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The Regulatory context of private military and security services at the European Union level (Addendum)

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Regulating privatisation of "war": the role of the EU in assuring the compliance with international humanitarian law and human rights

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1. Introduction[1]

This is an Addendum to the April 2009 report on existing European Union (EU) legislation with respect to private military and security services, delivered pursuant to WP 7.1 sub b ("The existing regulatory context for private military and security services at the national and EU level, report on the existing regulatory regime at the EU level") of the project *Regulating Privatization of "War": the role of the EU in assuring compliance with international humanitarian law and human rights* (Priv-War).[2]

2. Scope of this Addendum

On 1 December 2009, the Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community entered into force.[3] This Addendum briefly discusses the most important changes in the institutional structure of the EU concerning the Common Foreign and Security Policy (CFSP) in connection with the topic of regulating private military and security (PMS) services at the EU level, and provides a brief update of relevant regulations at the EU level since the April 2009 report.

3. The Treaty of Lisbon and EU competences (Internal Market; CFSP)

3.1 The institutional setting

Starting from the working hypothesis that the EU role in regulating the PMS industry for better compliance with human rights law and international humanitarian

[1] Prepared by Utrecht University, School of Law, Center for Conflict and Security Law, by Dr. G.R. den Dekker. Comments on the contents are welcome (G.R.denDekker@uu.nl). [25 February 2010; minor update 4 May 2010]

[2] See G. den Dekker, 'The Regulatory Context of Private Military and Security Services at the European Union Level', Priv-War National Report Series 04/09, April 2009 (www.priv-war.eu) [hereinafter: 'EU level report'].

[3] See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306/1, 17.12.2007.

law (IHL) is unsatisfactory at present,[4] the main shortcomings that can be identified today are, first and foremost, the fact that the export of – especially: armed – PMS services, from the EU to third States – conflict areas in particular – has not been regulated at the EU level. Furthermore, the offering and providing of PMS services within the Internal Market has not been harmonized beyond the primary EU law (the Treaties). It should be mentioned however, that at the national level these domestic private security services are in general comprehensively regulated (through legal prohibitions, licensing- and registration mechanisms). Also, the European Commission by 28 December 2010 shall assess the possibility of presenting proposals for additional harmonizing instruments for the Internal Market in the framework of the general Services Directive 2006/123/EC. If regulation at the EU level is contemplated, the main concern to be addressed would therefore be how to control armed private contractors from companies established in the EU and/or working from an EU Member State and prevent them from violating human rights law and/or IHL in the conflict areas where they operate. The export of (armed) PMS services outside the EU to zones of conflict is a matter for the external operations policy of the EU, the CFSP in particular. The next sections will briefly assess whether the recent changes in the institutional structure of the EU likely have implications for the possible regulation of the PMS sector at the EU level.

3.2 The CFSP after 'Lisbon'

With the entry into force of the Treaty of Lisbon the EU has officially lost its well-known pillar structure. The European Community has disappeared and the EU has remained, as (the single) international legal person. The institutional structure of the EU however is still arranged by two separate treaties. The Treaty on European Union (TEU) comprises the general principles and general institutional provisions of the Union as a whole including general provisions on the Union's external actions. The Treaty on the Functioning of the European Union (TFEU) brings together the policy areas of the Internal Market and the Co-operation in Justice and Home Affairs.[5] In the TEU there are both general and specific provisions on the CFSP, including on the Common Security and Defense Policy (CSDP). The CSDP – in essence no more than a renaming of the ESDP[6] – is the part of the CFSP that is meant to provide the Union with the operational capacity drawing on civilian and military assets of the Member States.[7] As such, the CFSP remains separate as the only policy area outside the TFEU.[8]

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[4] See EU level report, p. 2.

[5] The latest consolidated version of the TEU and of the TFEU can be found in OJ C 115/1, 9.5.2008.

[6] See S. Biscop, 'From ESDP to CSDP: Time for some Strategy', *La revue Géopolitique online*, 16 January 2010 (at http://www.diploweb.com/spip.php?page=imprimer&id_article=551).

[7] On the CSDP, see Articles 42-46 TEU (new); the CSDP eventually may develop into a common defense. Art. 42(7) TEU contains a collective self-defense arrangement for all EU Member States in case one of them is subject to an armed attack on its territory. Though similar in wording to Art. 5 of the North Atlantic Treaty, NATO shall remain the basis and the instrument for the collective defense of the Member States that are NATO members. Member States that are willing to enhance military

The CFSP still bears many marks of 'intergovernmental' rather than 'integrated' policy, also with the Treaty of Lisbon in force. The main rule, in Article 24(2) TEU, is that the CFSP shall be defined and implemented by the European Council and the Council acting unanimously (except where the TEU provides otherwise). Yet, several institutional provisions have been introduced to bridge the gap between CFSP and the other policy areas in order to ensure consistency and enhanced effectiveness in the external operations of the EU. Notably, the new High Representative of the Union for Foreign Affairs and Security Policy (hereinafter: the High Representative), who also is one of the vice-presidents of the European Commission and the Head of the European Defense Agency, is responsible for putting into effect the CFSP, together with the Member States (Art. 24(1) TEU). The High Representative in respect of the area of CFSP, and the European Commission for other areas of external action, may submit joint proposals to the Council in the field of the strategic interests and objectives of the Union (Art. 22(2) TEU). The High Representative shall submit recommendations to the Council when it is envisaged that the Union shall conclude an agreement with one or more third countries or international organizations which relates exclusively or principally to the CFSP (Art. 218(3) TFEU). Any Member State, next to the High Representative or the High Representative with the Commission's support, may refer any question relating to the CFSP to the Council and may submit to it initiatives or proposals as appropriate (Art. 30(1) TEU). The High Representative can submit proposals for decisions by the Council relating to the CSDP, including the possible use of both national resources and Union instruments together with the Commission where appropriate (Art. 42(4) TEU). It can be observed that regarding the external operations, especially the CFSP, the Council remains the EU's pivot.

3.3 Regulatory instruments

The main regulatory instruments with binding effect within the CFSP have remained the same in substance as before the Treaty of Lisbon albeit that the designation 'joint action' and 'common position' has disappeared. Reference is now exclusively to 'decisions' (Art. 25 TEU).[9] Such decisions may define (i) actions to be undertaken by the EU, (ii) positions to be taken by the EU and/or (iii) implementation arrangements for these actions or positions. The decisions can take the specific form of (implementation of) operational action for particular objectives if the international

integration between them can do so within the framework of the EU (Permanent Structured Co-operation).

[8] An important motivation for the new institutional arrangements in the CFSP has been the desire of the EU to play a more effective role in international crisis management. It can be doubted whether the innovations will significantly improve the decision-making and leadership on issues of security and defense policy and, consequently, the effectiveness of the Union as an international crisis manager, see S. Blockmans & R. Wessel, 'The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?' 14 *JCSL* 2 (2009): 265-308.

[9] The general policy guidelines and strategic lines for the CFSP are defined by the European Council and elaborated and executed by the Council by way of decisions (Art. 25, 26 TEU).

situation so requires (Art. 28 TEU; reminiscent of the old 'joint action') or they can define the Union's approach to a particular matter of a geographical or thematic nature (Art. 29 TEU, reminiscent of the old 'common position'). The actions and positions as laid down in those decisions are binding the Member States in their positions and policies. Still, it is made explicit that within the CFSP the adoption of legislative acts is not permitted (Art. 24(2), Art. 31(1) TEU). The notion of 'legislative acts' of the EU refers in essence to Regulations and Directives.[10] A Regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods (See Art. 288 TFEU).

There is no formal hierarchy in secondary Union law. A Regulation is special - it is the most 'intrusive' regulatory instrument which becomes part as such of the internal legal order of the Member States - and has no counterpart in the CFSP. When looking at the effects, the difference between a Directive and a CFSP decision arguably can be small. Both these instruments can produce similar results, since national legislation of the Member States can be the objective of a Directive and of a CFSP decision on operational actions or on particular geographical or thematic matters, as well.[11] Still, Directives would generally be used for 'internal' measures, whereas CFSP decisions generally relate to 'external' matters.

3.4 CFSP and EU regulatory competence

The secondary law of the Union can only be adopted to exercise the Union's competence on the basis of the Treaties - the primary law of the Union - and must remain within the boundaries of that primary law and in addition must have the correct legal basis. Competences not conferred upon the Union in the Treaties remain with the Member States.[12] In some areas, such as competition rules for the Internal Market, the Union has exclusive competence (Art. 3 TFEU), which means that only the Union may legislate and adopt legally binding acts in that area.[13] It should be noted that even if the Union has exclusive competence, also after 'Lisbon' the Member States have the right

[10] It can also refer to the (individual) Decisions that can be taken under Art. 288(3) TFEU and which shall be binding in their entirety to the addressee(s). These are other decisions than the decisions of Art. 25 TEU.

[11] See for example, Council Joint Action 2000/401/CFSP to control technical assistance to certain military en-users; Council Common Position 2003/468/CFSP on the control of arms brokering. Similarly, measures taken by the Council pursuant to Article 215 TFEU (former Art. 301 TEC) for the interruption or reduction of economic and financial relations with one or more third countries, could lead to national (implementation) legislation.

[12] See Art. 5(2) TEU and see also Declaration no. 18 of the Final Act to the Lisbon Treaty. The general international law principle that the competences of international organizations are determined by attribution (by the member States) has been laid down explicitly as the 'principle of conferral' in both the TEU (Art. 5) and the TFEU (Art. 7).

[13] Art. 2(1) TEU stipulates that when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

to take such measures as they consider necessary for the protection of their essential security interests as well as the possibility to take, under exceptional circumstances, emergency measures which may affect the competition in the Internal Market (Art. 346-348 TFEU).[14] In other areas, such as civil protection, the Union has only limited competence to carry out actions to support, coordinate or supplement the actions of the Member States at the European level (Art. 6 TFEU). Again in other areas there is a shared competence between the EU and the Member States (Art. 4 TFEU). When a competence is shared with the Member States in a specific area, both the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence (Art. 2(2) TFEU).

As regards the delimitation of the Union competences between the implementation of the CFSP on the one hand and the areas of exclusive or additional Union competence as laid down in the TFEU on the other hand, Article 40 TEU is now more balanced in comparison with the previous Article 47 TEU (old): not only shall implementation of CFSP respect Union powers laid down in the TFEU, but implementation of TFEU policies shall respect CFSP powers as well. The new institutional provisions in the TEU (and the TFEU) should make it easier for the Commission, the High Representative and the Council to co-ordinate the initiating and deciding on policy issues in the field of CFSP thereby taking account of Internal Market requirements and the legislative acts pertaining to it which (indirectly) may influence security and defense matters at the EU level. Still, also with the Treaty of Lisbon in force it can be assumed that regulatory measures at the EU level concerning external action should not at the same time create legal or factual barriers for the functioning of the Internal Market, even if the Commission has not yet adopted specific measures.[15] After all, the main thrust of the process of European integration is economical and inward-looking ('internal' market), the CFSP is still separate from the other policy areas and even the trade in defense-related products is being regulated in order to come close to a functioning internal market in its field.

4. Implications for the regulation of PMS services at the EU level

The question has been raised to what extent the institutional changes after 'Lisbon' can have implications for the possibilities of regulating PMS services at the EU level. The short answer is that there are few such implications, if any. The -

[14] Art. 346-348 TFEU are identical to Art. 296-298 TEC (the only change being that the term 'internal' market replaced the term 'common' market). See on Art. 296-298 TEC, EU level report, p. 7 and 15-17.

[15] See also EU level report, p. 6-7. It could be said that the wording of Art. 40 TEU in order to be workable no longer prohibits a combination of an Internal Market- and a CFSP legal basis for a regulatory measure at the EU level, but this is by no means certain. The division of competence between the areas as expressed in Art. 40 TEU is one of the very few instances where the Court of Justice of the EU has jurisdiction in the field of CFSP and decision making in that area (see Art. 275 TFEU). A new '*Ecowas*' type of case therefore is not impossible.

strengthened - CFSP is still largely separate from the other EU policy areas and the competences of the Commission and the Council and the available binding regulatory instruments have not changed in substance. Nevertheless, it is worthwhile to see whether the strengthened CFSP has possible implications for the division of competences between the Union and the Member States if it comes to regulating the PMS sector.

If regulatory measures for the PMS sector (-services) would be directly linked to the implementation of the CFSP, for example if it concerned establishing guidelines for the hiring of PMS contractors as part of EU CSDP missions (Art. 43 TEU), there can be little doubt that the EU is competent to take the decisions as provided in the CFSP. The same can likely be said with respect to the support for human rights and the maintenance of peace and international security, which may be influenced by the EU-based PMS sector operating in conflict areas outside the EU. The Union's competence in matters of foreign and security policy indeed covers all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defense policy (Art. 24(1) TEU).[16] It is also made explicit in the TFEU that the Union shall have competence, in accordance with the provisions of the TEU, to define and implement the CFSP, including the progressive framing of a common defense policy (Art. 2(4) TFEU). Furthermore, the regulation of EU-based PMS services, even if the PMS companies would be acting primarily outside the EU, can hardly avoid touching on aspects of Internal Market functioning (such as non-discrimination, the freedom of movement to provide services and the freedom of establishment within the EU).[17] Art. 4 TFEU *inter alia* mentions the Internal Market in the non-exhaustive list of areas of shared competence. Since regulation of the PMS sector is not necessarily or completely covered by policy areas for which an exclusive competence of the Union exists, it can be concluded that a general regulation of the PMS sector within the EU is a topic for which there is a shared competence between the EU and the Member States in principle (even though, depending on the precise aim and content of the contemplated regulation, the division of competences could be different – for example, if the regulation is primarily meant to provide competition rules for the offering or providing of PMS services within the Internal Market, it means an area is entered where the Union has exclusive competence).

If the EU is competent in principle but not exclusively competent, the principles guiding the EU as to which level and to what extent it shall act are those of subsidiarity and proportionality (Art. 5 TEU and Protocol no. 2 to the Lisbon Treaty). Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and

[16] The Union's objectives for external action, which are guiding it also in the context of CFSP (Art. 23 TEU) are also sufficiently wide for that purpose, as they include measures to safeguard the Union's security, its independence and integrity, to consolidate and support democracy, the rule of law, human rights and the principles of international law, and to preserve peace, prevent conflicts and strengthen international security (Art. 21 TEU).

[17] See the case law of the Court of Justice referred to in EU level report, p. 8-11.

local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply these principles, as laid down in the Protocol no. 2 on the application of the principles of subsidiarity and proportionality. Although Art. 5 TEU is broadly worded the acts with which Protocol no. 2 is concerned are in substance (draft) legislative acts. Initiators of legislative proposals of the EU (i.e. the Commission, groups of States, or others) shall justify and state clearly why any draft legislative acts comply with subsidiarity and proportionality, which shall be subject to the review of national Parliaments.[18]

The regulation of export of EU-based PMS services to conflict areas abroad could have an impact on human rights protection in those areas and possibly also on EU crisis management if the PMS sector becomes involved in those operations. There likely are in addition implications of regulation of the PMS sector for (the competition within) the Internal Market. Furthermore, if regulation is left to the individual Member States there is a clear risk that a PMC/PSC may decide to relocate to a Member State with a lenient regulatory regime.[19] In sum, it would seem that there is sufficient ground to address the issue of PMS sector regulation at the Union level (subsidiarity). Depending on the precise aim and content of the contemplated regulation, the objective of harmonization could call for a Regulation, unless the same result can be achieved by less intrusive legally binding acts, namely a Directive as regards the Internal Market or a decision for operational action or on a specific matter as regards the CFSP (proportionality). As regards the division of relevant competences between the EU institutions it has already been mentioned that assumedly the Treaty of Lisbon has not brought about any changes.

5. Update on relevant regulations at the EU level[20]

This section provides an overview of updates (since last years' EU level report) of regulations at the EU level in security- and defense related matters to assess whether they likely impact on the (regulation of the) PMS sector.

In the field of security related export controls a new Council Regulation (428/2009) for the control of exports, brokering, and transit of dual-use items has replaced the existing regulations.[21] New features include the introduction of controls on

[18] See Protocol no. 2, Article 4. In Article 8, it is stipulated that the correction mechanism of Art. 263 TFEU (i.e. action before the Court of Justice of the EU on the grounds of infringement of the principle of subsidiarity by a legislative act) shall be available.

[19] It has happened in the past that a PMC/PSC confronted with regulatory constraints by the home State relocated to another State and resumed activities under a different name (e.g. Executives Outcomes).

[20] For an analysis of relevant regulations - as per April 2009 and therefore partly superseded by this section of this Addendum, and case-law, see EU level report, p. 7-24.

[21] Council Regulation (EC) 428/2009 setting up a Community regime for the control of exports, brokering, and transit of dual-use items (recast), OJ L 134/1, 5.5.2009. Annex V to the Regulation lists ten pre-existing Council regulations that have been repealed by it. The changes implemented in the control entries are a result of the review of the Wassenaar Arrangement Dual Use Lists during 2008,

brokering activities and transit with regard to dual-use items. These added control mechanisms largely correspond to the mechanism for the control of arms brokering with regard to items on the EU Common List of military equipment.[22] Security related export controls under the new Regulation relate to dual-use of WMD materials, equipment and components (and technical assistance as defined) as well as brokering services for the purchase, sale or supply of such dual use items and therefore, like the old regulations, does not cover the (types of) services that are commonly offered by PMCs or PSCs.[23]

The control of export of military technology and equipment from the EU is subject to Council Common Position 2008/944/CFSP defining common rules,[24] which has effectively replaced the European Code of Conduct on Arms Exports of 1998.[25] As such, the voluntary Code of Conduct has been replaced by a binding arrangement,[26] indicating that common foreign policy goals must not be sacrificed to national export interests. Like under the Code, the Common Position is meant to ensure that the Member States through their national legislation shall control the export of technology and equipment on the Common Military List of the EU[27], thereby using national military technology and equipment lists for which the EU Common Military List shall be a reference point (Art. 12). Like the Code before it, the Common Military List does not relate to military or security *services* (only some technical services connected with certain items on the Common Military List of the EU are covered). Like under the Code, the EU Member States shall use their best endeavors to encourage third States which export military technology or equipment to apply the criteria of the Common Position (Art. 11).[28]

Directive 2009/43/EC on simplifying the terms and conditions of intra-EU transfers of defense-related products entered into force in June 2009.[29] The Directive is meant to add to the development of an internal market for defense-related equipment by facilitating intra-EU transfers through harmonization of relevant laws and regulations of Member States. The defense-related products to which the Directive applies must

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Missile Technology Control Regime Technical Annexes during 2008, and Australia Group Control Lists during 2008.

[22] See Council Common Position 2003/468/2003/CFSP; see EU level report, p. 13.

[23] The services that are covered under the dual-use export (and transit) regime are often referred to as 'strategic services'. They cover non-physical transfer of software and technology, technical assistance and brokering. The controls relating to technical assistance are laid down in Council Joint Action 2000/401/CFSP, see EU level report, p. 11.

[24] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, OJ L 335/99, 13.12.2008.

[25] See on this Code of Conduct, EU level report, p. 12.

[26] Cf. Art. 29 TEU (old Art. 15 TEU): "Member States shall ensure that their national policies conform to the Union positions".

[27] The Common Military List of the European Union is adopted annually. The most recent version can be found in Council Notice of 15 February 2010, *OJ* C 69/19, 18.3.2010.

[28] See in this respect also Council decision 2009/1012/CFSP of 22 December 2009 on support for EU activities in order to promote the control of arms exports and the principles and criteria of Common Position 2008/944/CFSP among third countries, OJ L 348/16, 29.12.2009.

[29] Directive 2009/43/EC of the European parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defense-related products within the Community, *OJ* L 146/1, 10.6.2009.

strictly correspond to the Common Military List of the European Union (Art. 13). Even then, this new Directive (in Ar. 1(3)) recognizes the right of Member States to invoke, on a case-by-case basis, (old) Article 296 TEC (now 346 TFEU) which provides for an exception to the rules based on a Member State's invoking of its essential security interests.[30] The frequent use of this exception was the primary motivation for further harmonization attempts in this field. In connection with the same, a new procurement Directive in the field of defense and security (2009/81/EC) has entered into force in August 2009.[31] The general ('civil') procurement Directive 2004/18/EC continues to apply to public contracts, even if procured by awarding authorities in the field of defense and security, but with the exception of contracts to which the new Directive is applicable.[32] The new Directive applies to procurement of military equipment such as arms, munitions and other war materials and also to sensitive non-military contracts in areas such as the protection against terrorism which often have features similar to defense contracts. The Directive applies to services insofar as they are directly related to the supply of military equipment or sensitive equipment (i.e. items for security purposes involving classified information) or if they specifically serve military or sensitive purposes (both categories are not further defined but generally described as 'military and civil defense services' and 'investigation and security services'). Even though it is meant to harmonize procurement precisely in the sensitive area of the defense and security markets, the new Directive still allows for exemptions if a Member State considers this necessary to protect essential military interests and security-related confidential information (cf. Article 296 TEC, now Article 346 TFEU).[33] This would apply to contracts which are so highly sensitive that even the new rules cannot satisfy the security needs of the Member State concerned. However, it is expected that in most cases the Member States can use the new Directive without any risk for their security.

With respect to the EU position on International Humanitarian Law (IHL), the Council has published an updated version of the EU Guidelines on promoting compliance with IHL.[34] The changes to the document are technical, and include references to new legislative and other instruments having a bearing on the protection of persons in armed conflicts. One of the criteria for refusing export licenses of military equipment and technology from the EU is whether the country of final destination

[30] On Article 296 TEC, see further EU level report, p. 14-17.

[31] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216/76, 20.8.2009.

[32] Art. 71 of Directive 2009/81/EC has amended article 10 of Directive 2004/18/EC to that effect. On Directive 2004/18/EC, see EU level report, p. 14.

[33] See Directive 2009/81/EC, Art. 2. See also Articles 12 and 13 of the Directive, which exclude certain contracts from its scope of application.

[34] See Council Notice on Updated European Union Guidelines on promoting compliance with International Humanitarian Law (IHL), 2009/C 303/06, OJ C 303/12, 15.12.2009. See also EU level report, p. 18.

respects human rights and IHL.[35] The express reference to IHL in this context was absent in the previous document.

It can be observed that any specific regulation of the PMS sector is still absent at the EU level. Existing rules and regulations which could indirectly impact on the PMS sector relate to specific goods not to the offering or providing of (private military or security) services.

6. Conclusions & Observations

The entry info force of the Treaty of Lisbon has introduced important institutional changes to the EU, in particular in the field of CFSP (which includes the CSDP). These changes however have not put an end to the institutional dividing line between the CFSP and the other policy areas of the Union, despite the fact that Art. 40 TEU (new) is meant to ensure more mutual respect as regards the implementation of the CFSP and the other policy areas. The competences of the Commission and the Council, as well as the available binding regulatory instruments have not changed in substance. It can be concluded that few implications, if any, derive from the institutional changes in respect of possibilities for regulating PMS services at the EU level. Despite important developments (e.g. the control of export of military technology and equipment has now been arranged in a binding instrument), any specific regulation of the PMS sector is still absent at the EU level. A general regulation of the PMS sector in the EU would seem to be a topic for which a shared competence between the Union and the Member States exists in principle (though this could be different depending on the precise aim and content of a given instrument).

If competent, the Union must observe the principles of subsidiarity and proportionality in determining the level and extent to which it should act, in particular in its role as legislator. The shared interests of the Member States in regard of the regulation of the PMS sector as well as the clear risk that a PMC/PSC may decide to relocate to a Member State with a lenient regulatory regime are in favor of regulatory action at the EU level. In regard of regulating the 'export' of PMS services from the EU to third States, it would seem that the Council under the CFSP is competent in principle to take decisions. Still, possible implications for (the competition on) the Internal Market may call for harmonizing measures on the initiative of the Commission. Also after 'Lisbon', it can be assumed that regulatory measures at the EU level concerning external action should not at the same time create legal or factual barriers for the functioning of the Internal Market, even if the Commission has not yet adopted specific measures. Depending on which EU body is competent, regulatory measures could take the form of a Regulation, which has no counterpart in the CFSP, unless the same result could be achieved by way of less intrusive binding instruments (proportionality).

[35] See Common Position 2008/944/CFSP, Criterion two.