposal the infringement procedure as contained in Art. 226 ECT, by which the ECJ, at the instigation of the Commission, can force a state that has defaulted on implementation of secondary legislation to take the required action.

[11] These are Germany, France, United Kingdom, Italy and Spain.

has a type of guidance role within the Commission[12].

b. The Council of the EU, Art. 202 ff. ECT

In accordance with Art. 202 ECT the Council of the EU (Council) must ensure co-ordination of the economic policies of the Member States within the objectives of Art. 2-4 ECT. In this respect it has its own decision-making powers. It also has certain rights in the legislative procedure, as well as control and proposal rights.

The Council is first and foremost the so-called *main legislative body* of the Community, as it passes bills either solely or in collaboration with the EP (cf. Art. 249 Sub-para. 1 ECT). This expressly applies to the co-decision procedure as per Art. 251 ECT and the co-operation procedure within the terms of Art. 252 ECT. The Council exercises control rights especially via-à-vis the Commission (cf. Art. 216 ECT). In accordance with Art. 230 Para. 2 ECT it can also have bills controlled by the ECJ as part of a nullity action. Lastly, the Council has proposal rights especially for the personnel of Community institutions, such as the ESC, the COR and the Court of Auditors[13].

The Council basically comprises representatives of the governments of the Member States. In accordance with Art. 203 Sub-para. 1 ECT each Member State delegates to the Council one representative, who is entitled to act in a legally binding capacity for the government concerned. Accordingly, the Council currently comprises 15 members. However, in the meantime it is acknowledged that governments can also be represented by Secretaries of State. An amendment to the wording of Art. 203 Sub-para. 1 ECT o.v. in Maastricht enabled in particular Germany to be represented by ministers of regional governments. In principle the Council convenes organised in departments occupied by the relevant ministers. Merely the so-called *General Council* functions independently of any specific department. In accordance with Art. 203 Sub-para. 2 ECT the Council is presided over by a Member State for a period of 6 months. This Member State also organises the required Council meetings (so-called Council Presidency). One function of the Council Presidency is i.a. to determine the agendas of the relevant Council meetings[14]. The *Council Presidency* can thus set its own subject focuses and influence Community policy in this way.

[12] Cf. Art.219 Sub-para. 1 ECT o.v.

[13] Cf. Art. 258 Sub-para. 2, 263 Sub-para. 3, 247 Para. 3 ECT.

[14] A distinction is made on the agendas between so-called "A and B points". While the A points are adopted without any pronouncement on the issue, discussion is nevertheless required for B points, i.e. the Council groups and/or a PRC could not agree on a solution with the result that it is now up to the ministers to take a decision.

In accordance with Art. 201 Para. 1 ECT a *Permanent Representatives Committee (PRC)* is assigned to the Council. This committee prepares the Council's work. In practice the Council currently has two committees *(PRC I* and PRC *II)* as well as the Committees on Agriculture and Justice and Home Affairs. The various political dossiers are allocated to the committees: PRC I mainly deals with issues in relation to foreign affairs; PRC II on the other hand deals especially with economic affairs. So-called *council groups* are allocated in turn to the PRC; these groups consult on individual dossiers. They comprise national experts and prepare PRC meetings. These council groups may be either permanent or ad-hoc council groups. The Council's preparatory work is in any case carried out by the national experts in the council groups.

The regulations with regard to resolutions in the Council are complicated. In accordance with Art. 205 ECT a distinction must be made between three different majority requirements in the voting procedures: in principle resolutions are taken by the Council as per Art. 205 Para. 1 ECT by *simple majority*, i.e. by 8 of 15 votes at present. The EC Treaty also provides for resolutions by *qualified majority* (cf. Art. 205 Para. 2 ECT) as well as *unanimous resolutions*. In case a resolution is passed by qualified majority, the votes of the Member States are weighted depending on their size. According to this system, the votes of the major states[15] are weighted with 10 votes, those of the smaller Member States are correspondingly smaller, whereas Luxembourg as the smallest Member State has two votes (see Fig. 2). Voting by qualified majority is predominant especially in the procedures as outlined by Art. 251, 252 ECT[16]. In accordance with Art. 205 Para. 2 ECT o.v. 62 of a total of 87 votes are required for a resolution. In some areas such as CFSP e.g. the EC Treaty provides for a unanimity requirement. A single Member State's chances to influence are greatest in these cases, as it solely may prevent a resolution. Against the background of the EU expansion to include 27 states, one of the most significant objectives of the Nice Summit was the simplification of resolution-making by enlarging the areas with majority decision and also especially by reducing those areas where unanimity in the Council was compulsory.

Member State	**Votes on Council**
Belgium	5
Denmark	3
Germany	10
Greece	5
Spain	8
France	10
Ireland	3

[15] These are Germany, France, Italy and the United Kingdom.

[16] Co-decision procedures and co-operation procedures (for an analysis see also BDI publication no. 327, p. 21).

Italy	10
Luxembourg	2
Netherlands	5
Austria	4
Portugal	5
Finland	3
Sweden	4
United Kingdom	10
Total:	**87**

Fig. 2: Vote weighting in ballots by quailed majority as per current legal position

The so-called *European Council* must be carefully differentiated from the Council of the European Union[17]. In accordance with Art.4 Sub-para. 2 p. 3 EUT it convenes at least twice per annum under the chair of the Council Presidency. In accordance with Art.4 Sub-para. 2 p. 1 EUT it comprises the heads of state and government and also the President of the Commission. Its task is to act as an "inspiration body of the Community", as it takes important leading decisions and develops the guidelines of the EU[18]. In this function it is not a body of the EU within the terms of Art. 7 ECT.

Likewise the Council must be differentiated from the *Council of Europe*, as it is known. It is a political organisation that goes far beyond the EU Member States. It was set up after the Second World War with the aim of promoting unity and cohesion in Europe[19]. The Council of Europe is located in Strasbourg and, in accordance with Art. 1 of its statutes, its objective is to forge closer relations between its members for the protection and promotion of the ideals and principles that form its joint legacy and also to support economic and social progress[20]. It can deal with all European issues, apart from those of national defence. In the course of time certain focuses have formed: protection of human rights and democracy, culture and social problems. The most important set of rules of the *Council of Europe* is the *European Convention on Human Rights (ECHR*); the body responsible for checking that the ECHR is observed is the *European Court of Human Rights (ECHR)*, which is located in Strasbourg.

c. The European Parliament

The third Community body that is intrinsically involved in the legislation process is the *European Parliament (EP).* In the course of the governmental conferences of the past years it has constantly gained importance. In particular it has participation, control and consultation rights.

The participation rights of the EP are defined in Art. 192 Sub-para. 1 of the EC Treaty and concern especially participation in legislation procedures as per Art. 251, 252 ECT as well as granting of its approval

[17] See also Weidenfeld/Wessels, key word "Council of Europe", p. 183 ff.

[18] Cf. Oppermann, § 5 margin no. 299, p.125.

[19] The Council of Europe was established in Strasbourg on 5.5.1949.

and the submission of positions. The EP has the greatest opportunity for influence in the co-decision procedure as per Art. 251 ECT, as a bill in accordance with this procedure cannot be concluded without or against the will of the EP. Further to the principle of the Commission's *monopoly of initiatives*, the EP has in accordance with Art. 192 ECT a so-called *right of initiative*, by which it can cause the Commission to act and to set the legislation procedure in motion by passing an *initiative report*.

The EP has a control function in particular vis-à-vis the Commission. In accordance with Art. 201 ECT o.v. it can introduce a *vote of no-confidence*[21] vis-à-vis the Commission. This vote, if it achieves the required ⅔ majority of votes cast and also the majority of members of the EP, can lead to the withdrawal of the entire Commission. It is permissible for any activity of the Commission. Furthermore, the EP can, in accordance with Art. 276 Para. 1 ECT, refuse to alleviate the budget of the Commission with the result that the Commission's budget cannot be executed. To realise the control function the treaties also provide for further questioning rights via-à-vis the Council and the Commission[22]. In accordance with Art. 21 Sub-para. 2 EUT, the EP can address queries and recommendations to the Council particularly in the area of the Common Safety and Defence Policy. The Council is in turn obliged to report at least once a year on progress in implementation of the CFSP. According to ECJ jurisdiction the EP lastly also has the right to express an opinion on any matter concerning the EU[23]. This is done in most instances in the form of so-called *political declarations*, which are however not of a binding political nature.

The EP currently comprises 626 members. However, this figure may also vary, although in accordance with Art. 189 Sub-para. 2 ECT the figure of 700 may not be exceeded. MEPs are elected by the citizens of the Member States for a period of office of 5 years in universal and identical elections. The right to vote, however, does require Union citizenship as defined by Art. 19 Para.1 ECT.

The EP has its official headquarters in Strasbourg. For reasons of vicinity to the Commission and the Council the EP also convenes in Brussels at regular intervals in *mini-plenary sessions*. The EP currently has 17 permanent and five non-permanent committees, which are occupied by the parties according to the result of the current

[20] Cf. Weidenfeld/Wessels, key word "Council of Europe", p. 205.
[21] Further information on this is contained in BDI publication no. 315, Fn. 15, p. 26.
[22] Art. 39 Para. 3 EUT (vis-à-vis Council), Art. 197 ECT (vis-à-vis Commission).
[23] Cf. ECJ coll. 1983, 255.

EP elections[24]. The committees convene regularly twice per month. The actual parliamentary work is done there, as each dossier, in which the EP is involved in accordance with the EC Treaty, is first discussed by the experts in the responsible committees before a vote is taken in the plenary session. The result of subsequent voting is in most cases also already anticipated by the decision of the committees.

d. Economic and Social Committee and Committee of the Regions

The ESC and the COR are so-called *auxiliary bodies*, which have a permanent consultative function within the scope of legislation in accordance with Art. 257 and Art. 263, 265 ECT respectively. Another common feature is that they support the work of the Council and the Commission in the legislation procedure by submitting positions. However, this supporting function is basically a merely optional form of participation (so-called *consultative procedure*), as – apart from legally determined cases of obligatory consultation – consultation only takes place at the request of the Commission and the Council.

Since Amsterdam the EP can also consult the two committees in accordance with Art. 262 Sub-para. 4 and Art. 265 Sub-para. 4 ECT o.v. In cases of obligatory participation consultation is, however, an essential requirement for the bill in question, i.e. the ESC and COR can enforce a *nullity action* for failure to have the prescribed consultation as per Art. 230 ECT. The illegal bill is then declared void by the ECJ.

In accordance with Art. 257 Sub-para. 2 ECT the ESC comprises representatives of various groups in the area of economic and social life[25]; at present it has 222 representatives. Each Member State provides a number of members as determined by a key contained in Art. 258 ECT. These members are nominated by the Council at the proposal of the Member States for a period of 4 years[26]. The main duty of the ESC is institutionalised representation of the interests of economic and social life of the Member States[27]. Especially representatives of social life are important partners for EUROMIL in the ESC.

In accordance with Art. 263 Sub-para. 1 ECT the COR comprises representatives of

[24] EUROMIL's partners are the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy and also the Committee on Employment and Social Affairs.

[25] Art. 230 Sub-para. 2 ECT includes here e.g. producers, farmers, transport entrepreneurs, employees, traders, craftsmen and liberal professions; cf. also Weidenfeld/Wessels, key word "Economic and Social Committee", p. 340 ff.

[26] Cf. Art. 258 Sub-para. 2 ECT.

[27] Cf. Weidenfeld/Wessels, key word "Economic and Social Committee", p. 340.

regional and local authorities[28]. In accordance with Art. 263 Sub-para. 3 ECT it comprises 222 members nominated by the Council for a period of four years at the proposal of the Member States by means of a unanimous resolution. The central duty of the COR is to reinforce representation of interests of state sub-divisions such as cities and municipalities at the European level, especially within the scope of legislation.

e. Other bodies and institutions

Art. 7 ECT lists all bodies of the Community. The *European Court of Justice* (ECJ)[29] and the *European Court of Auditors* (ECA) are also bodies of the Community. The EC Treaty also provides other Community institutions, such as e.g. in Art. 8 in connection with Art. 105 ff. ECT the *European Central Bank (ECB)* and in Art. 9 in connection with Art. 266 f. ECT the *European Investment Bank* (EIB).

3. Catalogue of legal acts

The bodies of the Community have various forms of legal act at their disposal, which they can utilise to perform the duties incumbent on them. A distinction must be made between general legal acts and special forms of bill as contained in Art. 249 ECT (see figure 3).

a. Preparatory legal acts

The EC Treaty does not expressly mention the *White Paper*, the *Green Paper* and the *Communication*, each of which do not have a determined content and which serve the preparation of subsequent bills.

aa. Green Paper

The *Green Paper* is designed to initiate a discussion process, after which it should be apparent whether the Commission needs to take action in certain areas. Accordingly, at the time of its publication it is not yet apparent whether a need for legal regulation exists at all. It is an outline of ideas, which is presented as a discussion document for the purpose of reaching a decision[30].

The Green Paper is accompanied by intensive consultation processes with the social groups concerned etc., in the course of which these groups can influence subsequent bills by submitting positions.

bb. White Paper

Unlike the Green Paper the *White Paper* contains an officially prepared contextual proposal relating to a specific policy area in which the Community bodies have legislative authority[31]. The Commission frequently summarise the results of the

[28] Cf. Weidenfeld/Wessels, key word "Committee of the Regions", p. 80 f.

[29] For detailed information refer to BDI publication no. 327, p. 42 f.

[30] Weidenfeld/Wessels, key word "White Paper", p. 391.

[31] Cf. Weidenfeld/Wessels, loc. cit.

consultation process initiated by a Green Paper in a White Paper. Bills are thus frequently introduced to the legislative process on the basis of a White Paper.

b. Non-binding legal acts

The non-binding forms of legal act known in Community law must primarily be differentiated from the merely preparatory measures. These include *guidelines*, *recommendations* and *positions*. Basically it must be noted that legal acts, even if they are actually non-binding, must still be observed by the *principle of Community-friendly behaviour* as stated in Art. 10 ECT. First of all, the principle of Community-friendly behaviour states that both the Member States and also other representatives of public power are obliged to interpret national law uniformly throughout the Community[32]. It also means that the Member States are obliged to implement Community law effectively.

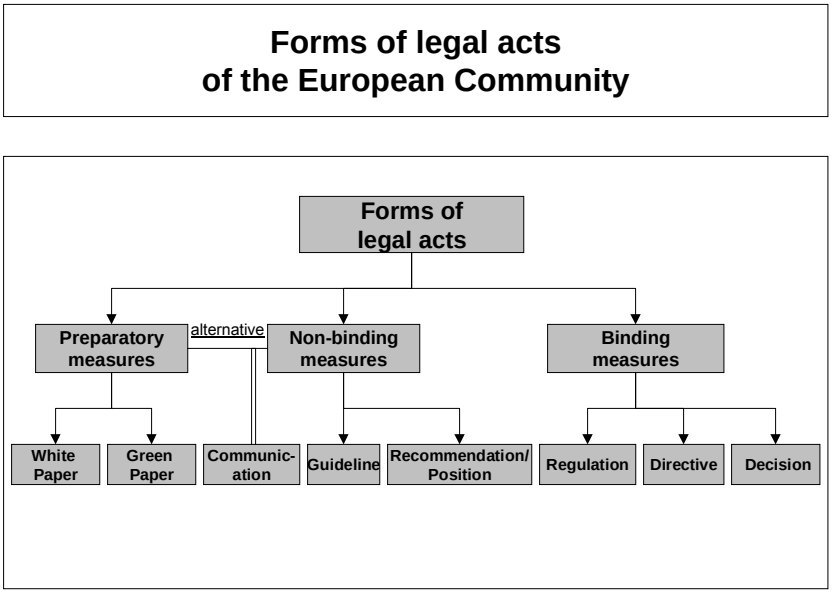

Fig. 3: Source: Lemor in BDI publication no. 327, p. 24

cc. Communication

The *communication* is a form of action used in particular by the Commission. It merely has the character of a recommendation, i.e. it does not have a binding effect on the party addressed. It can be addressed to natural persons or to legal entities and serves as information for the parties addressed. Some communications also serve to prepare future bills. As this aspect is of secondary importance in practice, the communication must be qualified as non-binding rather than a principally preparatory measure.

[32] Cf. ECJ case C-91/92, coll. 1994, I 3325, 3357 margin ref. 26.

aa. Guideline

The *guideline* serves i.a. to explain and justify bills, i.e. it does not have its own regulatory content. Frequently the treatment of bills is explained to the Member States with the aid of guidelines. Especially in the area of European economic law the interpretation and area of application of EC bills are explained to the Member States but also market participants (e.g. guidelines for the application of Art. 81, 82 ECT – restrictions on horizontal and vertical competition).

bb. Recommendation and position

The *recommendation* and *position* have their legal basis in Art. 249 Sub-para. 5 ECT. First of all, the EC Treaty states that these two forms of legal act are non-binding for the party addressed. They are thus differentiated from the other forms of legal act stated in Art. 249 ECT[33]. Recommendations contain non-binding references or opinions of the body that issues them. Positions occur especially frequently in the scope of the legislative procedure, as the ESC, COR and EP submit positions. In this case too e.g. the positions of the EP are non-binding for Council within the scope of the procedure as per Art. 251 ECT. Indirectly the position does have a factual effect, as the EP, in so far as the Council does not observe its position, can reject the bill and cause it to be unsuccessful.

c. Binding legal acts

Binding forms of legal act in Community law are enumerated in Art. 249 ECT. These are *regulations*, *directives* and *decisions*. Regulations and directives are thus products of the legislative process, whereas the decision is made by the Commission alone.

aa. Regulation

In accordance with Art.249 Sub-para. 2 EC the *regulation* is universally applicable, is binding in all its parts and is directly applicable in each Member State, i.e. it must be observed by the Member States and their sub-divisions like national law. It is thus the instrument, with which the Community bodies can create *legal uniformity* on a European level.

Regulations differ from directives mainly by means of their direct effectiveness. Unlike decisions, they apply generally, i.e. are not enacted for individual cases, but rather apply equally for each case coming under the actual area of application.

bb. Directive

In addition to the regulation, the directive is of special importance in the legislative procedure as per the EC Treaty. In accordance with Art. 249 Sub-para. 3 ECT, it is binding for each Member State that is

[33] These are regulations, directives and decisions.

addressed with regard to the objective to be achieved. Nevertheless, it is up to the Member States to select the form and means of application. This freedom is, however, under the proviso of *Community-friendly behaviour* as well as the *"effet utile"*[34] (cf. Art.10 ECT). *Effet utile* in this context states that, when applying directives, the Member States must select those forms of national law, which best guarantee practical application of the directive's content. Due to the need for application in national law we also speak of a so-called two-tier legislative procedure in relation to directives. As a result of the lack of immediate effect (generally speaking) the directive is the most suitable means of *aligning and harmonising laws*[35].

Unlike regulations, directives are not in principle applied directly. They differ from a decision in that they do not regulate a specific individual case, but rather have an abstract, effect vis-à-vis the parties addressed.

cc. Decision

In accordance with Art. 249 Sub-para. 4 ECT a decision is binding in all parts for the party addressed. From this wording it is first of all apparent that it does not initially have an abstract, general effect, but rather that in individual cases it is addressed to certain

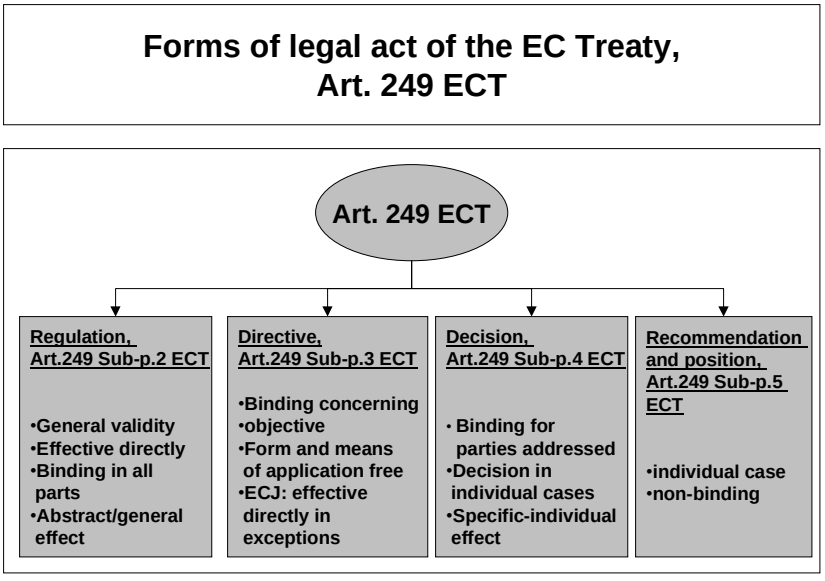

Fig. 4: Source: Lemor in BDI publication no. 327, p. 27

[34] "Effet utile" refers to the principle derived from Art. 10 ECT according to which the Member States must guarantee the practical effectiveness of Community law.

[35] EUROMIL endeavours to ensure that Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work is also applied to military personnel.

legal entities or natural persons. Member States can also be addressed by a decision. The Commission can take decisions in individual cases particularly in the areas of merger control and also subsidy and assistance control. As a result of the financial and economic consequences of these decisions, economic policy represents the most significant area of application of the decision.

Unlike the regulation, the decision regulates an individual case, i.e. it only has a specific effect within the context of an individual case. As compared with the directive, it is effective directly, i.e. does not need to be implemented in national law.

4. Forms of legislative procedure

A fundamental principle in comprehending jurisdiction on a European level continues to be the differentiation between *primary* and *secondary legislation*: primary legislation refers to treaties, i.e. mostly EU and EC treaties. Secondary legislation, on the other hand, refers to law enacted by Community bodies on the basis of the competences allocated to them as a result of treaties (i.e. primary legislation). The legislative procedures in accordance with the EC Treaty thus serve to establish European secondary legislation. The EC Treaty provides for various procedures to this end, within which various bodies are involved in different manners. This is the "three Cs procedure"[36].

a. Consultation procedure

The so-called *consultation procedure* is applied if the EC Treaty expressly points out within the scope of an authorisation that the Council at the proposal of the Commission and after consultation with the EP (if applicable the ESC and/or COR) issues a bill or other resolutions[37]. As the consultation procedure is basically applied if the Treaty does not expressly refer to Art. 251, 252 ECT, Art. 250 ECT must be observed in each case. A bill passes through two phases during the consultation procedure:

Phase 1:

After the procedure is introduced by the Commission's proposed bill to the Council, the latter in turn passes the proposed bill on to the participating body or bodies and requests it/them to submit a position. In this connection, when consulting with the EP, a differentiation must be made between the so-called *compulsory* and *optional consultation*. A *compulsory consultation* takes place if the EC Treaty provides for participation of the EP in the form of a consultation. An *optional consultation* takes place if the EP is also consulted in other

[36] **C**onsultation, **c**o-operation and **c**o-decision procedures.
[37] Cf. e.g. Art. 89, 94, 308 ECT.

cases apart from compulsory ones, i.e. the Council introduces consultation itself.

Phase 2:

The EP and the other participating bodies can now submit a position that is passed on to the Council. However, the Council is not compelled to observe it as a result of the non-binding nature of the position. It may resolve the bill by the majority provided for in the appropriate authorisation document with the result that the bill is enacted. However, the regulation contained in Art. 250 Sub-para. 1 ECT must be noted. According to this regulation a bill diverging from the proposal of the Commission may only be resolved unanimously.

b. Co-operation procedure

The *co-operation procedure* is regulated in Art. 252 ECT. Since the Treaty of Amsterdam its practical significance is negligible, as it is only applied in the area of *Economic and Monetary Union*[38]. It is *compulsory* for the EP to participate in this procedure and *optional* for the ESC/COR to participate[39]. Lastly, the Council may also enact a bill against the will of the EP. In accordance with *Art .252 ECT* the procedure to enact a bill may pass through up to three stages.

Phase 1:

After the Commission introduces the procedure and submits a proposed bill to the Council, the Council submits this proposal to the EP (if need be also to the ESC and COR) for a position. The EP can draw up a position, which is then forwarded to the Council. The Council then determines a *common position* by a qualified majority.

Phase 2:

The second phase is introduced when the Council forwards the common position to the EP[40]. If the EP approves the common position or does not make a pronouncement on it within a period of three months, the Council enacts the bill on the basis of the common position. The EP may make proposals for amendments to the common position or may reject it within the same period of time[41]. This result is forwarded to the Council and the Commission. The Commission then itself examines the common position and also the proposed amendments of the EP and submits a position on them to the Council.

[38] Cf Art. 99 Para. 5, 102 Para. 2, 103 Para.2 and Art. 106 Para. 2 ECT.

[39] COR and ESC thus only participate if the relevant authorisation document provides for this. Participation exists in the possibility to submit a (non-binding) position.

[40] At the same time the Council and the Commission inform the EP of the reasons for the common position, cf. Art. 252 lit.b ECT.

[41] In accordance with Art. 252 lit.c ECT an absolute majority of members is required for this.

Phase 3:

In the third phase the Council can now enact the bill on the basis of the common position, the EP's proposed amendments and the Commission's position. A resolution is made in principle by qualified majority. If the EP has rejected the common position, the Council can only resolve unanimously. If the Council wishes to deviate from the Commission's proposal, unanimity is likewise required. The bill is enacted as soon as it has been adopted.

c. Co-decision procedure

The *co-decision procedure* is regulated by *Art. 251 ECT*. It is the only legislative procedure in which the EP participates on an equal footing with the Council in the area of European legislation, as the Council cannot enact a bill without or against the will of the EP. This procedure was not introduced until the *Treaty on the European Union* ("*Maastricht Treaty"*) and was reformed for the first time by the *Treaty of Amsterdam*[42]. When it is enacted a bill can pass through up to four stages.

Phase 1:

The Commission introduces the procedure by submitting a proposed bill to the Council *and* EP. The EP is requested to submit a position, which is then passed on to the Council. If need be, the ESC and/or COR are also consulted. If the EP does not propose any amendments, the Council can thus enact the bill by a qualified majority as per the proposed bill. If there are any proposals for amendments by the EP, the Council may adopt them by a qualified majority and thus enact the bill by observing these proposals. If the Council adopts none or not all of the proposed amendments, it sets out a common position, which is passed on to the EP.

Phase 2:

The EP consults the common position of the Council in a second hearing and must submit its position on it within a period of three months. If the EP does not submit a position within this period or if it approves the common position, the bill is considered to be enacted in accordance with the common position. If the EP rejects the common position by an absolute majority of its members, the bill has failed irreversibly. The EP can, however, also submit proposed amendments again by an absolute majority of its members. These amendments are then submitted to the Council[43]. The Council in turn must examine the position within three months. If it approves all proposed amendments, the bill is thus considered to be enacted in this amended form[44]. If the

[42] Cf. BDI publication no. 315, p. 21-23, 28-29.

[43] The proposed amendments are simultaneously forwarded to the COM, which submits a position on them.

[44] However, one exceptional feature exists, if the COM has rejected the proposed amendments by the

Council approves none or not all of the proposed amendments, a conciliation procedure is introduced.

Phase 3:

successful, the bill is considered to have failed definitively.

Phase 4:

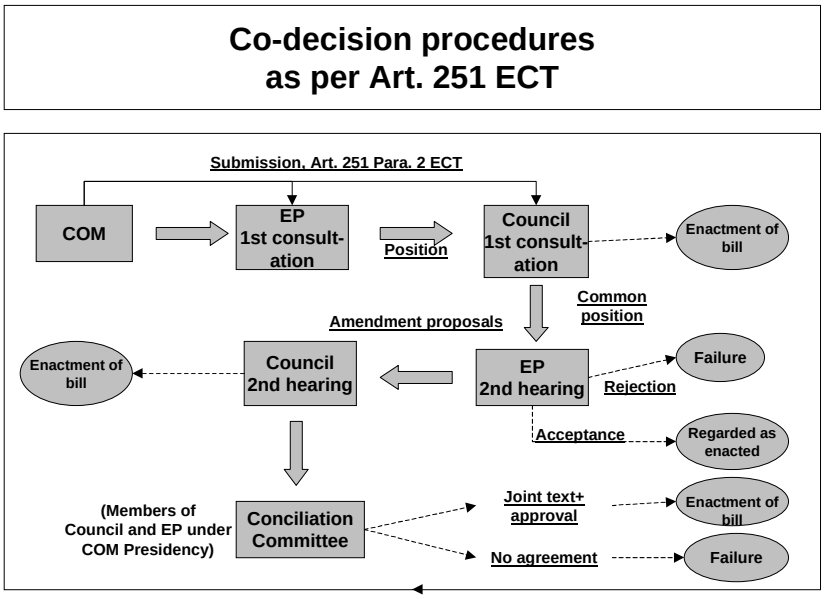

Fig. 5: Source: Lemor in BDI publication no. 327, p. 30

The *Conciliation Committee (CC)*[45] is convened by the Council President in consultation with the President of the EP within a period of 6 weeks after the Council issues a negative resolution. Within a period of a further six weeks an agreement must be reached. Once an agreement is reached, the Council and the EP approve a so-called *joint text*, which is submitted to the Council and the EP for adoption. If this is not

The bill is only enacted on the basis of the *joint text*, if the Council and the EP agree to it separately. To this end the absolute majority of cast votes is required in the EP, the qualified majority of votes is required in the Council. If these majorities are achieved, the bill is considered to be enacted on the basis of the *joint text*. Otherwise it has failed conclusively.

II. The Treaty of Nice

The *Treaty of Nice* was signed in Nice on 26th February 2001. Signature was preceded by the longest summit to date in the history of conferences of heads of state and government. Originally scheduled for 7th-9th

EP in its position: in these cases the Council can only resolve unanimously.

[45] In accordance with. Art. 251 para. 4 ECT the CC comprises the same number of members as the Council and the EP. It convenes under the leadership of the Commission, which does not have any decision-making powers. However, the Commission must work towards an agreement between the Council and the EP.

December 2000, it lasted until 11th December. The reason for this was in particular the excessive agenda, which was worked through very slowly due to a lack of will for compromise of the parties involved. After being ratified by all Member States the Treaty is due to come into force on 1st January 2005[46]. The main objective of the summit was to prepare the EU for the imminent *eastern enlargement*. To this end in particular a reform of the institutional procedures and also treatment of the so-called *Amsterdam left-overs* was needed. Likewise, formalisation of the *European Security and Defence Policy* (ESDP) in the Community treaties and further integration of the WEU in accordance with the conclusions of the Cologne European Council were items on the agenda.

1. Institutional changes

The main objective of the Nice summit meeting was to bring about reform of the institutions and procedures: the procedures should be facilitated and the number of unanimous resolutions in the Council reduced. The bodies should also be prepared for eastern enlargement. This reform succeeded only in part.

a. The EU Council

Reform of the voting procedures in the Council proved to be especially difficult. In addition to enlargement to include the accession candidates and the revised weighting of the voting ratios, further procedures should be transferred to the co-decision process and also from the system of unanimity to the system of qualified majority.

aa. Vote weighting

After lengthy and controversial negotiations in and also directly after Nice[47] the heads of state and government agreed on a two-tier reform of the vote weighting system, the first stage affecting the former EU (EU-15), the second stage affecting the expanded EU (EU-27)[48].

- **EU-15 (as of 1st January 2005[49])**

Member State	Amsterdam	Nice
Belgium	5	12
Denmark	3	7
Germany	10	29
Greece	5	12

[46] After the Treaty was rejected by the referendum in Ireland, it is not yet clear at this time how the further procedure is to be, especially in the case of Ireland, in order to ensure that it is adopted there too and can thus come into force on time.

[47] Even a few days after Nice it was not entirely clear what individual resolutions the heads of state and government had reached. Firstly, different figures concerning Romania and its future figure in the Council were published. This figure was not finalised until the meeting of Permanent Representatives on 21.12.2000: Romania is to receive 14 votes upon accession.

[48] Cf. regarding this entire issue Weidenfeld/Giering, p. 76 ff.

[49] Cf. Art. 3 of the Protocol of the Treaty on the European Union and the treaties on the establishment of the EC, Annex I of the Treaty of Nice (OJ C 80/49 dated 10.03.2001).

Spain	7	27
France	10	29
Ireland	3	7
Italy	10	29
Luxembourg	2	4
Netherlands	5	13
Austria	4	10
Portugal	5	12
Finland	3	7
Sweden	4	10
U. Kingdom	10	29
Total	**87**	**237**

Fig.6: New vote weighting of EU-15 in the Council after Nice

- **EU-27 (as per Declaration on EU Enlargement of the Treaty of Nice)**

Accession candidate	**Vote weighting after Nice**
Poland	27
Romania	14
Czech Republic	12
Hungary	12
Bulgaria	10
Slovakia	7
Lithuania	7
Latvia	4
Slovenia	4
Estonia	4
Cyprus	4
Malta	3
Total	**108**
Total EU-27	**345**

Fig.7: Vote weighting for accession candidates in the Council after Nice

In accordance with Figure 20 of the Declaration on EU Enlargement, which is an annexe of the Treaty of Nice, vote weighting for the accession candidates will be included in the EC Treaty after the Treaty comes into force on 1st January 2005, if one of these states joins the EU as of this date. In each case amendment of Art. 205 ECT n.v. is required[50]. Until the Treaty of Nice comes into force, the regulation contained in Art. 205 ECT o.v. and therefore the previous vote weighting continue to apply.

bb. Voting procedures

Changes were also made particularly in the voting procedure. Until now to pass a resolution it was merely necessary to achieve a majority in each case (simple or qualified majority or unanimity). Further prerequisites will have to be met to be able to achieve a resolution under the Treaty of Nice. When it comes into force a resolution passed by a qualified majority will have to fulfil the following prerequisites:

- **EU-15**

In the EU-15 first of all three prerequisites will be required when the Treaty comes into force on 1st January 2005:

In accordance with Art. 205 Para. 2 ECT n.v. in future at least 169 of the 237 votes at that time will be required in the "reformed" EU-15[51]. In addition this majority will have to be borne by a majority (i.e. by at least eight) of the Member States. Furthermore, in accordance with Art. 205 Para. 4 ECT n.v. in future a member can ask for it to be verified

[50] In the declaration only those states were considered with which accession negotiations are already under way; however this does not entirely exclude other developments, even if they are rather improbable at this stage.

[51] In this respect the supposition of Giering is incorrect, which assumes in Weidenfeld/Giering,

in such cases whether the qualified majority simultaneously represents at least 62% of the total population. The blocking minority in the EU-15 will be 71.3%.

- **EU-27**

The resolution procedure will, however, become considerably more difficult once some, but not all, candidate countries have become members of the EU. Although the requirement of a three-fold majority remains, calculation of the *blocking minority* is problematic. First of all, in accordance with the revised Treaty, it is apparent in the Declaration on EU Enlargement that the qualified majority will require a minimum of 258 of the total of 345 votes, once enlargement is complete. However, it is now agreed that this (too) is a shortcoming of the text and the minimum figure must be reduced to 255. Otherwise, a difference of approximately 3.5% would remain between the current and the future *blocking minority*, which is considered to be unreasonable. In the period between coming into force and accession of the last candidate country the *blocking minority* is recalculated for each new accession by allocating votes to the accession countries and recalculating the threshold in accordance with the Declaration on EU Enlargement[52]. Lastly, in accordance with the declaration the *blocking minority* at the time of the EU-27 should be increased to the threshold for the qualified majority and the number of votes for the blocking minority in an expanded Union[53] should be increased from 88 to 91.

b. The European Commission

Within the Commission too some changes will take place once the Treaty of Nice comes into force. On the one hand, these changes will concern the choice of Commissioners, on the other hand they will concern the appointment procedure and the position of the Commission President.

aa. Composition of the Commission

In accordance with Art. 213 Para.1 ECT, the Commission has comprised twenty members to date; a national of each Member State must be a member of it[54]. Against the background of enlargement by 12 Member States to a total of 27, this would require at least 27 Commissioners. However, it is uncontested that the efficiency of the Commission already suffers from its size. Therefore, a change had to be introduced with regard to occupancy of the Commission, without harming the sensitivities of the smaller Member States in particular.

p. 81, that there is a minimum of 170 votes in accordance with the original version of the Treaty.

[52] Cf. Weidenfeld/Giering, p. 81 ff.

[53] Figure 21 of the declarations adopted by the conference, OJ C 80/77 dated 10.03.2001.

[54] However, the "large" Member States have been entitled to two Commission positions to date, cf. Fn. 12.

The Treaty of Nice thus provides for a two-tier reform of the Commission, as follows:
Firstly, the large Member States shall forego the second Commissioner granted to them until now. Until accession of the last accession candidate each new Member State shall be entitled to one Commissioner each when it joins. The number of Commissioners is thus increased in the meantime to 27[55]. In the second stage Art. 213 Para. 1 ECT n.v. is to be amended to state that the number of members is less than the number of Member States. The members will then be selected according to a *rotation system* approved by all, which must still be determined unanimously by the Council[56].

bb. Appointment of the Commission President

The appointment procedure of the Commission President was also amended in Nice. In accordance with Art. 214 Para. 2 ECT n.v. appointment will be in five stages in future:

In a first stage the Council nominates by a system of qualified majority a person for the office of Commission President in the composition of heads of state and government. In a second stage the EP must agree to this proposal. In a third stage the Council then adopts a list of persons proposed by the Member States, who are to become members of the Commission, in agreement with the designated President likewise by qualified majority. In a fourth stage the Commission College nominated in this way must be approved by a vote of the EP. If the EP gives its approval, the Commission is finally appointed by the Council by qualified majority in a fifth stage.

cc. Position of the President

The position of the President of the Commission is also reinforced by further amendments to Art. 217-219 ECT. Art. 217 Para. 1 ECT n.v. expressly regulates for the first time the principle of "political leadership" as previously determined in Art. 219 ECT: the President decides on the organisation of the Commission, he/she defines the responsibilities and allocates them among the Commission members. He/she can also change this division of responsibilities in the current "legislature period" and ask certain Commission members to resign.

dd. Conclusion

All in all the Treaty of Nice considerably reinforces the position of the Commission President. This is also expressed by the growing influence of the EP in the appointment procedure and also in the rights and obligations of the President, which have been formally defined for the first time. Against the background of the problems prevailing within the Commission

[55] Cf. Art. 4 Para. 1 of the Protocol on enlargement.
[56] Cf. Art. 4 Para. 2 of the Protocol on enlargement.

over the past few years and imminent eastern enlargement, such a reinforcement must be welcomed as a counterbalance to the Council.

c. The European Parliament

The formal regulations with regard to the EP were also amended by the Treaty of Nice. The Treaty of Nice defines a redistribution of seats in the EP as well as amendments for inclusion in the legislation process within the scope of the co-decision procedure. The response to the question, whether this reform is adequate against the background of a Europe that is developing rapidly, is very varied.

aa. Redistribution of seats

The redistribution of seats in the EP will take place in two stages like the composition of the Commission. This reform must also be viewed against the background of imminent enlargement.

Art. 189 Para. 2 ECT n.v. is to be amended to ensure that the number of members of the EP may not exceed 732. This means an increase of 32 members over the current figure. However, Art. 2 Fig. 4 of the protocol already states that the number of members of parliament may temporarily exceed 732[57]. This regulation is necessary to ensure that the acceding candidates can be granted their full quota of members without infringing Art. 189 Sub-para. 2 ECT n.v.

In accordance with Art. 2 of the Protocol of the Treaty on the European Union and the treaties on the establishment of the European Communities, Art. 190 Para. 2 Sub-para. 1 ECT is also amended as follows in a first stage:

Member State	***Seats after Amsterdam***	***Seats after Nice***
Belgium	*25*	*22*
Denmark	*16*	*13*
Germany	*99*	*99*
Greece	*25*	*22*
Spain	*64*	*50*
France	*87*	*72*
Ireland	*15*	*12*
Italy	*87*	*72*
Luxembourg	*6*	*6*
Netherlands	*31*	*25*
Austria	*21*	*17*
Portugal	*25*	*22*
Finland	*16*	*13*
Sweden	*22*	*18*
U. Kingdom	*87*	*72*
Total:	***626***	***535***

Fig.8: Redistribution of seats of EU-15 in EP after Nice

This amendment will come into force on 1st January 2004 for the election period 2004-2009 and will amend seat distribution between the current Member States[58].

In a second stage the acceding countries will also be taken into consideration in the distribution of seats, with the result that the

[57] Cf. Art. 2 Fig. 4 of the Protocol of the Treaty on the European Union and the treaties on the establishment of the European Communities.

figure of 732 members is achieved after all *accession candidates* have joined[59]. For the accession candidates this gives the following number of MEPs once they have joined:

Accession candidate	***Seats after Nice***
Poland	*50*
Romania	*33*
Czech Republic	*20*
Hungary	*20*
Bulgaria	*17*
Slovakia	*13*
Lithuania	*12*
Latvia	*8*
Slovenia	*7*
Estonia	*6*
Cyprus	*6*
Malta	*5*
Total:	***197***
Total EU-27:	***732***

Fig.9: Distribution of seats of accession candidates in the EP after Nice

bb. Enlargement of competences

An other area for reform of the Treaty of Nice concerns enlargement of the authority of the EP. This enlargement has only been realised to a limited extent. The EP thus received new competences in some areas. In addition some policy areas were transferred to the co-decision domain, in which the EP participates in accordance with Art. 251 ECT.

Another new aspect is e.g. the EP's competence to sanction in cases where a Member State infringes the democratic fundamental principles of the EU. In accordance with Art. 7 EUT n.v., the EP is from now on also entitled to initiate this *sanction mechanism*. In so far as Member States endeavour to reinforce co-operation within the scope of the first pillar, the approval of the EP will be required in future seeing that this is an area that comes under co-decision, as defined by Art. 251 ECT. In addition, consultation with the EP must take place when decisions are incumbent concerning acceptance of expenditure for enhanced co-operation from the EU budget. In addition, it is authorised to obtain expertises of the ECJ concerning compatibility of international agreements with third-party countries. Previously only the Commission, the Council or the Member States had this right.

In addition a rather limited enlargement of the area of application of the co-decision procedure was achieved. In view of the fact that this enlargement before the Nice summit meeting had been declared a main area of reform, the result was nevertheless very restricted. The following areas were fully transferred to the co-decision process: support measures to implement precautions of discrimination of the type[60] stated in Art. 13 Para.1 ECT n.v., questions relating to asylum and refugees as per Art. 63 no. 1a-d and also no. 2a ECT n.v., with the exception of aspects of family law also the

[58] Art.2 Fig. 1 of the Protocol under Fn. 48.
[59] Art.2 Fig. 3 of the Protocol, see Fn. 48.

area of co-operation in civil matters within the terms of Art. 63 ECT n.v. (cf. Art. 67 Para. 5 ECT n.v.) as well as measures in accordance with Art. 62 no. 3 and Art. 63 no. 3b ECT n.v.[61]. In the area of social policy measures can in future be transferred into the co-decision domain by unanimous decision in accordance with Art. 137 lit. d, f, g ECT n.v.[62]. Measures in the area of social security and social protection of employees are expressly not affected by this. In the area of industrial policy support measures for formal objectives within the terms of Art. 157 Para. 3 ECT n.v. are transferred to the area of co-decision, in so far as they serve attainment of the objectives laid out in Art. 157 Para. 1 ECT n.v.[63]. The same applies to measures within the scope of structural policy within the terms of Art. 159 ECT: in accordance with Art. 159 Para. 3 ECT n.v., Art. 251 ECT will in future also be applied to such measures performed outside the structural fund. Lastly, the EP is given the right of participation as per Art. 251 ECT to determine the status for the European political parties in accordance with Art. 192 Para. 2 ECT n.v. This right is of importance especially when verifying the finances of parties receiving funding from Community sources.

cc. Conclusion

By way of summary it may be said that Nice also did not bring about an equal status of the EP and the Council. Nevertheless it should be stated that the influence and significance of the EP in Europe has increased constantly since the Single European Act was passed. It is not clear whether the required majority of Member States actually endeavours to achieve equal status of this type. Complete reform of the institutional structure of the EU, in which the role of the national parliaments should be re-defined, would be necessary. The post-Nice process is the next opportunity for this.

d. Economic and Social Committee and Committee of the Regions

The Treaty of Nice also contains some institutional changes both with regard to the ESC and the COR and also with regard to the prerequisites for membership and the appointment procedure.

aa. Seat distribution

In accordance with Art. 258 p. 2 and Art. 263 p. 3 ECT n.v. the accession candidates are now taken into account with the result that in the EU-27 the number of members in both bodies will increase from the current figure of 222 to 344 according to

[60] Cf. Art. 13 Para. 2 ECT n.v.

[61] In accordance with the Joint Declaration on Art. 67 ECT n.v., Art. 251 will however not be applied until 1st May 2004.

[62] This concerns measures in the following areas: protection of employees upon termination of employment, representation and collective observance of employee/employer interests, employment conditions for citizens of third-party countries residing lawfully on the territory of the Community.

[63] Guarantee of the competitiveness of Community industry.

the new seat distribution in the ESC and COR. The seat distribution between the previous Member States within the EU-15 remains unchanged. At the same time the maximum membership figure increases in accordance with Art. 258 p. 1 and Art. 263 p. 2 ECT n.v. to 350 in both bodies. For the EU-27 the seat distribution will be as follows:

Member State	Seat distribution after Amsterdam	Seat distribution after Nice
Germany	24	24
U. Kingdom	24	24
France	24	24
Italy	24	24
Spain	21	21
Poland	-	21
Romania	-	15
Netherlands	12	12
Greece	12	12
Czech Rep.	-	12
Belgium	12	12
Hungary	-	12
Portugal	12	12
Sweden	12	12
Bulgaria	-	12
Austria	12	12
Slovakia	-	9
Denmark	9	9
Finland	9	9
Ireland	9	9
Lithuania	-	9
Latvia	-	7
Slovenia	-	7
Estonia	-	7
Cyprus	-	6
Luxembourg	6	6
Malta	-	5
Total	**222**	**344**

Fig.10: Future seat distribution of the EU-27 in the ESC and COR

bb. Appointment of members

In accordance with Art. 259 Para.1 and Art. 263 ECT n.v. the Council appoints the members of both bodies for a period of four years each by qualified majority instead of unanimously. A prerequisite for membership of the COR is to be the performance of a political office[64] in future. If this mandate is lost on the basis of an election, membership in the COR also expires.

2. Changes in Community policies

The Treaty of Nice also contains changes in some policy areas of the EU and EC Treaties.

a. EU Treaty

Within the scope of the EU Treaty e.g. the *sanctions mechanism* against a Member State infringing the principles of the EU is amended in accordance with Art. 7 EUT. In addition considerable changes were made in the area of the Common Foreign and Security Policy in the second pillar (Art. 11-28 EUT n.v.). These changes are the consequence of the changes in interpretation of the ESDP since the Cologne European Council. The main focus of this is the restructuring and further "integration" of the *WEU* in the EU. Due to the special importance this chapter is treated separately and extensively under B.I. In the area of judicial and police co-operation in criminal matters, in accordance

with Art. 29-42 EUT n.v., especially the already resolved establishment of a *"European Judicial Co-operation Unit" (Eurojust)* was implemented by the Treaty[65]. The main focus here was formalisation of rules and competences of this body in the EU Treaty, to guarantee the formal objective[66] of offering the citizens a high level of security in a zone of freedom, security and law[67].

b. EC Treaty, in particular social policy as per Art. 137 ff. ECT n.v.

In the policy areas of the EC Treaty the Treaty of Nice does not introduce any major innovations in content[68]. In the area of social policy some innovations are planned, although they do not change the structure considerably. According to them, regulations governing social security for the creation of free movement of employees[69] and social security, protection from dismissal and co-determination[70] remain in the domain unanimity. In Art. 137 Para. 2 p. 3 ECT n.v., however, an authorisation clause was introduced to enable the Council in future to transfer to the domain of co-decision bills concerning employee protection, regulations governing the termination of employment and also those governing representation and collective observance of employee and employer interests as well as employment conditions for citizens of third-party countries in accordance with Art. 251 ECT. In accordance with Art. 137 Para. 5 ECT n.v., however, the non-applicability of this article remains especially in relation to the *right of association*[71]. Besides the procedure of enhanced co-operation can also now be applied in the area of social policy. However, this is under the proviso that the projects concerned do not come under the exclusive responsibility of the Community and at the same time do not detract from social and economic cohesion.

Another innovation concerns installation of a high-level group concerned with social protection. During the Lisbon European Council in March 2000 it was decided by the heads of state and government to establish a group concerned with social protection. It was their duty to promote development of co-operation between the Member States for modernisation and improvement of the social protection systems. With the amendment of Art. 144 ECT n.v. this group

[64] Cf. Art.263 ECT n.v.
[65] Against the background of the terrorist attacks on the USA on 11th September 2001 this area has gained special significance. Anti-terrorism measures throughout Europe were resolved at the EU Special Summit Meeting of Foreign and Interior Ministers on 21.09.2001.
[66] Cf. Art. 29 EUT o.v.
[67] Cf. Fischer, Art. 29 ff. p. 96 ff.; BDI publication no. 327, key word "combating crime", p. 45.
[68] Overview of amendments in Stuth, p. 15f. ; BDI publication no. 327, key word "the EC Treaty", p. 49 ff.
[69] Cf. Art.42 ECT n.v.
[70] Cf. Art.137 Para. 2 ECT o.v.
[71] Text Art. 137 Para. 5: "The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."

was transformed into the so-called *Social Protection Committee*. Its aim is to promote co-operation between the Member States and the Commission. It has merely a consultative function and is designed to monitor the social conditions and the developments in the area of social protection as well as the flow of information between the Member States. To this end it submits reports and positions. In accordance with Art. 144 p. 2 ECT n.v. the Member States and the Commission each delegate two members to this committee.

e. Enhanced co-operation

A major reform area of the Treaty of Nice is the area of *enhanced co-operation*. Enhanced co-operation was incorporated in the treaties for the first time with the Treaty of Amsterdam (cf. Art.43-45 EUT o.v. and Art. 11 ECT o.v.). It makes it possible for several Member States, which are prepared for more increased integration in certain selected areas as other Member States, to intensify their co-operation and to proceed in this way to intensified integration. For enhanced co-operation the participating Member States utilise the bodies and decision-making mechanisms of the EC and thus create partial secondary legislation[72]. However, to date the procedure of enhanced co-operation was merely applied within the scope of the 1st pillar and the 3rd pillar. The Treaty of Nice extends the procedure of enhanced co-operation for the first time to the CFSP. In addition the procedure will in future not be subject to the same prerequisites in all three pillars, but rather will demonstrate special features in each pillar.

aa. Previous procedure[73]

Until now Member States seeking integration have been authorised by the Council at the proposal of the Commission by a qualified majority to initiate enhanced co-operation in accordance with Art. 40 Para. 2 EUT o.v. and Art. 11 Para. 2 ECT o.v. However, only those Member States, which also participate in such enhanced co-operation, may participate in a resolution concerning authorisation[74]. At the same time the application for authorisation for enhanced co-operation was forwarded to the EP for its position in accordance with Art. 11 Para. 2 ECT o.v. and Art. 44 Para. 2 EUT o.v. Should the Commission itself have objections to the authorisation applied for, it can refuse to present it to the Council by stating the reasons for such refusal. The procedure for voting in the Council is characterised by the *veto right* of each individual Member State[75]. This *veto right* may, however, only be based on “important national reasons”, which must be presented

[72] Cf. Oppermann, Europarecht, § 6 margin no. 533, p. 204.

[73] Cf. overview in BDI publication no.327, p.47.

[74] Cf. Art. 44 Para. 1 EUT o.v.

by the appropriate Member State. This prerequisite is at the same time a control mechanism, albeit a small one, to protect from abuse of veto right. A prerequisite for authorisation to perform has to date been i.a. participation of a majority of Member States, orientation around the objectives and principles of the treaties as well as the institutional framework of the EU and guarantee of the *acquis communautaire*[76].

bb. Procedure after Nice

As already mentioned, the Treaty of Nice provides a slightly modified procedure for each of the three pillars. The main differentiating feature is the veto right, which is abolished for the 1st and 3rd pillars, however maintained and introduced for the 2nd pillar. A common feature of them is the applicability of Art. 43-45 EUT n.v., which contain some innovations (e.g. participation of a minimum of 8 Member States etc.).

- **1st pillar (EC)**

In accordance with Art. 11, 11a EUT n.v. the participating Member States address an application for authorisation for enhanced co-operation to the Commission, which forwards this proposal to the Council for a vote. Otherwise, it may refuse to present it to the Council by stating the reasons for such refusal. After consulting with the EP, the Council passes a resolution by qualified majority. If the area in which the Member States wish to have enhanced co-operation affects an area, for which the procedure as per Art. 251 ECT applies, the approval of the EP is also required. If a Member State wishes to adhere to enhanced co-operation at a later stage, in accordance with Art. 11a Para.2 ECT n.v. it must forward a communication to this effect including a justification to the Commission. The Commission must forward the communication plus position to the Council within three months. The Council has to take a decision on this subject within four months.

- **3rd pillar (Judicial and Police Co-operation in Criminal Matters)**

In the area of the 3rd pillar (Art. 40-40b EUT o.v.) the Member States seeking integration submit an application to the Commission, which can forward the application to the Council, as has been the case until now, or can reject it by stating the reasons for this. After the proposal is presented by the Commission or at the initiative of at least eight Member States, the Council reaches a decision by qualified majority. The EP must be consulted previously, although the position does not have any legally binding character. If a Member State wishes to adhere to enhanced co-operation at a later

[75] Cf. Art. 11 Para. 2 p. 2 ECT o.v. and Art. 44 Para. 1 EUT in conjunction with Art. 11 Para. 2 ECT o.v.

[76] BDI publication no. 327, key word "Enhanced co-operation", p. 47.

stage, it must forward a communication containing a justification to this effect to the Commission, which must forward the communication plus position to the Council within three months. The Council will take a decision on this application within four months.

The procedure in accordance with Art. 40-40b EUT n.v., as compared with the procedure as per Art. 11, 11a ECT n.v., has the special feature that the Member States seeking integration can direct an application directly to the Council, if the Commission rejects presentation of an application for authorisation[77].

- **2nd pillar (CFSP)**

The Treaty of Nice in Art. 27a-27e EUV n.v. provides for the application of the procedure of enhanced co-operation for the CFSP for the first time. This is differentiated in a few essential points from the procedures of the 1st and 3rd pillars. First of all the participating Member States address their application directly to the Council in accordance with Art. 27c EUT n.v. Before taking a decision, it transfers the application to the Commission and the EP. The EP is not consulted, i.e. does not submit a position, but rather is merely informed. The Commission, on the other hand, can submit a position especially against the background of a coherent enhanced co-operation with Union policy. The Council comes to a resolution on authorisation by qualified majority within the scope of the CFSP in accordance with Art. 27c EUT n.v. in conjunction with Art. 23 Para. 2 Sub-para. 1 EUT n.v. However, in accordance with Art. 27c Sub-para. 2 EUT n.v., Art. 23 Para. 2 Sub-para. 2 EUT n.v. is also applied with the result that the veto right in the area of CFSP regulated in that article continues to be applied. The condition that at least eight Member States must participate in enhanced co-operation in accordance with Art. 43 lit. g EUT n.v. is a simplification vis-à-vis the previous legal situation should further states join the EU, as the number will also remain constant for the time being in an expanded EU, with the result that the number of Member States to participate will be reduced by a certain percentage.

cc. Conclusion

With the enlargement of the procedure of enhanced co-operation to the 2nd pillar the possibility of making more flexible policies in the area of CFSP was also created. However, this only applies with certain restrictions, as in accordance with Art. 27b EUT n.v. Issues concerning military or defence policy, i.e. essential elements of the ESDP, do not fall expressly within enhanced co-operation. Rather, in the area of CFSP, only the performance of joint actions and the application of a joint

[77] Cf. Art. 40a Para.1 EUT n.v.

position come under enhanced co-operation. This rule is required politically by the majority in the Council and takes account of the particular sensitivity of this area. The area of application within the scope of the CFSP is further restricted by

Nice may not be an adequate means to do so. Especially in view of the imminent enlargement of the Union, enhanced co-operation also in the area of CFSP will have to be more flexible.

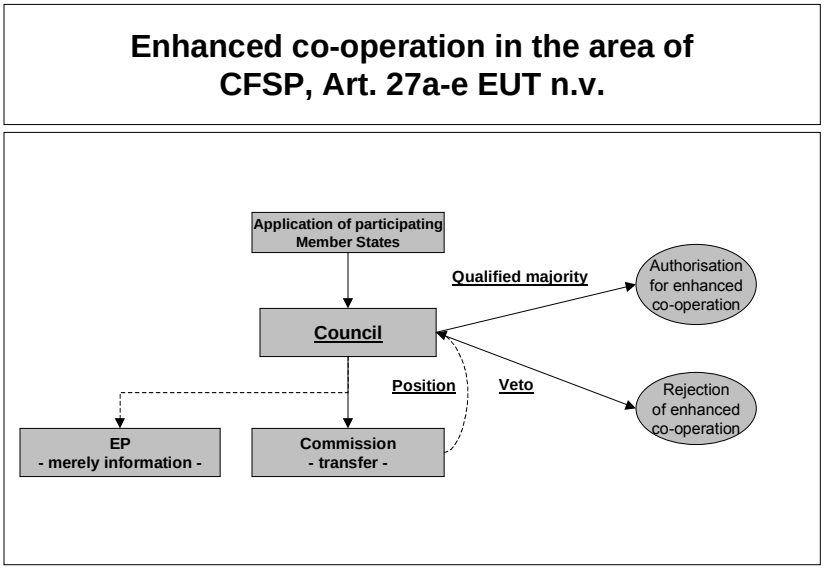

Fig. 11: Lemor Illustration 5

the newly introduced Art. 43a EUT n.v., according to which enhanced co-operation may only be adopted as a "last means". The possibility of a differentiated procedure is thus given *de jure*. This consequence is also necessary and desired against the background of growing international expectations regarding the EU's ability to act. At the same time, however, it remains unclear which projects in the CFSP enhanced co-operation should be applied to in practice. In the short or long-term the EU must be able to react autonomously and extremely rapidly. The compromise made in

3. European Union Charter of Fundamental Rights

On the occasion of the Nice European Council the heads of state and government solemnly proclaimed the European Union Charter of Fundamental Rights. This was preceded by the resolution of the heads of state and government on the occasion of the Cologne European Council to summarise fundamental rights already existing on the EU level in a charter, thus making them more transparent.[78]. As yet the EU does not have its own specific catalogue of

fundamental rights laid down in writing. However, the *European Court of Justice* had recognised the existence of fundamental rights at Community level already at an early stage and has developed then continuously ever since[79]. In its jurisdiction it recognises the principle of equal rights, the freedom of association, the freedom of religion and faith, protection of privacy, the right to property, the freedom to choose an occupation, the respect of family life, the adversarial principle, the inviolability of the home, the freedom of expression as well as the guarantee of recourse to law. In addition, Art. 6 Para. 2 EUT stipulates that the EU is obliged to observe fundamental rights as guaranteed by the European Convention on Human Rights[80] and as deriving from the joint constitutional traditions of the Member States as general principles of Community law. This includes in particular the right to life, freedom, integrity and security of the person, the right to an adequate court audience, the right to respect for private and family life, the right to freedom of thought, conscience and religion, the right of freedom of expression and of assembly as well as the prohibition of torture, slavery and forced labour[81]. However, these fundamental rights do not apply unrestrictedly, as they are subject to certain limitations, which in turn have their own limits.

a. Formulation of the Charter[82]

The Cologne European Council was of the opinion that the draft charter of fundamental rights should be elaborated by an independent body, established specifically for this purpose – the *Convention*, as it is known. Members of this body included representatives of the heads of state and government, of the President of the Commission as well as members of the EP and the national parliaments. Representatives of the other European institutions, e.g. the ECJ, COR and ESC, as well as other experts participated in the hearings organised by the *Convention*. The Convention presented the draft charter of fundamental rights on the occasion of the Biarritz European Council. The Chairman of the Convention was former German Federal President Roman Herzog.

b. Relevant fundamental rights

The EU Charter of Fundamental Rights and the European Convention on Human Rights

[78] Cf. on the entire subject: Fischer, IV, p. 263 f.
[79] Since ECJ, case 29/69 (Stauder), coll. 1969, 419 ff.
[80] The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome in 1950. Signatory states were the Member States of the Council of Europe. Monitoring the compliance with the rights granted by the Member States is incumbent on the European Court of Human Rights with its headquarters in Strasbourg, France.
[81] Weidenfeld/Wessels, key word "European Human Rights Convention", p. 363 f.

guarantee fundamental rights and human rights to EU citizens and citizens of the signatory states. In accordance with Art. 52 Para. 3 of the Charter, the fundamental rights of the Charter have the same meaning and scope of application as those human rights and freedoms granted by the European Convention on Human Rights. This is under the proviso that the rights deriving from the Charter and those of the Convention correspond. In addition to the above mentioned fundamental and human rights, the Charter includes citizens' rights, freedoms, rights of equality, procedural rights as well as fundamental economic and social rights

The Charter begins with a Preamble, followed by seven Chapters.[83]. The "General Provisions" in Chapter 7 are significant for the scope of the fundamental social rights in particular.

aa. Freedom of expression and information, Art. 11 of the Charter

Art. 11 of the Charter contains the fundamental rights of freedom of expression and information. This includes the right to receive and impart information without interference by public authorities and regardless of frontiers.

aaa. Area of protection

In accordance with the text of Art. 11 of the Charter, freedom of expression and information are granted without any limitation, the reason being that Art. 11 of the Charter does not contain itself any limitation of these fundamental rights. However, limitations do arise from the general stipulations of Art. 52 of the Charter, which apply to all fundamental rights. In accordance with Art. 52 Para. 1 of the Charter, limitations on Art. 11 are in principle possible if they are provided for by law and if they respect the essence of freedom of expression and information. In addition this limitation must correspond to the principle of proportionality, i.e. it must be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Another limitation is derived via Art. 52 Para. 3 of the Charter from Art. 10 Para. 2 of the European Convention on Human Rights, which stipulates that limitations at least on the freedom of expression may be possible due to the reasons listed therein[84].

bbb. Conclusions

The stipulations contained in Art. 11 of the Charter do not present any progress for

[82] Annex IV of the conclusions of the Chairman of the Cologne European Council.

[83] Chap. 1 "Dignity" (Art. 1-5), Chap. 2 "Freedoms" (Art. 6-19); Chap. 3 "Equality" (Art. 20-26), Chap. 4 "Solidarity" (Art. 27-38), Chap. 5 "Citizens' Rights" (Art. 39-46), Chap. 6 "Justice" (Art. 47-50), Chap. 7 "General Provisions" (Art. 51-54).

[84] Reasons include e.g. national security, territorial inviolability, public security etc.

military and police personnel as compared to the stipulations contained in Art. 10 of the European Convention on Human Rights. Even if a limitation on the essence is only possible when the principle of proportionality is adhered to, the same scope of the respective fundamental rights as within the terms of the European Convention on Human Rights is derived from the reference contained in Art. 52, Para. 3. The only new provision in Art. 11 of the Charter is the explicit inclusion of freedom of information in the list of fundamental rights. However, this fundamental right had already been protected before, as can be seen from a comparison with Art. 10 Para. 1 of the European Convention on Human Rights.

bb. Freedom of assembly and association, Art. 12 of the Charter

Art. 12 of the Charter refers to the freedom of assembly and association. It stipulates that everyone has the right to assemble freely and peacefully with others and to associate freely with others at all levels, in particular in political, trade union and civic matters. This includes the right of every person to form and to join trade unions for the protection of his/her interests.

aaa. Area of protection of Art. 12 Charter

Art. 12 of the Charter also provides for the so-called *right of association*. In accordance with the wording of this article, the right of assembly and association are guaranteed without any limitation. The long discussed fundamental question as to whether European social legislation also applies to military personnel was recently decided by the ECJ. After the long discussed fundamental question as to whether European social legislation also applies to members of the armed forces was recently resolved by the ECJ (in accordance with this ruling members of the armed forces are employees within the terms of European social legislation and are thus not excluded from it), the question now arises as to the applicability of Art. 12 of the Charter to servicemen[85].

bbb. Limitations

The rights of assembly and association are limited in accordance with Art. 52 of the Charter, where it is stipulated that limitations on the fundamental rights of the Charter may be made if the principle of proportionality applies[86] and if they are within the limits defined by the European Convention on Human Rights[87]. Art. 11 of the European Convention on Human Rights is applied, as it is recognised that it has the same meaning and scope as Art. 12 of the Charter, thus corresponding to this fundamental right. This means that in addition to Art. 52 Para. 3 of the Charter

[85] Case C-285/98 dated 11.01.2000 Tanja Kreil./. Federal Republic of Germany.
[86] Cf. Art. 52 Para. 1 of the Charter.

also Art. 11 Para. 2 of the Charter must be observed. Art. 11 Para. 2 contains explicit limitations for members of the armed forces, the police and the state administration.

ccc. Conclusion

The provisions of Art. 12 of the Charter do not represent any progress as compared to the already existing provisions of the European Convention on Human Rights due to its reference to Art. 52 Para. 3, as the limitations are possible under the same conditions as within the scope of the European Convention on Human Rights, i.e. also for military personnel. In order to put military personnel on an equal footing with other persons with regard to these rights, EUROMIL has proposed an amendment to Art. 12 of the Charter. A wording could be chosen stipulating that any limitation may only apply if it is indispensable in order to maintain state functions. Nevertheless, EUROMIL is well aware of the fact that the specific conditions arising from the nature of military and police duties have to be taken into account in particular with regard to the right to strike and the right of association especially in the context of military operational issues. EUROMIL and the member associations have declared their willingness to do so.

[87] Cf. Art. 52 Para. 3 of the Charter.

cc. Limitations on fundamental rights, Art. 52 of the Charter

Art. 52 of the Charter provides for a limitation on all the fundamental rights guaranteed by the EU Charter of Fundamental Rights. This is a so-called *horizontal clause*, which contains the conditions for limitation on fundamental rights, while specifying different rules for such limitations in its three paragraphs[88].

Art. 52 Para. 1 contains a *general legal reservation* stating that limitations are in principle permissible provided they are set by a formal "law" on Community level. This interpretation arises from the fact that the Charter explicitly provides a legal reservation due to national law in the case of some fundamental rights. Therefore it must be assumed that the limitations provided for by law as stipulated in Art. 52 Para. 1 mean Community "legislation", i.e. European secondary legislation. However, Community legislation does not provide for the authority to enact "laws" in this sense. At the most, a regulation in the sense of Art. 249 Sub-para. 2 ECT might be compared with a "law" due to its abstract and general nature[89]. In addition Art. 52

[88] Calliess, EuZW 2001, 261 (264), Fischer VII, explanations on Art. 52 of Charter, p. 550 ff.

[89] Insofar not precisely Calliess, loc. cit., who presents the directive as being comparable to a law. However the directive, in accordance with Art. 249 Sub-para. 3 ECT is an abstract-individual regulation, which only binds the parties addressed and not all

Para. 2 of the Charter contains the so-called guarantee of the essence of such rights and freedoms, according to which the inviolable essence of a fundamental right must be guaranteed and must not be limited by secondary legislation. This concerns the implementation of the jurisdiction by the ECJ on the limitations on fundamental rights on Community level[90]. In addition the *principle of proportionality* must be adhered to in accordance with Art. 52 Para. 2 of the Charter.

The basic protection of fundamental rights granted by these three principles is, however, limited by two provisions. The same limitations that apply to the same fundamental rights of European primary legislation also apply to the fundamental rights of the Charter as per Art. 52 Para. 2. The limitations on those fundamental rights of the European Convention on Human Rights, which correspond to the fundamental rights of the Charter, also apply in accordance with Art. 52 Para. 3. In addition some articles of the Charter provide for a legal reservation based on national legislation[91] or even "practices"[92] [93].

On the whole the wording of Art. 52 Para. 1 is very broadly termed, as it does not contain any specific limits to these limitations, apart from the principles of proportionality and protection of the essence of rights and freedoms. It also refers to national legal reservations and "practices", which in a legal sense are very difficult to define appropriately and which may differ from one Member State to the other. Therefore it has to be anticipated that this provision does not guarantee a uniform application of the fundamental rights and thus of Art. 11 and 12 of the Charter. It remains to be seen whether the jurisdiction of the national courts as well as that of the ECJ and the European Court of Human Rights will develop in this respect at all and how.

c. Status of the Charter

The solemn proclamation of the European Union Charter of Fundamental Rights does not mean that it has been incorporated into the European Treaties. It is therefore not part of the *acquis communautaire* after Nice. It is not binding for the ECJ[94]. This gives rise to the question concerning the future status of the Charter.

Member States generally (although this might normally be the case).

[90] Cf. ECJ, judgment on case C-292/97, margin no. 45 dated 13th April 2000.

[91] Art.10, 14, 16, 27, 28, 30, 34, 35, 36.

[92] Art.16, 27, 28, 30, 34, 35, 36.

[93] Cf. Calliess, EuZW 2001, 261 (261).

[94] Calliess, EuZW 2001, 261 (267); Hatje, EuR 2001 143, 176 f.

In the "Declaration on the Future of the Union"[95] adopted in Nice, the representatives of the Member States agreed that an intensive and comprehensive discussion on the future of the EU is to be initiated, in which all interested social groups should participate. In the same declaration the European Council commits itself to adopting a declaration at the Council meeting in Laeken/Brussels in December 2001, specifying appropriate initiatives for continuing this process. This reform process should cover four subject areas: delimitation of competences to enact legislation, a further simplification of the treaties, the role of the national parliaments in the architecture of Europe and the status of the EU Charter of Fundamental Rights in accordance with the conclusions of the Cologne European Council.

There are various answers to the question concerning the future legal status of the Charter of Fundamental Rights[96]: Some of the Member States are striving to create a European constitution and thus advocate integrating the Charter into the *acquis communautaire*. However, it is still being discussed how this should be achieved. One possibility would be to pass the Charter as *the European Constitution* sui generis or to include it through Art. 6 Para. 2 EUT, which is how the European Convention on Human Rights became part of European legislation. The other Member States in principle reject any incorporation of the Charter that goes beyond its current non-binding status, as they reject the idea of establishing a European Constitution. They fear that by incorporating the Charter into the *acquis communautaire* the basis for such a constitution would be established.

d. Conclusions

Whether the EU Charter of Fundamental Rights will ever reach the status of a European Constitution that is binding for all Member States depends on whether it will be possible within the scope of the post-Nice process to convince the required majority of Member States of the need for a European Constitution. Taking into account the discussions that have taken place since Nice, it is doubtful at present whether this will happen at all. The creation of a European Constitution seems to have been discontinued entirely for the time being. This leaves the possible amendment of Art. 6 Para. 2 EUT. Such an amendment could subsequently serve as a normative basis for jurisdiction by the ECJ and the European Court[97]. However, this is exactly what had already been presented, discussed and rejected as a proposed compromise in Nice.

[95] 23rd Declaration of the declarations adopted by the Nice conference, OJ C 80/77 dated 10.03.2001.
[96] Cf. Calliess, EuZW 2001, 261 (261).
[97] Cf. Calliess, EuZW 2001, 261 (268).

With regard to the Treaty of Nice and the future of the EU, the EP presented initial specific proposals for the future development of the post-Nice process as early as the end of May 2001. The EP adopted a non-legislative report by the rapporteurs of the Committee on Constitutional Affairs Inigo Méndez De Vigo (EPP-ED) and António José Seguro (SPE) on 31.05.2001[98]. In their report the MEPs demand a convention to be established comprising members of the EP, the national parliament, the Commission and the governments of the Member States. This convention has to begin its work as early as 2002 and submit a "constitutional proposal" to the Intergovernmental Conference.

[98] EP document no. A5-0168/2001.

B. Military structures of the European Union

The military structures of the EU emerging since Cologne are the result of a lengthy political development process. It is not yet fully foreseeable as to where further developments will lead. However, without any doubt the terrorist attacks on 11th September 2001 and the new world security situation resulting from them will play a decisive role in this development. Against this background the following section presents the European Security and Defence Policy (ESDP), the European Security and Defence Identity (ESDI) and also the partly non-transparent structures of NATO and the WEU in relation to the CFSP.

I. Development of the Security and Defence Policy[99]

The first approach to a European Security and Defence Policy took place directly after the Second World War: as early as 1948 the so-called "Brussels Pact" was concluded, which was a precursor in its structure to the WEU. In 1949 NATO was also established by the Washington North Atlantic Treaty. In 1950 the French National Assembly began an initiative for a first common European defence community, which was however not set up due to the same National Assembly's veto. The proposal by the French National Assembly provided for the creation of a European army including the Federal Republic of Germany. The objective was to integrate the former adversary firmly in the Western European community. In 1954 the *EEC* was established. The foundation of the EEC represents a break in European post-war history, as its consequence was also a new order in Europe. At the same time the Brussels Pact produced the WEU and the Federal Republic of Germany and Italy were included in the *Western European Union*[100]. In addition to issues relating to security policy, the WEU was also responsible for matters relating to economic co-operation as well as other social and cultural duties. The WEU thus in 1957 supervised the re-integration of the Saarland region into the Federal Republic of Germany and organised the first elections to the regional parliament there. However, these duties were transferred to the *Council of Europe* in 1960. The "Treaty of Brussels", according to which Belgium, France, Luxembourg, the United Kingdom and the Netherlands undertook to afford mutual assistance, was signed in March 1958.

The actual start of a joint European security and defence policy is marked by the negotiations on the *Single European Act* in 1986: for the first time in the history of the European Communities issues of security policy were viewed in a Community framework[101]. In 1988 Spain and Portugal

[99] Cf. Schedule of European integration, p. 2.
[100] Previously called "Western Union".
[101] Cf. Oppermann, § 30 margin no. 2077, p. 904.

joined the WEU. In 1990 the WEU also opened up for countries that were not members of the EU by accepting these countries on the basis of association agreements and by creating an observer status. In the meantime 27 countries participate, albeit to different extents, in the WEU. The first cohesive and conclusive plan for a common security and defence policy was the *Treaty of Maastricht*, which was passed in November 1993 and also heralded the birth of the EU[102]. As part of the framework agreement, the CFSP was formalised in the second pillar as an area of so-called *intergovernmental co-operation*. It caused two fundamental directions for the future[103]: on the one hand, for the first time in connection with tightening up of the CFSP, the objective was formulated to establish a European security and defence policy. On the other hand, the EU was instructed to utilise the structures of the WEU in order to realise these objectives. The latter was to be commissioned to carry out the required actions. The *Treaty of Amsterdam* further developed the formal foundations of the CFSP[104]. The main focus of the Treaty of Amsterdam was the "integration" of the WEU and its bodies (at least step-by-step) in the EU and at the same time restructuring of the CFSP. The attempt of some Member States to integrate the WEU fully in the EU Treaty, however, failed due to the opposition by the majority of Member States. With the integration of the WEU, the CFSP was to receive its own capacities and structures. The Treaty of Amsterdam also stressed the importance of coherent foreign policy measures by the EU within the scope of its foreign, economic and development policy[105]. In addition some instruments for action and competences of the CFSP were created, such as the appointment of former NATO Secretary General, Javier Solana, to the position of EU representative responsible for the area of CFSP[106].

The latest developments in the direction of a *Common European Security and Defence Policy (CESDP)* are events since 1998, which terminated in the Cologne European Council in May 1999: the future development of the ESDP was determined here and institutional changes were developed that were finally resolved at the Helsinki European Council in December 1999. The central issues were the creation of military capacity, the improvement of non-military crisis management and also resolution-making[107].

[102] Weidenfeld/Weidenfeld-Algieri, Manual, p. 886.
[103] Cf. Clement, Mittler-Brief, p. 4.
[104] Cf. Weidenfeld/Algieri, p. 162.
[105] Weidenfeld/Weidenfeld-Algieri, Manual, p. 886.
[106] Javier Solana was also appointed Secretary General of the WEU.
[107] Conclusions of the Presidency of the Helsinki European Council, 10th/11th December 1999, Annexe IV, Report of the Presidency to the European Council.

On the occasion of the Feira European Council in June 2000, military and non-military aspects of crisis management were specified, as were proposals to regulate the inclusion of non-EU Member States in operations under EU leadership. The changes were taken into account on the occasion of the Nice European Council in December 2000 by the changes in the corresponding passages of the Treaty in Art. 17-28 EUT n.v.[108]. Extensive amendments to the Treaty also failed this time due to the opposition of some Member States. In its outcome Nice must be considered as merely another stage in a continuing, dynamic process of co-operation in the area of foreign and security policy.

II. ESDP after Nice

As already stated, the Treaty of Nice provides for some reforms in the institutional structure of the CFSP and also in the area of enhanced co-operation within the scope of the second pillar.

1. Institutional reform of the CFSP

On the basis of the guidelines determined by the Cologne European Council and the President's report, the European Council established at its Nice conference the following new, permanent political and military bodies, which are to be actively included in the framework of the ESDP in future in addition to the Council and its Secretary General, the High Representative for the CFSP: the permanent *Political and Security Committee (PSC),* the *Military Committee (EUMC)*[109] and also the *Military Staff (EUMS)*[110].

a. Political and Security Committee (PSC)

The plan agreed on in Helsinki provides for the PSC as the driving force behind the ESDP and the CFSP. The PSC replaces the former *Political Committee*. In addition to the duties incumbent on it to date in accordance with Art. 25 EUT o.v., the PSC should in particular assume the political control and strategic leadership of operations for crisis management, and be authorised by the Council, notwithstanding Art. 47 EUT n.v., to formulate suitable resolutions with regard to political control and strategic leadership of the operation. Depending on the occupancy of the national representatives it convenes on the level of the *political directors*. The Secretary General/High Representative of the CFSP can, after consulting with the President, assume Presidency of the PSC especially in crisis situations. The PSC is also responsible for drawing up conclusions of the General Council as well as putting forward guidelines for the other committees (especially the EUMC). In addition, under the supervision of the Council, it should

[108] Cf. Hatje, EuR 2001143 (162). Fischer III.7, p. 96.

[109] English abbreviation for "European Union Military Committee".

assume responsibility for political leadership in developing military capabilities. Furthermore, in times of crisis the PSC is the body, which examines the crisis situation and draws up conceivable options for the EU reaction within the standardised institutional framework. This is done observing the appropriate resolution and implementation procedures of the individual pillars. For this reason especially close co-operation must be ensured between the PSC and the responsible PRC. To this end the report of the President of the Nice European Council provides for a close personnel interaction between these two bodies[111]. Lastly, the PSC assumes intensification of consultations, especially with NATO.

b. Military Committee (EUMC)

The European Council resolved in Helsinki to allocate to the Council a military body in addition to the political body. This is designed to enable the EU to fulfil its responsibility as per Art. 17 Para. 2 EUT n.v. in combination with the duties it assumed within the scope of the so-called *Petersberg tasks*[112] [113]. The EUMC is a military consultation body. It makes military recommendations to the PSC and assumes the leadership of the EU's military activities. At the same time the EUMC is the highest military body of the EU, which defines the military guidelines for the Military Staff (EUMS). The recommendations are pronounced regarding development of a general crisis management plan, individual missions in crises and concerning military relations of the EU towards third-party countries and also towards NATO. In crises the EUMC is also responsible for drawing up military options etc. with the result that they can be resolved by the PSC. Lastly, the EUMC supervises the proper course of military operations.

The heads of general staff convene in the EUMC. It is presided over by a four-star general/admiral, who is appointed for a period of three years at the recommendation of the general staff of the Council[114]. He represents the EUMC in the PSC and in the Council.

c. Military Staff (EUMS)

The Council structures also include the EU Military Staff, EUMS[115]. It is responsible for

[110] English abbreviation for "European Union Military Staff".

[111] Cf. Report of Presidency of Nice European Council, Annexe III, Political and Security Committee.

[112] Petersberg Declaration of the Council of Ministers of the Western European Union concerning its meeting held in Petersberg, Bonn on 19th June 1992.

[113] Petersberg duties include humanitarian duties and rescue missions, peace-keeping duties and combat missions in crisis management including peace-keeping measures.

[114] In accordance with Annexe IV of the Report of the Presidency of the Nice European Council, the President should be a former head of general staff of a Member State.

[115] Cf. on this subject report of the Presidency of the Nice European Council, Annexe V.

early warning, situation assessment and strategic planning with regard to performing the Petersberg tasks. This also includes determining European national and multi-national armed forces. In addition the EUMS carries out the policies and resolutions in accordance with the requirements of the EUMC. It is also the source of strategic know-how as well as the link between the EUMC and the military forces available to the EU. It also guarantees an extensive exchange of information with the position centre, the staffs on national and multi-national levels and also the appropriate bodies of NATO[116]. The EUMS also evaluates information from the intelligence services and other information sources in crisis situations and supports the EUMC in its planning work.

The EUMS is presided over by a three-star general/admiral. He performs his work in accordance with the instructions of the EUMC. The EUMS is a division of the Council Secretariat directly subordinate to the Secretary General/High Representative.

2. EU crisis reaction forces

The CFSP requires its own instruments for action in order to successfully pursue its own security and defence policy. Since Cologne therefore both military and non-military capabilities have been designed. Military crisis management will in future be accompanied by non-military crisis management. The EU is thus drawing consequences especially from experiences in the Kosovo mission, which demonstrated clear deficits in this area.

a. Military reaction forces

The fundamental considerations and guidelines for creating military capabilities for the ESDP were set out in Cologne[117]. The heads of government and state ascertained there that, even after the Treaty of Amsterdam, reinforcement of the CFSP was determined including step-by-step determination of a common European defence policy within the terms of Art. 17 EUT. For this reason it was endeavoured at that time to reinforce the CFSP by developing a Common European Security and Defence Policy (CESDP). This in turn required autonomous capability for action based on credible military capabilities and appropriate resolution bodies. The EU draws the obligation to create this capability for action from Art. 11 EUT, according to which it is obliged to stand up for preservation of peace and reinforcement of international security in accordance with the principles of the Charter of the United Nations and also the principles of the Helsinki Final Act and the objectives of the Charter of Paris. Under the Finnish Presidency the previously only vaguely

[116] Weidenfeld/Algieri, p. 171.

[117] Cf. Annexe III of Council conclusions regarding the Cologne European Council.

formulated intentions were actually realised at the Helsinki European Council. The decision was taken there to set up the EU's own intervention force (the European Rapid Reaction Force) as a crisis management capacity, and extensive planned objectives were drawn up, i.e. the so-called headline goals[118]. According to this, the EU should by 2003 be able to implement and deploy in crisis management operations armed forces up to corps size (i.e. up to a size of 15 brigades) comprising approximately 50,000 to 60,000 servicemen including combat support groups and logistics as well as corresponding navy and air force units within a period of 60 days and be able to maintain each mission for a minimum period of one year. On the one hand, the objective is to achieve compatibility and interoperability between national armed forces that have previously co-operated inadequately and also to adapt strategic plans[119]. On the other hand, the heads of state and government resolved in Helsinki that the Member States are obliged to improve their national and multi-national capabilities. This obligation is currently highly relevant, as basically all Member States are reducing defence expenditure and are at the same time assuming power-intensive and cost-intensive duties all over the world (e.g. in the Balkans). Another demand in Helsinki was the speedy development of collective capability objectives in the areas of armed forces management, strategic reconnaissance as well as strategic transportation.

On the occasion of the Capabilities Commitment Conference under the French Presidency in November 2000[120], the Member States presented their (albeit preliminary) contributions to the EU military crisis management forces (cf. Figure 7).

Member State	Contribution
Germany	18,000
United Kingdom	12,500
France	12,000
Italy	12,000
Spain	6,000
Netherlands	5,000
Belgium	3,000
Greece	3,500
Finland	2,000
Austria	2,000
Sweden	1,900
Portugal	1,000
Ireland	1,000
Luxembourg	100
Denmark	did not participate initially

Fig. 12: Extent of Member States' participation in European crisis reaction forces
Source: Austrian Institute for European Security Policy, Newsletter 3/2000: "Fast intervention troop becomes reality"

After determining these preliminary contributions of EU Member States, the EU accession candidates and the remaining European NATO states, which are not EU

[118] Cf. Annexe 1 re. IV conclusions of the Presidency of the Helsinki European Council.
[119] Cf. Weidenfeld/Algieri, p. 176.
[120] Capabilities Commitment Conference held in Brussels on 20/21.11.2000.

members, also declared that, if the need arose, they would provide contingents for missions within the scope of the ESDP in accordance with their capabilities. This creates a total troop capacity of approximately 100,000 servicemen, 400 fighter aircraft and 100 ships[121]. Binding statements by the Member States are expected during the General Council meeting in Brussels on 19th November 2001.

formulated that basically an extensive range of crisis management mechanisms should be used in addition to military means, e.g. diplomatic activities, humanitarian aid and economic measures as well as non-military policing missions[123]. It was agreed that the core action of non-military crisis management was the presence of police, reinforcement of the state under the rule of law and civilian administration as well as

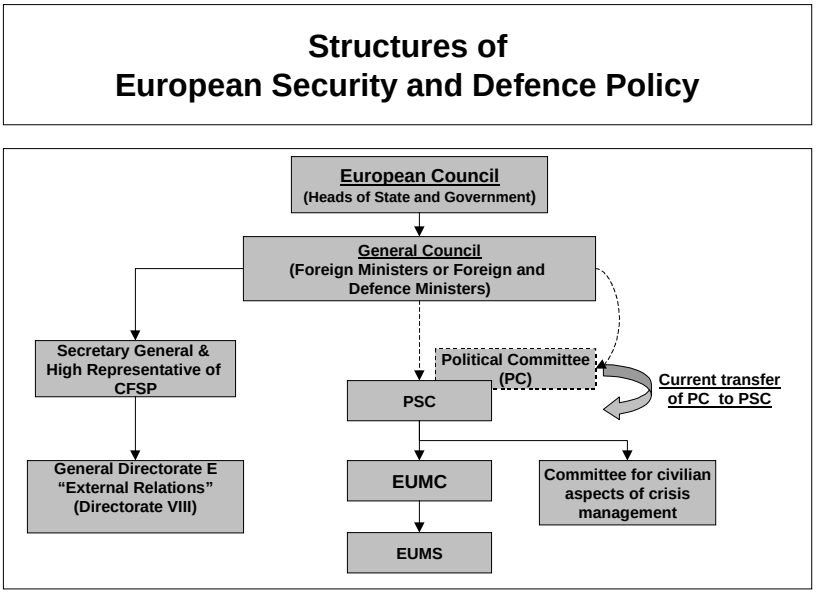

Fig. 13: Source: Theiler in IFDT 2/2001, S.19.

b. Non-military task forces

The fundamental principles for non-military crisis management were set out during the EU Summit in Feira[122]. These principles were based on the experience made by NATO in ensuring public order in the Balkans. In Cologne the objective was thus disaster protection measures. Therefore, the heads of state and government came to a resolution in Feira in accordance with the Helsinki headline goals for non-military crisis management[124]. Its objective is to provide up to 5,000 police officers until 2003 by means of co-operation between the Member

[121] Cf. Wiesmann, ES 2001, 17 (19); Weidenfeld/ Algieri, p. 177.
[122] Cf. Thränert, p. 4.
[123] Cf. Weidenfeld/Algieri, p. 172.

States within the scope of the ESDP. They must be able to be active in the entire area of conflict prevention and crisis management operations. 1,000 police officers from this intervention unit should be able to be stationed in a crisis area within 30 days. In addition the Member States should provide judges, public prosecutors and law enforcement staff to enforce public security and order, who are likewise active in the crisis zones. All these non-military measures should be carried out either at the request of the United Nations, the OSCE or also as independent actions within the scope of the ESDP[125].

A committee for the non-military aspects of crisis management was also appointed. This committee convened for its first meeting on 16th June 2000. Its task is to provide information concerning the civilian issues of crisis management, to formulate recommendations and to consult with the PSC and other Council bodies[126].

[124] Cf. Report of Presidency of the Feira European Council on reinforcement of the Common European Security and Defence Policy.
[125] Cf. Thränert, p. 4.
[126] Cf. Weidenfeld/Aligeri, p. 175 f.

C. Relation of ESDP to WEU and NATO

I. WEU

1. Structure and objectives

The Western European Union (WEU) came into being in 1954 as the successor of the *Brussels Pact* established in 1948. Originally it was a mutual assistance pact between the Western European countries against further aggression by Germany. In the meantime 28 countries participate in the WEU to different extents: in total 10 EU Member States are full members[127] of the WEU, while five others have observer status[128]. In addition there are associated NATO members as well as partner countries in Central and Eastern Europe, which are associates[129] of the WEU.

The objective of the WEU is to provide an extensive duty to assist between the member countries in case of an armed attack on Europe as well as furthering integration of peace and security in Europe. In doing so, in particular the values of the EU and its independence are to be preserved. Lastly, the WEU also aims to reinforce international security.

[127] Belgium, Germany, France, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom.
[128] Denmark, Finland, Ireland, Austria, Sweden.
[129] Bulgaria, Estonia, Iceland, Latvia, Lithuania, Norway, Poland, Romania, Slovakia, Slovenia, Czech Republic, Turkey, Hungary.

2. Institutional effects

Even on the occasion of the Treaty of Amsterdam it became apparent that the WEU would at least be partially incorporated in the EU in the foreseeable future. Art. 17 Para.1 Sub-para. 1 of the treaty resolved in Amsterdam states that the WEU is an integral part of the Union's development. In the past years political and military competences for the EU's own ESDP have been developed. At the same time various functions, including the Petersberg tasks, were transferred to the EU[130]. After its meetings in Cologne and Helsinki the European Council discovered that the WEU had fulfilled its purpose as an organisation. After this the proposal was made on a European level to dissolve the WEU by 2004. However, it was impossible to do so, as there are still unresolved questions. It is therefore uncertain what is to happen in future with the Parliamentary Assembly of the WEU. To date a definitive decision has not yet been taken as to whether it should be integrated in the EU. If this assembly were dissolved, the countries that are not EU Member States would lose their influence on this policy. It is possible that the WEU will finally only have remaining functions such as the Parliamentary Assembly and the European Armaments Agency[131]. It remains to be stated that transfer of the WEU's competences to the

[130] Cf. Clement, Mittler-Brief, p. 6.
[131] Cf. Weidenfeld/Algieri, p. 180.

EU has progressed considerably. The outstanding questions do need to be answered as soon as possible (maybe also within the scope of the post-Nice process).

III. NATO

The European pillar within NATO is referred to as *European Security and Defence Identity (ESDI)* and must not be confused with ESDP, which is the term used to designate an entirely independent and autonomous EU policy.

1. Structure and objectives

NATO was set up in Washington on 4.4.1949 as a collective security pact of western countries. The NATO Treaty forms the foundation of collective defence of the treaty states, which is expressed particularly in the duty of all states to assist in case of an attack on another or several NATO states, as defined in Art. 5 of the Washington Treaty. This duty to assist means that each treaty state must offer the state under attack assistance within the scope of the legislation governing individual or collective self-defence, as recognised in Art. 51 of the Charter of the United Nations. This case of assistance was invoked for the first time by NATO on 2nd October 2001 directly after the terrorist attacks on the World Trade Center in New York and the Pentagon in Washington. In addition to the obligation to assist, the NATO Treaty includes increased political, cultural and economic co-operation of the treaty states. NATO currently comprises 19 Member States[132]. In addition so-called partnerships exist with a further 27 states, including also the EU Member States Finland, Ireland, Austria and Sweden.

Both NATO in Brussels and SHAPE in Mons including the PfP representatives form, together with the North Atlantic Assembly, important bodies and elements of lobbying for EUROMIL.

2. Principles of ESDP

Between NATO and the ESDI and the ESDP respectively there exists the danger of a state of tension, if European interests in both areas were to diverge. Consequently, from the viewpoint of the USA and other participating countries, the ESDP could become autonomous at the cost of the ESDI. The result of this could seriously damage the integrity of NATO and thus weaken it.

For this reason, especially under pressure form the United States, principles were developed that should be observed by the Europeans within the scope of the ESDP. Firstly, the ESDP should not lead to duplicate troop planning, commando

[132] Belgium, Denmark, Germany, France, Greece, Italy, Iceland, Canada, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Czech Republic, Turkey, Hungary, United Kingdom, United States of America.

structures and procurement decisions. The USA insists that all decisions relating to military policy be discussed previously within NATO. Furthermore, European decisions should not be taken dissociated from the wider framework of NATO decisions, i.e. the ESDP should not be dissociated from NATO's alliance policy. Lastly, those NATO states that are not also EU Member States should not be discriminated against, as otherwise it is feared that NATO policy will be alienated from EU policy.

Fig. 14: Source: Ischinger in IFDT 3/99, p. 33

The EU has taken account of these principles by current developments and especially by the Treaty of Nice. Art. 17 Para. 1 Sub-para. 2 EUT n.v. states that the ESDP neither affects the specific character of security and defence policy nor other obligations of some Member States within NATO[133]. Rather this policy is declared to be compatible with the ESDP. In accordance with Art. 17 Para. 4 EUT n.v. the ESDP should also not oppose closer co-operation of several Member States within NATO. Such statements indicate that in the view of the EU the ESDP should have a complementary function.

It is in fact provided that the EU can conduct its own operations. However, it will utilise the means and capabilities of NATO to do so. It is a declared aim to create a "strategic partnership for crisis management" between NATO and the EU. At the same time differences and also autonomy of decision-making should be respected. During the Swedish Council Presidency the General Council resolved on 22/23.01.2001 that during each Presidency at least one meeting

[133] Cf. Fischer, III.. 2.2 re. Art.17 EUT, p. 91.

should take place between the EU and NATO on ministerial level and at least three meetings between the PSC and the NATO Council. Furthermore, co-operation should be intensified by joint meetings of the relevant military committees, working groups and participation of the NATO Secretary General in EUMC meetings. NATO for its part should invite the Council Presidency and the CFSP Secretary General to NATO meetings. The Chairman of the EUMC should also participate in NATO Military Committee meetings. It is also planned to co-ordinate NATO and EU defence policy planning processes in a joint planning process, in which all NATO states and EU Member States should participate.

As a result, it is the declared objective of the EU to share work on a transatlantic basis, in which an equal and reinforced partnership develops, by means of a reinforced EU that is empowered to act independently. Partners in the international political arena should be able to support and relieve each other[134].

[134] Cf. Weidenfeld/Algieri, p. 184.

D. EUROMIL's place in the structure of European and international institutions

The European Organisation of Military Associations (EUROMIL) was established in 1972 as an association of free, democratic lobby groups for military personnel on a European level. The umbrella organisation currently comprises around 500,000 servicemen from 19 European countries organised in 26 associations. EUROMIL was also successful in opening up to the east at an early stage: servicemen's associations in Central and Eastern Europe joined the umbrella organisation immediately after the fall of the Iron Curtain.

I. Objectives

All members of EUROMIL feel committed to the image of the *citizen in uniform*. In accordance with this image servicemen in principle have the same rights and obligations as every other citizen. A serviceman, who is to protect and defend the rights and freedom of his co-citizens – also outside his home country – must be able to experience and perceive both in service. On the basis of this principle in particular the following demands of EUROMIL are directed at the responsible national and international institutions: all restrictions on the civic and social rights of servicemen not necessarily arising from the military mission and the constitution of the state concerned must be removed. Interest groups for servicemen and responsible citizens in uniform in them create the basis for equal, active participation in the political life of their countries. In particular EUROMIL has adopted the objective to implement the *freedom of organisation and association* of all European servicemen in active service. These fundamental rights, which must apply for servicemen of all status groups and ranks, are still withheld in some EU Member States and partners of the North Atlantic Alliance. The right of association is a universal human right.

Art. 23 Para. 4 of the United Nations' Universal Declaration of Human Rights states: "Everyone has the right to form and to join trade unions for the protection of his interests." The same applies on the basis of Art. 12 Para. 1 of the EU Charter of Fundamental Rights and Art. 11 Para. 1 of the ECHR. EUROMIL endeavours to ensure that this activity of association is formalised for all servicemen both on national and international levels in the appropriate laws, treaties and conventions. Freedom of organisation includes the right to establish an association, the freedom to join one and the ability of the association and its members to conduct the association's activities. Right of association includes the right and freedom to form associations, join them and carry out activities on behalf of the association to preserve and promote working and economic conditions. It is one

of EUROMIL's declared policies to forego servicemen's right to strike. Strong representation of servicemen on an international level is now more necessary than it ever has been, especially against the background of the European unification process. Integration of the CFSP has progressed further due to the developments since the Cologne European Council and the Treaty of Nice. EUROMIL continues to pursue the goal to achieve socially acceptable solutions in view of troop reductions throughout Europe and the integration of major international military associations and also to achieve a guaranteed general social framework in UN missions.

Along with a European defence policy, however, the conditions of servicemen with regard to labour and social rights must also be resolved on a European level by the institutions. A central issue for EUROMIL is to include servicemen in the European Union's labour and social legislation and to obtain a status for them equal to that of civilian employees. EUROMIL is supported in this objective by the European Trade Union Confederation (ETUC).

II. Structures

EUROMIL maintains an office in Brussels in order to implement the outlined objectives. EUROMIL is therefore permanently present in the capital of Europe and can maintain close relations with the European institutions and also the Council of Europe, which has its headquarters in Strasbourg, as well as other organisations dealing with security policy in and around Brussels and also in other European capitals. It must be expressly stated here that EUROMIL has gained both a consultative status and the right of collective complaint with the Council of Europe.

In addition to the Board, which together with the Secretary General represents the interests of EUROMIL at the Council of Europe, the EU, the WEU, the OSCE, at the NATO Parliamentary Assembly in Brussels, but also at SHAPE, the member associations are actively involved in the work. Besides lobbying at European and other international institutions in situ, the so-called leading associations draw up political positions and demands. In this way it is guaranteed that the know-how and ideas of the national associations can be utilised for the benefit of all.

"EUROMIL is backing Europe and trusting its future. Servicemen will also be indispensable for future security and the re-establishment of peace, for which, if the worse comes to worse, they will pay with their lives!"

Conclusion of the Brussels Resolution by EUROMIL dated 5th May 1998.

Annexe

(Treaty texts)

I. EU Treaty (Nice)

Article 17

"(1) The common foreign and security policy shall include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.

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 and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

The progressive framing of a common defence policy will be supported, as Member States consider appropriate, by co-operation between them in the field of armaments.

(2) Questions referred to in this Article shall include humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peacemaking.

(3) Decisions having defence implications dealt with under this Article shall be taken without prejudice to the policies and obligations referred to in paragraph 1, second sub-paragraph.

(4) The provisions of this Article shall not prevent the development of closer co-operation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO, provided such co-operation does not run counter to or impede that provided for in this Title.

(5) With a view to furthering the objectives of this Article, the provisions of this Article will be reviewed in accordance with Article 48."

Article 27a

"(1) Enhanced co-operation in any of the areas referred to in this Title shall be aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene. It shall respect:

- the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy;
- the powers of the European Community, and
- consistency between all the Union's policies and its external activities.

(2) Articles 11 to 27 and Articles 27b to 28 shall apply to the enhanced co-operation provided for in this Article, save as otherwise provided in Article 27c and Articles 43 to 45."

Article 27b

"Enhanced co-operation pursuant to this Title shall relate to implementation of a joint action or a common position. It shall not relate to matters having military or defence implications."

Article 27c

"Member States which intend to establish enhanced co-operation between themselves under Article 27b shall address a request to the Council to that effect.

The request shall be forwarded to the Commission and to the European Parliament for information.

The Commission shall give its opinion particularly on whether the enhanced co-operation proposed is consistent with Union policies. Authorisation shall be granted by the Council, acting in accordance with the second and third sub-paragraphs of Article 23(2) and in compliance with Articles 43 to 45."

Article 27d

"Without prejudice to the powers of the Presidency or of the Commission, the

Secretary-General of the Council, High Representative for the common foreign and security policy, shall in particular ensure that the European Parliament and all members of the Council are kept fully informed of the implementation of enhanced co-operation in the field of the common foreign and security policy."

Article 27e

"Any Member State which wishes to participate in enhanced co-operation established in accordance with Article 27c shall notify its intention to the Council and inform the Commission. The Commission shall give an opinion to the Council within three months of the date of receipt of that notification. Within four months of the date of receipt of that notification, the Council shall take a decision on the request and on such specific arrangements as it may deem necessary. The decision shall be deemed to be taken unless the Council, acting by a qualified majority within the same period, decides to hold it in abeyance; in that case, the Council shall state the reasons for its decision and set a deadline for re-examining it.

For the purposes of this Article, the Council shall act by a qualified majority. The qualified majority shall be defined as the same proportion of the weighted votes and the same proportion of the number of the members of the Council concerned as those laid down in the third sub-paragraph of Article 23(2)."

II. EC Treaty (Nice)

Article 137

"(1) With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:
(a) improvement in particular of the working environment to protect workers' health and safety;
(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated;
(e) the information and consultation of workers;
(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
(g) conditions of employment for third-country nationals legally residing in Community territory;
(h) the integration of persons excluded from the labour market, without prejudice to Article 150;
(i) equality between men and women with regard to labour market opportunities and treatment at work;
(j) the combating of social exclusion;
(k) the modernisation of social protection systems without prejudice to point (c).
(2) To this end, the Council:
(a) may adopt measures designed to encourage co-operation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.
The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions, except in the fields referred to in paragraph 1(c), (d), (f) and (g) of this Article, where the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament and the said Committees. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the

procedure referred to in Article 251 applicable to paragraph 1(d), (f) and (g) of this Article.
(3) A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2. In this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 249, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive.
(4) The provisions adopted pursuant to this Article:
- shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof;
- shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.

(5) The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."

III. Charter of Fundamental Rights of the European Union

Article 11
Freedom of expression and information

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
(2) The freedom and pluralism of the media shall be respected."

Article 12
Freedom of assembly and of association

"(1) Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
(2) Political parties at Union level contribute to expressing the political will of the citizens of the Union."

Article 52
Scope of guaranteed rights

"(1) Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
(2) Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.
(3) In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

IV. European Convention for the Protection of Human Rights

Article 10
Freedom of expression

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or

penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 11
Freedom of assembly and association

"(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

V. The North Atlantic Treaty
Washington D.C. – 4th April 1949

Article 5

"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security. (...)"

VI. Charter of the United Nations

Article 51

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. (...)"

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