years but which made an exception for widows who have not remarried and who are obliged to work after the death of a husband. The Court accepted the Commission's argument that the French rules gave automatic priority to widows and was thus contrary to Article 2(4) of the Equal Treatment Directive and the provision could not therefore be justified under Article 141(4) EC.

ERIKA SZYSZCZAK*

II. EXTERNAL RELATIONS

A. The Treaty establishing a Constitution for Europe

Each time this writer has prepared a three-yearly update on the external relations of the Union, the Treaty framework has changed and the sense that Europe's leaders are being distracted from vital problems grows. The Constitution for Europe now on offer, the result of a mandate from the European Council at Laeken to effect a simplification of the treaties with a view to making them better understood without changing their meaning, would introduce new legal uncertainties into the framework for the conduct of external relations. Its entry into force, however, now appears unlikely.

The fusion of the European Union and the European Community would make the Union a single organization with explicit international legal personality (Article I-7), and successor to the European Community (Article IV-438). There is provision for the contractual and non-contractual liability of the Union (Article III-431). The abolition of the Second Pillar under which the Common Foreign and Security Policy (CFSP) is currently constructed under rules not of European Community law but of public international law, leaves however uncertainty as to how the intergovernmental character of the Union's foreign policy would be safeguarded. The institutional and procedural rules are not fundamentally changed (in particular the near total exclusion of the European Court of Justice). Primacy as established by the European Court in Community law would however extend to all law adopted by the institutions of the Union (Article I-6). The Union's competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy, is not further defined, leaving it uncertain to what extent the adoption of common foreign policies in specific areas would circumscribe the independence of Member States in the conduct of their national foreign policies (Article I-12 and I-16).

While these provisions appear to call into question the satisfaction by the Member States of the independence in the conduct of foreign policy which is a key criterion of separate sovereign status, the Constitution offers a guarantee (Article I-11) that the limits of Union competence are governed by the principle of conferral and that competences not conferred on the Union remain with the Member States. The UK Government stated that the CFSP will remain intergovernmental and backed this assertion in the terms of the European Union Bill (which fell with the dissolution of Parliament). The Bill contained new powers to give effect to CFSP obligations, but

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would not equate these obligations with what are now 'Community rights and obligations' under section 2 of the European Communities Act 1972.

Under Article III-325, the Union's powers to conclude agreements with Non-Member States relating to CFSP are assimilated, except for procedural aspects, to the existing provisions for Community external agreements. No distinction is made regarding the effect of what are currently two kinds of international agreement. It is also not clear, given this lack of distinction, whether the Union may be capable of acquiring exclusive competence under Article I-13.2 for conclusion of some CFSP agreements. Curiously, however, the European Court is not excluded from considering CFSP agreements or their legal effects.

With the objective of improving the effectiveness of the formation of external policy and its representation abroad, the Constitution creates the new post of Minister for Foreign Affairs (Article I-28). The Minister for Foreign Affairs is to be appointed by the European Council, acting by qualified majority, and the President of the Commission, and shall 'conduct the Union's common foreign and security policy'. The intention is to merge the present posts of External Relations Commissioner and High Representative for the Common Foreign and Security Policy and thus to overcome institutional tensions and rivalries between the Commission and the Policy Planning and Early Warning Unit directed by Javier Solana within the Council Service. The Constitution makes special provision to absolve the Foreign Minister from Commission collegiate responsibility when he presides over the Foreign Affairs Council or acts under Council mandate. It does not however otherwise alter the powers of the two institutions to make external policy or to represent the Union abroad. There are therefore serious questions about whether this 'double-hatting' can work when, as is often the case, there is conflict between the Council and the Commission and in particular litigation before the European Court. The risk is that because of his divided allegiance the Foreign Minister would not have the full confidence of either institution. There is also, at political level, concern that the title of 'Minister for Foreign Affairs', a title until now conferred only by sovereign States, is a further move to giving the European Union the trappings, if not as yet the substance, of Statehood. As well as a longer-term President of the European Council, the Union would also have a flag, an anthem, a motto, a currency and a Europe day (Article I-8).

Another move towards integration of external representation is the proposed establishment of a European External Action Service. Under Article III-296 the Service is to comprise officials from the Council General Secretariat and the Commission as well as staff seconded from national diplomatic services. The Council is given power to establish the service on a proposal from the Minister for Foreign Affairs after consultation with the European Parliament and with the consent of the Commission. Consistently with a Conference Declaration on this Article, preparatory work for the Service has begun—and predictable fissures and rivalries are already emerging. Under Article III-328 the present delegations of the European Commission would be replaced by Union delegations in third countries and at international organizations. The delegations would be staffed not only by Commission officials but also by Council officials and by national diplomats on secondment. They would operate under the authority of the Minister for Foreign Affairs and in close co-operation with Member States' diplomatic and consular missions. These changes reflect increased integration and interchange between external services and could be implemented, at least on an interim basis, under existing Treaty powers.

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B. Defence policy

Over the last three years there has been quiet and constructive building and testing of the structures and resources assembled since the Joint Declaration by Britain and France at St Malo in December 1998. The European Security and Defence Policy was declared operational at the end of 2002 and since then has conducted low-key and successful military operations in Macedonia ('Concordia'), in Bosnia ('Althea'), and in the Democratic Republic of Congo ('Artemis', conducted under UN Security Council mandate).[1] In each case the European Union took over an operation previously conducted by NATO. Practical requirements have led not only to the conclusion of Status of Forces Agreements by the Union with Non-Member States where operations are taking place, but also to the conclusion of an Agreement between the Member States on the status of military and civilian staff seconded to the Union institutions and on headquarters and staff made available to the Union for defence exercises and operations.[2] A comprehensive framework for EU/NATO relations, known as the 'Berlin Plus arrangements' was concluded in March 2003 between the High Representative and the NATO Secretary General. Under these arrangements NATO guarantees EU access to NATO planning and the EU may request use of NATO assets and capabilities, including command of an EU-led operation by the NATO Deputy Supreme Allied Commander Europe.

In July 2004 the Council by Joint Action established the European Defence Agency—an intergovernmental agency intended to assist the development of more flexible and efficient European military resources.[3] The aim is to enhance armaments cooperation and create a competitive European defence equipment market. Research would be carried out in liaison with European Community research activities so as to enhance Europe's industrial potential in the area. Participation in the Agency is open to all States (though Denmark does not participate), but groups of Member States may establish ad hoc projects.

Much of this constructive work is mirrored in the Constitution. It must be stressed that what has already been accomplished under the Treaties of Amsterdam and Nice is the establishment of a defence capacity in support of CFSP policies—in particular conflict prevention and crisis management in States outside the Union. It does *not* amount to a 'common defence' by which is meant defence of the territories of the Member States against armed aggression. This core function is the responsibility of NATO, which is founded on a collective commitment to assist any Member that is the victim of an armed attack. Article I-41 makes clear this important distinction, and also provides that the framing of a common defence policy 'will lead to a common defence, when the European Council, acting unanimously, so decides'. Any such decision would not prejudice the position of the neutral States, and there is a saving for the NATO framework. A decision would require ratification under national constitutional requirements. The Constitution also gives explicit authority for the European Defence Agency—already established under existing powers.

For many States it was important that the defence provisions should not replicate or prejudice the security guarantee provided by NATO. Article I-41.7 provides that armed aggression on the territory of a Member State would place other Member States under

[1] See Council Decision 2003/432/CFSP of 12 June 2003, OJ L 147/42, 14 June 2003.
[2] Known as the EU SOFA, OJ 2003/C 321/02.
[3] Joint Action 2004/551/CFSP of 12 July 2004, OJ L 245/17, 17 July 2004.

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an obligation to assist it in accordance with the United Nations Charter. But there is a saving for the position of the neutral States, and a requirement that cooperation in this area 'shall be consistent with commitments under the North Atlantic Treaty Organization, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation'.

The Constitution's provisions on defence are clear and realistic, but it cannot be said that their entry into force is essential to further progress towards a European defence policy.

C. Iraq

Iraq illustrated vividly the limitations of the European CFSP. In February 2003 the European Council were agreed on the threat of proliferation of weapons of mass destruction, agreed on the need for full and effective disarmament of Iraq, agreed that the UN must remain at the centre of the international legal order and agreed that force should only be used as a last resort. But their disagreement about when that point had been reached was very sharp and very public. Five of the (then 15) Member States issued a public letter of support for the United States' approach to Iraq and were joined by Poland, Hungary and the Czech Republic, then still candidate States. President Chirac complained that those three States 'had missed a good opportunity to keep quiet'. Soon afterwards, France made clear its intention to veto at that time a further UN Security Council Resolution giving explicit authorization for the use of force to back up earlier resolutions on the disarmament of Iraq, and Germany (then a Member of the Security Council) also opposed a further resolution. Yet although the crisis had a damaging effect on relations within the Union, a few weeks later the European Commission began to provide emergency humanitarian aid through ECHO and later, after the adoption of a Security Council resolution establishing post-conflict arrangements, the Council of Ministers lifted the old sanctions and made provision for assistance with reconstruction.

Partly as a response to this public split, and partly as a reaction to the United States National Security Strategy of September 2002, the European Council in December 2003 adopted the first European Security Strategy.[4] The document is a complex account of threats and challenges to European security from such sources as failed States, weapons of mass destruction and terrorism, and places a strong emphasis on pro-active conflict management and on effective multilateralism.

D. Weapons of mass destruction

Also in December 2003 the European Council endorsed a Strategy Against Proliferation of Weapons of Mass Destruction (WMD)—nuclear, biological, and chemical weapons. This strategy formed part of the post-Iraq bridge-building process, but was also a response to the perceived threat of terrorists gaining access to WMD. It recognizes the need for counter-proliferation measures to be accompanied by efforts to eliminate the political motivations for the acquisition and threat of use of WMD such as instability and conflicts and to coordinate the range of available EU instruments with

[4] For comparative analysis of the two documents, see S Duke in (2004) 9 European Foreign Affairs Review 459. See also A Toje in (2005) 10 EFA Review 117.

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wider international systems of control under treaties with effective inspection powers. The Union, for example, will use all diplomatic means to strengthen participation in and compliance with regimes such as the Treaty for the Non-Proliferation of Nuclear Weapons (NPT), tighten its own export controls and help with the interdiction of the international movement by sea of WMD. In negotiation of agreements with certain third States, the Union will seek to include a 'non-proliferation clause' which might (following the precedent of clauses on human rights) be made an essential element of any agreement. A modified version of the clause has been included in the Euro-Mediterranean Agreement with Syria, but the agreement has not yet been formally signed.[5]

The European Union and the United States at their summit in Ireland in June 2004 adopted a Declaration on the Non-Proliferation of Weapons of Mass Destruction containing a multi-faceted list of actions to prevent, contain, and reverse proliferation—with particular reference to the terrorist threat.[6]

France, Germany, and the UK, acting within an agreed European policy framework, have made sustained efforts at the highest diplomatic level to persuade Iran faithfully to adhere to its obligations under the NPT Treaty. Iran is a Party to the NPT and to a Safeguards Agreement within its framework, and gives administrative effect to an Additional Protocol allowing random inspection by the International Atomic Energy Agency (IAEA). The IAEA has however reported that it is unable to declare, on the basis of its inspections, that all nuclear material in Iran is in use for peaceful purposes or otherwise accounted for. As a Party to the NPT Iran has an 'inalienable right' to develop, produce and use nuclear energy for peaceful purposes without discrimination, but the concern is that Iran is enriching uranium to a point where it would be relatively easy for it to produce nuclear weapons. In October 2003, following a visit to Tehran by the Foreign Ministers of the three European States taking the lead on this, and the deployment of various incentives such as a trade agreement with the European Community, support for WTO membership and easier access to European technology and supplies, Iran agreed to suspend uranium enrichment and reprocessing and to cooperate with the IAEA to rectify outstanding issues of compliance. In June 2004, however, IAEA inspectors expressed dissatisfaction with Iran's explanations of the discovery of highly enriched uranium at two sites. Suspicions over Iran's compliance and the motives for its enrichment programme have continued, as have European diplomatic pressures and US threats to refer Iran's conduct to the Security Council. Iran's case is that in view of past sanctions imposed by the international community it cannot exercise its right to use nuclear energy for electricity generation unless it becomes self-sufficient rather than relying on sharing research and development from other Parties to the NPT.[7]

E. New family, new neighbours

In 2004 the big bang enlargement brought ten new Member States into the Union, just in time to take part in European Parliament elections and, on 29 October, to sign the

[5] Text in Council Doc 16336/04, Arts 3, 4, and 5.

[6] Dromoland Castle 26 June 2004, Council Doc 1076/1/04 REV 1 (Presse 206).

[7] *The Observer*, 1 May 2005. See also *Iran's Nuclear Programme: A Collection of Documents*. Jan 2005, Cm 6443; E Denza in (2005) 10 EFA Review 289.

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Treaty Establishing a Constitution for Europe. Accession Treaties with Romania and Bulgaria were signed in April 2005. Negotiations with Turkey—waiting in the anteroom for decades while other applicants swept past—will begin in October 2005. Croatia has been accepted as a candidate State, but due to doubts as to its zeal in cooperating with the International Criminal Tribunal for Yugoslavia no date for negotiations has yet been set.

Geographical enlargement as well as enhanced concerns over borders and security has led to a major foreign policy initiative by the European Union known as the European Neighbourhood Policy (ENP). The ENP is directed, from the Union's point of view, at pro-active conflict settlement, cooperation in fighting organized crime and terrorism, and encouraging and assisting its new neighbours towards stability, good governance, democracy and respect for human rights. In exchange for these improvements the Union would offer not membership but only conditional integration in the single market—a status potentially similar to that granted under the European Economic Area. Russia declined the invitation, and the list of countries regarded as covered in June 2004 comprises Belarus, Moldova, Ukraine, Armenia, Azerbaijan, Georgia, Algeria, Egypt, Israel, Jordan, Libya, Morocco, Palestine, Syria, and Tunisia. This list not only spans the Eastern European and South Mediterranean regions, but covers groups of countries whose own relations are strained or fractured.[8] Under the ENP, the peaceful settlement of disputes is set up as an essential aspect of EU external action, and it is hoped that economic integration, investment and financial and technical assistance will prove to be as compelling an incentive to stability and reform as the goal of accession has been over the last 20 years. The ENP is already being implemented through diverse and detailed Action Plans for each country and by reform and rationalization of the current plethora of instruments under which finance and assistance is channelled.[9]

Although prospective membership of the Union is not part of the ENP deal, it is not precluded, and several of the States participating have made clear that membership is their long-term objective. The Union however does not share that objective, and the States in the Western Balkans that are regarded as potential candidates are not included in the ENP.

F. New legal framework for air services

The Judgments of the Court of Justice in the *Open Skies Cases,*[10] in which the Commission established that eight Member States had infringed their Treaty obligations, have already been carefully analysed.[11] All eight States had maintained restrictive nationality conditions in their air services agreements with Non-Member States

[8] See Commission Communication *European Neighbourhood Policy Strategy Paper* May 2004, COM(2004) 373.

[9] See articles by R Aliboni; RA Del Sarto and T Schumacher; S Pardo and L Zemer on the ENP in EFA Review 10 (2005) 1–78; N Copsey and A Mayhew (eds) *European Neighbourhood Policy and Ukraine* (Sussex European Institute Brighton 2005), esp Cremona paper on 'Partnership, Security and the Rule of Law'.

[10] Cases C-466–469/98; C-471–472/98; C-475–476/98.

[11] See CMR Greaves, 2003 ICLQ 499; R Holdgaard (2003) 8 EFA Review 365; R Franklin (2005) 10 EFA Review 79.

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which violated EC Treaty rules on freedom of establishment, while seven of these had concluded 'open skies agreements' with the United States covering areas where the Community had adopted internal rules and under the AETR principle had thereby acquired exclusive external competence. The Court's judgments were cautious in their application of pre-existing principles, and were criticized rather for leaving the Member States with undue flexibility as to how they should set about renegotiating their bilateral agreements in order to comply with them.

In June 2003 the Council agreed to give the Commission a double mandate—to negotiate an Open Aviation Area with the United States based on commercial principles, fair competition and equivalent regulatory conditions, and a general 'horizontal' mandate to assist Member States to amend their bilateral agreements so that entitlements are available to any Community-controlled airline. In 2004 the Council also agreed a procedure under which the continuing rights of the Member States to negotiate agreements in areas *not* held to be within exclusive Community competence are subject to conditions of transparency and supervision.[12]

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[12] Regulation 847/2004, OJ L 195/3, 2 June 2004. See House of Lords Select Committee on the European Union, 17th Report 2002–3 *'Open Skies' or Open Markets?* and Supplementary Report, 36th Report, 2002–3, HL Papers 92 and 151.

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