



Project no. CIT1-CT-2004-506392

NEWGOV **New Modes of Governance**

Integrated Project
Priority 7 – Citizens and Governance in the Knowledge-based Society

The Impact of Intergovernmentalism on the Evolution of CFSP
reference number: 01/D51

Due date of deliverable: December 2006
Actual submission date: 13 March 2007

Start date of project: 1 September 2004

Duration: 48 months

Organisation name of lead contractor for this deliverable:
University of Cologne, Udo Diedrichs (with support from Tobias Kunstein)

Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)		
Dissemination Level		
PU	Public	X
PP	Restricted to other programme participants (including the Commission Services)	
RE	Restricted to a group specified by the consortium (including the Commission Services)	
CO	Confidential, only for members of the consortium (including the Commission Services)	

Summary

Decision-making in CFSP has been traditionally summarised under the heading of intergovernmentalism, marking a sharp difference to Community-based procedures in the first pillar of the EU. Still, this characterization has increasingly become problematic in recent years. In the framework of a basically intergovernmental institutional design, a number of different ways and modes of policy-making have emerged which are increasingly converting the legal and living constitution of CFSP into a "mixed-mode" policy area in which intergovernmental bargaining co-exists with emerging processes of coordination and market regulation.

Contents

1	THE IMPACT OF INTERGOVERNMENTALISM ON THE EVOLUTION OF CFSP AND ESDP.....	3
2	THE LEGAL CONSTITUTION OF CFSP: CHANGE WITH AND WITHOUT TREATY REVISIONS.....	3
2.1	TREATY REFORMS: FOLLOWING THE PATH OF INTERGOVERNMENTALISM.....	3
2.2	CHANGES TO THE RULES WITHOUT TREATY REFORM: PRAGMATIC INTERGOVERNMENTALISM AT WORK.....	5
2.2.1	<i>Secondary Legislation and the Evolution of CFSP.....</i>	6
2.2.2	<i>Inter-institutional arrangements.....</i>	6
2.2.3	<i>Intra-institutional rules: compensating missing Treaty-based competences.....</i>	7
3	THE LIVING CONSTITUTION OF CFSP: TRENDS AND DEVELOPMENTS.....	8
3.1	LEGISLATION IN CFSP: TRENDS AND DYNAMICS IN INTERGOVERNMENTAL POLICY-MAKING.....	8
3.2	MORE THAN INTERGOVERNMENTALISM: EC LEGAL ACTS IN CFSP.....	12
3.3	THE FINANCING OF CFSP: MIXING UP THE SOURCES.....	14
3.4	ULTRA -SOFT COORDINATION IN CFSP/ESDP: SHAMING WITHOUT NAMING?.....	17
3.5	REGIME-BUILDING IN CFSP AND ESDP: CREATING A MARKET WITHOUT A SUPRANATIONAL AUTHORITY.....	18
4	CONCEPTUALISING CHANGE: HYBRIDISATION, MIXTURE AND INNOVATION?.....	19

Table of Figures and Graphs

TABLE 1:	CFSP LEGAL ACTS 1993-2004 (INCLUDING AMENDMENTS).....	9
TABLE 2:	TOPICS OF JOINT ACTIONS 1993-2004.....	9
TABLE 3:	THE REGIONAL FOCUS OF JOINT ACTIONS 1993-2004.....	10
TABLE 4:	CURRENT OPERATIONS IN EU CRISIS MANAGEMENT.....	11
TABLE 5:	EC LEGISLATION RELATED TO CFSP 1993-2004.....	12
TABLE 6:	MAIN TOPICS OF EC REGULATIONS PROVIDING FOR THE IMPOSITION OF RESTRICTIVE MEASURES AGAINST NATURAL OR LEGAL PERSONS BASED UPON PRIOR CFSP ACTS 1993-2004.....	13
TABLE 7:	FINANCIAL SOURCES OF EU EXTERNAL ACTION.....	16

1 The Impact of Intergovernmentalism on the Evolution of CFSP and ESDP

The impact of governing modes may be approached from different perspectives. In the multi-level system of the EU, different levels of governance have to be taken into account when trying to assess the importance of different modes of steering and decision-making. In the first place, an institutional impact of a specific mode of governance may become visible at the EU level, changing the institutional dynamics and leading to new ways of decision-making. At the national level, effects may be measured in terms of Europeanisation of member states and societies, but also by identifying potential for resistance. In this paper, the first perspective will be applied in order to assess the impact of intergovernmentalism on the institutional evolution of CFSP since its creation in the early 1990s, in keeping with the overall research perspective of cluster one and the follow-up to the emergence and evolution of governing modes in different policy areas.

This research perspective will be focused on two levels of institutional impact: the level of the primary law and institutional foundations of CFSP, subject to a process of reform and change since the inception of the Treaty of Maastricht, and mainly shaped by intergovernmental bargaining at different IGCs, and the level of the living constitution, where the institutional evolution of CFSP is subject to the daily interaction of EU institutions and member governments in order to produce a policy output in terms of formal and informal instruments. In order to identify the impact of intergovernmentalism as precisely as possible, this analysis will resort to quantitative data as far as possible regarding the evolution of CFSP and its policy output. Furthermore, different forms and methods of institutional adaptation will be assessed with regard to their potential for shaping CFSP in the legal as well as living dimension of its constitution.

2 The Legal Constitution of CFSP: Change with and without Treaty Revisions

2.1 Treaty reforms: following the path of intergovernmentalism

The Treaty revisions since the coming into force of the Maastricht Treaty have brought major changes to the institutional and procedural set-up of the CFSP, without formally modifying its basically intergovernmental nature. The process in place since 1992 may be described as a formal legalisation of procedures and structures, coupled with a strengthening of institutional capacities (via the introduction of the post of a High Representative for CFSP and of Special Representatives) and facilitation of decision-making (via the introduction of constructive abstention and modifications in the provisions on the use of qualified majority voting. The elaboration of the Constitutional Treaty first within the Convention, then finalised in the Intergovernmental Conference, has added a number of substantial changes to the existing framework, and pending ratification, would have endowed CFSP with a number of important improvements of its functioning in terms of efficiency and effectiveness, less so in terms of legitimacy and transparency.

As Michael Smith sustains, “(t)he transgovernmental EPC network, the coutumier, the increased linkages between EPC and the EC, and the limited though significant involvement of

the ECJ laid the groundwork for the most important phase of legalization of European foreign policy: raising its status to that of an international treaty¹.

The demand for translating EPC into a more coherent, effective and legitimate policy structure increased considerably in the 1980s:

- The dynamic evolution of the European Community triggered off by the Single European Act, the Single Market programme and the introduction of majority voting in the Council called for a closer link to foreign policy cooperation, avoiding a split of the integration process;²
- success of EPC since the mid-1980s, like the growing use of group-to-group dialogue created a positive pressure for further steps, enhancing the scope of action;³
- member states tried to build up a stronger European role in foreign and security policy as a response to the end of the Cold War and the new challenges to international security.

When the Common Foreign and Security Policy (CFSP) came into existence with the entry into force of the Treaty of Maastricht, the modes of decision-making and interaction in this policy domain were already well-defined and successfully working.⁴ Still, a “new threshold”⁵ in EU foreign policy cooperation was reached. Although there was no radical change in the mode of governance, the legal base had fundamentally been altered; the establishment of an enhanced institutional and procedural framework for what had been foreign policy cooperation among the member states of the European Communities meant in the first place that new potentials and perspectives could be activated, but it had a rather modest impact on the daily routines and the deep-rooted practices in Europe's diplomatic community.

Intergovernmentalism was less a well-defined conceptual approach, but much more corresponded to the political practice among the member governments of dealing with each other. In the negotiations to the Treaty of Maastricht, the experience of “Black Monday” when the Dutch Presidency dramatically failed to replace the Three-Pillar-Approach by a Community-based model, reflected the lack of federal aspirations at the level of the member governments, and also indicated that the Three-Pillar-structure which had initially been so heavily criticised, would represent a feasible formula.⁶

¹ Smith, Michael E., *Diplomacy by Decree, The Legalization of EU Foreign Policy*, *Journal of Common Market Studies*, Vol. 39, No. 2, 2001, pp. 79-104, p. 94.

² De Ruyt, Jean: *L'Acte Unique Européen*, Brussels 1987; Ifestos, Panayiotis: *European Political Cooperation, Towards a Framework of Supranational Diplomacy?*, Aldershot etc.1987.

³ Edwards, Geoffrey/ Regelsberger, Elfriede (eds): *Europe's Global Links. The European Community and Interregional Cooperation*, London 1990.

⁴ Regelsberger, Elfriede: *Die Gemeinsame Außen- und Sicherheitspolitik der EU (GASP), Konstitutionelle Angebote im Praxistest 1993-2003*, Baden-Baden 2004.

⁵ Tonra, Ben: *The Europeanisation of National Foreign Policy, Dutch, Danish and Irish Foreign Policy in the European Union*, Aldershot 2001.

⁶ Diedrichs, Udo (1996): *National Views and European Cleavages: From the Single European Act to the Treaty on European Union*, in: Franco Algeri und Elfriede Regelsberger (eds), *Synergy at Work, Spain and Portugal in European Foreign Policy*, Bonn, pp. 233-258.

The following features of CFSP in comparison to EPC are of crucial importance:

- the formal “legalisation”⁷ of foreign policy cooperation within the framework of the Treaties, including the single institutional framework, with the European Council and the Council as the key bodies;
- a certain “scope enlargement” of CFSP, in particular by covering security policy and by introducing closer relations with the WEU as an integral part of the process of European integration;
- the expansion and differentiation of legal instruments, which should include – beneath declarations – joint actions and common positions. These were de facto already existent under EPC, but received a more systematic structure.
- a differentiation of procedures in the sense of defining a possibility for majority voting, while consensus remained the rule.

After having described the major factors that accounted for the emergence of CFSP, it is now necessary to assess the importance of decision-making procedures and the patterns of interaction. CFSP provides an excellent example of the importance to distinguish between decision-making procedure and mode of governance, the latter being more comprehensive than the former. The legal provisions are rather parsimonious and clear. Consensus is the rule, i.e. every member government is expected to agree to a decision before it can be taken. On the other hand, the style of interaction is highly influenced by the rules of diplomatic intercourse and marked by a considerable degree of collegiality, informal practice and confidentiality.

After the coming into force of the Treaty of Maastricht, the institutional reform debate on CFSP did not come to an end. There was continuing pressure for further reform, mainly under the label of efficiency, effectiveness and legitimacy.⁸ The perspective of enlargement was increasingly regarded as a catalyst for major procedural and institutional modifications. In the end, the result of the Treaty reforms lied in a modification of the set-up of CFSP without changing its basic face. The creation of the High Representative for CFSP and the introduction of constructive abstention for decision-making, and of common strategies as a new instrument in the Treaty of Amsterdam (1997), in the end led to a perfection of a “rationalised intergovernmentalism”⁹, which tried to improve the working of the mechanism of CFSP, without altering its nature.

In parallel, the implementation of the Treaty on European Union revealed an intensive use of its provisions by the EU. In particular joint actions and common positions belong to the usual repertoire of CFSP, while after 2001 also agreements with third countries have become increasingly important. These reflect the growing activities of the EU in the field of crisis-management, where the Union invites third countries to participate in crisis-management operations.

2.2 Changes to the rules without Treaty reform: pragmatic intergovernmentalism at work

Still, a highly impressing dynamics has been triggered off in CFSP without formally changing the Treaties, i.e. under the general procedural rules of intergovernmental decision-making,

⁷ Smith, *Diplomacy by Decree*, op. cit.

⁸ Regelsberger, *Die Gemeinsame Außen- und Sicherheitspolitik der EU*, op. cit. p. 13ff.

⁹ Wessels, Wolfgang: ‘An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes’, in: *Journal of Common Market Studies* Vol. 35, No. 2, 1997, pp. 267-299.

which has nevertheless proved to be productive and pragmatic when translated into political reality; the changes may be classified into the following categories:

2.2.1 Secondary Legislation and the Evolution of CFSP

The Council of the EU has taken over the role of an institutional innovator in particular by the creation of the interim structure for the European Security and Defence Policy (the interim PSC, military committee and military staff) and by the inclusion into the domain of the CFSP/ESDP of bodies so far attributed to the Western European Union, namely the EU Institute for Security Studies in Paris and the Satellite Centre in Torrejón. Finally, the creation of the European Defence Agency is a telling example for this kind of institutional change, which has been enacted in advance of the entry into force of the Constitutional Treaty. Although these decisions were taken as secondary legal acts their scope and importance goes well beyond 'normal' Legislation. It has contributed to the establishment of a innovative institutional landscape that not only complemented or enriched the existing structures of CFSP, but added a new quality to it.

The financing of CFSP/ESDP under the legal framework of ATHENA is also a case in point. ATHENA defines basic rules for the financing of common costs, i.e. those expenditures which lie somewhere between pure member states individual coverage along the principle of costs lie where they fall, and Community-funded expenditure.¹⁰

2.2.2 Inter-institutional arrangements

The inter-institutional agreement of May 1999 between the EP, the Commission and the Council has opened new channels of influence for the European Parliament, while consolidating and affirming the Commission's role. The new inter-institutional agreement of 2006 mainly follows the lines of its predecessor while setting some new accents.

In an inter-institutional accord, the Commission and the Council agreed to appoint a double-hatted special representative, Erwan Fouéré, who is at the same time special representative for Macedonia¹¹ and head of the delegation of the European Commission in Skopje. He receives instructions both from the Council as well as from the Commission, having to find a path in satisfying both institutional and political demands. So far, the record of this experiment is positive, hinting at potential for further increasing the mutual coordination and even combination of functions that belong to the Commission and to the Council's sphere of decision-making.

Concerning information of the European Parliament special arrangements have been established regarding the access to sensitive information in security and defence policy, based upon an Inter-institutional Agreement between the European Parliament and the Council from 20 November 2002.¹² The agreement distinguishes between different categories of documents according to their classification and to their origin. If access is allowed, 'byzantinist' procedures have to be followed.¹³

¹⁰ Council Decision 2004/197/CFSP, 23 February 2004, amended by Council Decision 2004/925/CFSP of 22 December 2004, and by Council Decision 2005/68/CFSP of 24 January 2005.

¹¹ Council Joint Action 2005/724/CFSP of 17 October 2005.

¹² See Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, OJ C 298, 30 November 2002.

¹³ Access to information by the EP depends upon specific conditions, see *ibid.*

The President of the EP or the Chairman of AFET are entitled to request from the Presidency of the Council or from the HR to pass information on ESDP, including sensitive components. The EP President and a special committee chaired by the AFET chairman¹⁴ shall be informed by the Presidency or the HR of the content of sensitive information “where it is required for the exercise of the powers conferred on the European Parliament by the Treaty on European Union in the field covered by the present Interinstitutional Agreement”.¹⁵ The respective documents can be consulted on the premises of the Council by the EP President or the special committee. This cautious and restrictive formula leaves a range of interpretation open regarding the extent to which the EP in fact will gain access to certain pieces of information. Even more restrictive is the wording when it comes to making information available to the EP. Here, it is stated that “where this is appropriate and possible in the light of the nature and content of the information or documents concerned”, they will be made available only to the President of the European Parliament who shall have a number of options for passing them to other EP bodies.¹⁶

These provisions create an unusual situation for the European Parliament and have led to criticism about the rather vague definitions of the conditions for passing information, the veto options and a perceived discrimination among the members of Parliament by too strictly reducing the number of persons having access to sensitive information.¹⁷ In the end the extent to which information is handed over will depend on the amount of trust and mutual confidence between the two institutions and the persons involved, and also upon the degree of ‘professionalisation’ within Parliament in dealing with this kind of sources.

ESDP thus reveals a split balance for the European Parliament: while the matters related to military decisions are widely kept out its influence and offer only restricted rights of access to information, in the area of civilian aspects of crisis management Parliament can play a role, mostly via its budgetary competencies. It will be important in the future to bring both strings more closely together for the purpose of a coherent EU security and defence policy.

2.2.3 Intra-institutional rules: compensating missing Treaty-based competences

Due to the lack of primary and secondary legal acts that would open access channels to the EP, Parliament itself has generated a number of milestones based mainly upon its rules of procedure. In this regard, the appointment of the High Representative and Secretary General of the Council belong to the most important ones. The rules foresee that the candidate for the post should be invited to appear before the EP and present to the committee his/her views and positions belong meanwhile to the standard procedure in Parliament when appointments are at stake. Although formally the candidate would not be obliged to appear in Parliament, there has so far never been a case of refusal.

The EP intends to participate in the appointment of the High Representative although there is no legally binding provision in the Treaties. In its rules of procedure, Parliament has introduced a respective provision. Before the appointment is made, the Presidency of the Council and the President of the Commission will be asked to make a statement to Parliament.¹⁸ After

¹⁴ The special committee shall be chaired by the AFET chairman and be composed of four members selected by the EP Conference of Presidents.

¹⁵ Ibid. p. 5.

¹⁶ These options do not apply to information classified as ‘top secret’; see *ibid*, p. 5-6.

¹⁷ See Malin Tappert, *European Parliament resigned to limited oversight of ESDP?*, in: *European Security Review*, Number 16, February 2003.

¹⁸ Rules of Procedure of the European Parliament, 16th edition, October 2006, Title 2, Chapter XIII, Rule 85.

appointment, but before officially taking up his/her duties, the High Representative will be asked to make a statement to the responsible committee and answer questions. Afterwards, the European Parliament may make a recommendation.¹⁹

A similar procedure is defined for the appointment of a special representative by the Council.²⁰ Here, special attention is paid to the mandate given by the Council. Thus, the special representative, according to the EP's rules of procedures, shall be invited to keep the EP "fully and regularly informed as to the practical implementation of his mandate".²¹ It is worth mentioning that the EP receives regular bi-annual reports from the EU special representative for Bosnia and Herzegovina on the implementation of his mission.²² Although this practice is not based upon a legally binding commitment, it corresponds to the objectives of the EP to enhance its role and position in CFSP by establishing links and responsibilities even where the Treaties do not explicitly foresee them. Furthermore, the EP foresees that the High Representative may be invited at least four times a year to appear before Parliament, and four times at the responsible committee, in order to make statements and answer questions.²³ In a similar manner, special representatives responsible for particular policy issues may be asked to appear in the responsible committee in order to make statements.²⁴ In case that a head of delegation is appointed, Parliament may invite the nominee to appear before the relevant body.²⁵

3 The Living Constitution of CFSP: Trends and Developments

3.1 Legislation in CFSP: Trends and Dynamics in Intergovernmental Policy-Making

The number of legal acts concluded within the area of CFSP has grown with a particular dynamics since the end of the 1990s, which has been due in the first place to the increase of specific instruments. Joint Actions and Common Positions have acquired a high dynamics particularly since the second half of the 1990s, responding at the same time to international demands as well as to internal capabilities.

¹⁹ Rules of Procedure of the European Parliament, *op. cit.*, Rule 85.

²⁰ Rules of Procedure of the European Parliament, *op. cit.* Rule 86. Before appointment, the Council shall be asked by the President of the EP, upon request of the committee responsible, to make a statement and answer questions concerning the mandate, objectives and other relevant matters relating to the tasks and role of the special representative. After appointment and prior to taking office, the appointee may be invited to make a statement and answer questions to the committee. Within three months of the hearing, the committee may submit a proposal for a recommendation by the EP relating directly to the statement and answers provided.

²¹ Rules of Procedure of the European Parliament, *op. cit.* Rule 86, paragraph 4.

²² Report to the European Parliament by the OHR and special representative for BiH, January - June 2002, 23 June 2003.

²³ Rules of Procedure of the European Parliament, *op. cit.* Rule 87.

²⁴ Rules of Procedure of the European Parliament, *op. cit.* Rule 87, paragraph 3.

²⁵ Rules of Procedure of the European Parliament, *op. cit.* Rule 88, paragraph 1.

Table 1: CFSP Legal Acts 1993-2004 (including amendments)

	Common Strategies	Joint Actions and Implementing Decisions	Common Positions and Implementing Decisions	Agreements under CFSP	CFSP Council Decisions	PSC/COPS decisions
1993		5	1			
1994		9	8			
1995		9	12			
1996		18	10		1	
1997		15	13		2	
1998		19	22		1	
1999	2	23	31		3	
2000	1	17	24		6	
2001		17	22	2	8	
2002		19	24	17	3	
2003	2	25	23	16	6	3
2004		28	26	11	5	8
Total	5	204	216	46	35	11

Source: EURLEX

The most important external driving factors for the adoption of joint actions in the period between 1993 and 1999 has been the crisis in the federal Republic of Yugoslavia, reaching a peak in 1999 with the Kosovo conflict, while after 1999 the emergence and evolution of ESDP has created a momentum for joint actions, taking the shape of crisis management operations. However, the relatively most frequent topic of a joint action concerns the nomination, appointment or mandate of an EU special envoy or special representative, while the next topic of relevance is covered by the missions and operations in civilian or military crisis management that the EU is undertaking or supporting worldwide, whereas the most important policy topic is the fight against small arms and light weapons.

Table 2: Topics of Joint Actions 1993-2004

	Purpose of Joint Action		
	Nomination, appointment and mandate of special envoys and special representatives	non-proliferation. fight against arms and weapons, in particular small arms and light weapons, landmines	Missions and operations by the EU or other organisations receiving support by the EU
Cases	60	35	30
Total Joint actions 1993 -2004		204	

The regional focus of joint actions has been dominantly on the immediate EU environment. by far most joint actions with a regional focus have been dealing with South Eastern Europe, more particularly former Yugoslavia. Next, Africa (with a focus ion the Great Lakes region and on Congo), and the Middle East (with emphasis on the peace process and the Palestinian territories) have been high on the agenda. All in all, taken by the profile of joint actions, the EU has predominantly been a regional pacifier with a global scope of action and increasing global engagement.

Table 3: The Regional Focus of Joint Actions 1993-2004

	Regional Focus of Joint Actions		
	South Eastern Europe/former Yugoslavia	Middle East (Peace process, Palestinian authority, Iraq)	Africa
cases	73	19	19
Total Joint actions 1993 -2004		204	

The same judgment derives from the analysis of the current crisis management operations undertaken under the label of ESDP, which have been mainly concentrated in the Western Balkans, then on Africa and in the greater Middle East.

With regard to common positions, between 1993 and 2004 38 out of 208 have been devoted to the situation in the Federal Republic of Yugoslavia, 10 on Congo, and 12 on international terrorism, all of the latter after 2001.

Beyond the adoption of joint actions and common positions, the conclusion of international agreements under CFSP has been one of the most outstanding features in the legal output. These have to be seen in direct relation to the emergence and evolution of the European Security and Defence Policy, which highlighted the need for including third countries in crisis management operations led by the EU, and also required the conclusion of agreements with those countries where operations were undertaken for defining the status and activities of the EU forces. Of the 46 agreements included in the EURLEX system so far, 35 have been devoted to fixing the terms of participation of third countries in crisis management operations, while around 7 have been concluded with governments of those states where an operation took place.

Table 4: Current operations in EU crisis management

Operation	EU Military Operation in Bosnia and Herzegovina EUFOR Althea	EU Police Mission Bosnia and Herzegovina EUPM	EU Police Advisory Team in the Former Yugoslav Republic of Macedonia EUPAT	Aceh Monitoring Mission AMM	EU Police Mission in the Palestinian Territories EUPOL COPPS	EU Border Assistance Mission at Rafah Crossing Point EU BAM Rafah	EU Integrated Rule of Law Mission for Iraq EUJUST LEX	EUFOR RD Congo	EU Police Mission in Kinshasa (RDC) EUPOL Kinshasa	EU security sector reform mission in the Democratic Republic of the Congo EUSEC DR Congo	EU Support to AMIS II (Darfur)
Nature of the mission	military	civilian	civilian	civilian	civilian	civilian	integrated military-civilian	military	civilian	civilian	civilian
Legal Base	Council Joint Action 12 July 2004	Council Joint Action 11 March 2002	Council Joint Action 24 November 2005	Council Joint Action 09.09.2005	Council Joint Action 14 November 2005	Council Joint Action 12 December 2005	Council Joint Action 7 March 2005	Council Joint Action 27 April 2006	Council Joint Action 9 December 2004	Council Joint Action 2 May 2005	Council Joint Action 20.07.2005
starting date of Operation	2 December 2004	1 January 2003	15 December 2005	15 September 2005	14 November 2005	30 November 2005	1 July 2005	30 July 2006	12 April 2005	8 June 2005	18.07.2005
Objective of the operation	military security and surveillance over commitment to Dayton agreement in succession of S-For	support to police forces and build-up of a police structure	build-up of police and internal security forces	civilian observer mission on the fulfilment of the peace agreement between the Indonesian government and the Aceh Liberation Front	long-term advice and support for the build-up and reform of a police force	surveillance of border crossing point Rafah in accordance with the Israeli-Palestinian agreement of 15 November 2005	training of higher civil servants in the police, judicial and law enforcement institutions in the fields of administration and investigation	support to MONUC in the provision of security during elections in Congo	build-up of police forces	support and training for Congolese security forces particularly with a view to the respect for democratic and legal standards	support to the military and police component of the African Union mission AMIS II
Mandate under international Law	UNSC 1575 (2004) from 22.11.2004							UNSC 1671 25.04.2006			UNSC 1547 11.06.2004, UNSC 1564, 18.09.2004; UNSC 1574, 19.11.2004

3.2 More than Intergovernmentalism: EC legal acts in CFSP

Legal acts in CFSP are increasingly linked to legislation in the sphere of the European Community. Since the end of the 1990s a real boost in EC legislation has been observed which is related to decisions taken in the framework of the Common Foreign and Security Policy. In this respect, it is not only the Council which has acquired an active role, but also the Commission has been involved to a rising degree.

The first remarkable push in CFSP-related EC-legislation came after 1998 with the crisis in Yugoslavia over Kosovo, which triggered a number of CFSP acts that subsequently required EC action in the shape of taking restrictive measures directed against the regime in Belgrade; in later years such measure were adopted also against transnational entities and natural persons, most prominently in the case of Usama bin Laden, the Al Qaida network and the Taliban.²⁶

The following table highlights these developments:

Table 5: EC legislation related to CFSP 1993-2004

	EC Regulations	EC regulations		Council Decisions
		Council Regulations	Commission Regulations	
1993				
1994	3	3		
1995	3	3		
1996	3	3		
1997	2	2		
1998	6	6		
1999	14	8	6	
2000	20	13	7	1
2001	16	7	9	3
2002	25	8	17	4
2003	44	11	33	7
2004	45	9	36	7
Total	181	73	108	22

The legal basis for most of the regulations imposing restrictive measures is provided for by Arts. 60 TEC, Art. 301 TEC, and Art. 308 TEC. Art. 60 TEC stipulates that "(i)f, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent meas-

²⁶ See Council Regulation EC 881/2002, 27 May 2002, OJ L 139, 29.05.2002.

ures on the movement of capital and on payments as regards the third countries concerned. [...]".

Art. 301 TEC provides the link to CFSP by stating that "(w)here it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission".

Finally, the general clause of Art. 308 is also recurred to, which enables the Council to take decisions even without an explicit authorisation in the EC Treaty: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

The most prominent case of an EC regulation providing for restrictive measures directed against legal or natural persons has been the mentioned regulation against Usama bin Laden, Al Qaida and the Taliban, which, after the adoption of the act in 2002 by the Council has been amended (by the Commission) 42 times until 2004; amendments concerned the list annexed to the regulation naming the persons and entities to be submitted to the restrictive measures. The Commission has been empowered by regulation EC 881/2002 (Art. 7) to adjust the list on the basis of decisions by the UN Security Council or the Sanctions Committee. In a similar manner, restrictive measures against third countries have been updated and adjusted in recent years, leading to a dynamic set of regulations

Table 6: Main topics of EC regulations providing for the imposition of restrictive measures against natural or legal persons based upon prior CFSP acts 1993-2004

Topic	Number of legal acts
Yugoslavia	47
Usama bin Laden	43
Terrorism in general	
Western Africa (Liberia and Sierra Leone)	18
Kimberley Process	16
Afghanistan	13
Iraq	11
Myanmar	9
Zimbabwe	8
Angola	7

As a rule, almost all of the EC regulations adopted in the context of adopting, emending or repealing restrictive measures against natural or legal persons refer to a Common Position by the Council which sets out the measures to be taken. In the end, therefore, almost 90% of all such EC legislation may be derived from a number of Common Positions listed above:

- Council Common Position 2004/694/CFSP of 11 October 2004 on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY)
- Council Common Position of 8 October 2001 amending Common Position 96/184/CFSP concerning arms exports to the former Yugoslavia and Common Position 98/240/CFSP on restrictive measures against the Federal Republic of Yugoslavia, *OJ L 268, 9.10.2001, p. 49–49*
- Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP(1)
- Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, *OJ L 344, 28.12.2001, p. 93–96.*
- Council Common Position 2004/487/CFSP of 29 April 2004 concerning further restrictive measures in relation to Liberia
- Council Common Position 2004/161/CFSP of 19 February 2004 renewing restrictive measures against Zimbabwe
- Council Common Position 2004/31/CFSP of 9 January 2004 concerning the imposition of an embargo on arms, munitions and military equipment on Sudan
- Council Common Position 2004/137/CFSP of 10 February 2004 concerning restrictive measures against Liberia and repealing Common Position 2001/357/CFSP
- Council Common Position 2003/680/CFSP of 29 September 2003 amending Common Position 2002/829/CFSP on the supply of certain equipment into the Democratic Republic of Congo
- Council Common Position of 19 December 2002 lifting restrictive measures against the União Nacional para a Independência Total de Angola (UNITA) and repealing Common Positions 97/759/CFSP and 98/425/CFSP
- Council Common Position of 10 December 2002 concerning restrictive measures against Somalia *OJ L 334, 11.12.2002, p. 1–2*
- Council Common Position of 11 January 2002 concerning a prohibition on imports of rough diamonds from Sierra Leone, *Official Journal L 010, 12/01/2002 P. 0081 – 0081*

There is thus a link in the quantitative development between common positions, their amendments or repeal and subsequent Community legislation, not in the sense of a close correlation, but indeed as a kind of co-evolution. The adoption of common positions explains thus the activities in EC legislation related to these positions.

3.3 The Financing of CFSP: Mixing Up the Sources

Actually the ‘hardest’ competencies of the EP in CFSP are to be found in the budgetary field. The EC budget contains under sub-section B 8 the operational expenditure for CFSP, while the administrative expenditure is covered within the Council’s budget line and not subject to interference by the EP, according to a gentlemen’s agreement between the institutions.

In addition to the Treaty, it is the Interinstitutional Agreement of 17 May 2006 between the EP, the Council and the Commission that contains particular provisions on financing CFSP.²⁷ It states that the three institutions will engage in a conciliation procedure through a dialogue, in which they try to arrive at a common understanding on CFSP expenditure.

Agreement must be reached on the overall amount as well as on the distribution between the different articles of the CFSP chapter. It is also confirmed that the Commission is authorised

²⁷ Interinstitutional Agreement between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management, OJ C 139, 14.06.2006, Point G, paragraphs 42-43.

to transfer appropriations autonomously between different articles within one chapter, so that the necessary flexibility in implementing the budget is considered to be assured.²⁸ Two important cases deserve attention. Should the amount of the CFSP budget prove to be insufficient during the financial year, The EP and the Council are called to search for a solution on the grounds of a Commission proposal. This means that without the EP's approval, no further financial appropriations will be allowed. Second, the Council has to send to the EP a financial statement for any decision it takes entailing expenditure, including a specific cost estimate. Once a year, when the Council passes to the Parliament its report on the main aspects and basic choices of CFSP, it shall contain the financial implications for the EC budget. The Commission furthermore is committed to inform Council and EP in a quarterly report about the implementation of CFSP actions and on the financial forecast for the remaining year.²⁹

In the past, disputes between Council and Parliament were caused by different interpretations and preferences on financing international actions of the Union. In 2002, conflict emerged over the amount of the operational CFSP budget, which the Council wished to increase, while the EP threatened to reduce the line unless the Council adopted a commitment to inform the Parliament timely before taking CFSP actions. Also, the sources of financing civilian crisis management were heavily discussed; while the EP intended to finance measures for EUPM in Bosnia by resorting to the CARDS programme, the Council insisted on using the CFSP chapter.³⁰

As a result, the provisions of the 1999 Inter-institutional Agreement had already been specified by a Joint Declaration of the Parliament, the Council and the Commission from 25 November 2002, which strengthens the EP in particular by introducing concrete dates and procedures for the budgetary coordination process. The Council report on the main aspects and basic choices of CFSP shall arrive at the Parliament before 15th June for the year in question. As to CFSP decisions entailing financial expenditure, the Council commits itself to inform the EP no later five working days after taking the decision. Furthermore, an 'early warning' by the Council to the EP is foreseen in the context of a regular 'political dialogue' whenever a joint action might have important financial implications. The 2006 Inter-institutional agreement takes this situation into account and tightens the coordination mechanism between Council, Commission and Parliament. The Council is called to consult the EP each year a forward-looking document until June 15, including the main aspects and basic choices of CFSP and the implications for the budget of the EU.³¹ At least five times a year the Council commits itself to consultations with the EP, in the context of the regular political dialogue, and on a level specified in the Inter-Institutional Agreement, including the bureaux of the EP committees concerned, the Council at Ambassador level (the Chairman of the PSC) and members of the Commission.³²

In practice, these arrangements still have not worked in a satisfactory manner from the EP's point of view. The EP complained in the past that the Council report did to contain an adequate focus on the financial implications of CFSP, and insisted that these should be laid down

²⁸ Interinstitutional Agreement, op. cit., paragraph 42.

²⁹ Interinstitutional Agreement, op. cit., paragraph 43.

³⁰ Agence Europe, 23. November 2002.

³¹ Interinstitutional Agreement, op. cit. paragraph 43.

³² Ibid.

in a separate document.³³ Also, information by the Council had been regarded as incomplete and delivery as not timely enough. The EP tried to embed the financial competences it enjoys in a broader framework of political dialogue, while the Council has traditionally tried to keep these issues at a technical level and not to offer substantial political consultation. The new Inter-Institutional Agreement will thus have to prove its viability for all institutional players.

So, further efforts will have to be undertaken to make the budgetary arrangements in CFSP work smoothly. The EP tries to use its comparatively strong position in this field for enhancing its rights of getting information - as timely and as complete as possible – on important actions and decisions, and for growing into the role of a regular political interlocutor to the Council. The latter seemed to resist these efforts, but if it wishes to run CFSP operations efficiently, it will probably have to become more responsive to the Parliament's demands.

The issue of financing is not only a playground for inter-institutional quarrels, but reveals in reality the highly composed nature of CFSP in practice. De facto, CFSP and ESDP may be financed by different sources ranging from Community programmes in support for CFSP actions, via the CFSP chapter of the EC budget for operational expenditure, into the area of financing by the member states, either by the ATHENA³⁴ mechanism for common costs (mostly incremental costs for operations-, force- and component headquarters, essential infrastructure and equipment) or by national spending on the basis of the principle that costs lie where they fall. ATHENA is managed by a Special Committee, enjoys certain legal privileges, and includes an early financing mechanism.

Table 7: Financial Sources of EU External Action

	EC Budget Community Pro- grammes	EC Budget CFSP Chapter	ATHENA (based upon Member States Contributions)	Member States Contributions
Legal Base	budgetary procedure and inter-institutional agreement EC and EU Treaty	budgetary procedure EU Treaty with special provisions on CFSP in inter-institutional agreement	Council Decision 2004/197/CFSP	EU Treaty
cases of application	external aid and support programmes (e.g. CARDS, ENPI)	joint actions without military or defence implications	common costs for crisis management missions having military or defence implications	costs lie where they fall (member states pay the bill)

These different modes of financing imply divergent institutional rights of participation and influence. Going from the left to the right of the table, parliamentary powers decrease, while member state autonomy rises. In particular crisis management operations reveal a multiple and complex institutional and financial environment that makes it rather difficult to separate the expenditure on the spot. Thus, the EU military operation in Congo EUFOR RD Congo find itself embedded into the broader objectives and principles of the EU-ACP cooperation,

³³ See Opinion of the Committee on Budgets, included in the Report on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP, including the financial implications for the general budget of the European Communities, op. cit., p. 22-24, p. 23.

³⁴ Council Decision 2004/197/CFSP of 23 February 2004.

which had been redefined by the Cotonou agreement in 2000 and had been prominently focused on democracy building and institutional stability. The Commission strategy paper on Congo from 2003 stressed in particular the promotion of transition to democracy and the build-up of reliable security forces as a key objective of EC support to the country. In particular the organisation of elections was regarded as a key step towards achieving these goals.³⁵ The Commission also sent observer missions to elections in Congo. The missions undertaken in Congo starting with Artémis in 2003 can be seen in the continuity of these strategic lines.

EUFOR RD Congo was then financed both from the EC budget with 9 mio Euro, while the member states contributed 6 Mio Euro. This mixed financing does not open immediate sources of influence for the EP but reveals the de facto hybrid nature of crisis management in the implementation of an operation. On the spot, EC financial support is administered by EU-ROPAID and controlled by the Commission delegation in Kinshasa.

The different forms and mixtures of financing CFSP and in particular ESDP operations might lead to a hidden and incremental increase in jointly financed actions, which could help the member states to save money, increase planning security and share the risk with other participants. The creation of ATHENA is a clear sign that even in the strictly intergovernmental sphere there is a growing demand for pooling resources.

3.4 Ultra -Soft Coordination in CFSP/ESDP: Shaming without Naming?

Since the summits of Cologne and Helsinki in 1999 the EU has tried to define a set of military and later also civilian goals that should be achieved in order to become fully operational for the conduct of crisis management operations.³⁶ The Helsinki Force Catalogue contained the list of necessary resources in terms of staff, equipment and weapon systems which would be needed to fulfil the Petersberg tasks. As the guiding principle of ESDP was defined in terms of voluntary national contributions to crisis management, in particular regarding the deployment of troops, it was clear that neither a supranational authority nor procedural patterns borrowed from the EC would be applied. The result was a tension between intergovernmentalism in institutional terms and the need for more effectiveness in capability terms. The capabilities commitment conferences which started in November 2000 in Helsinki tried to list up the range of resources and staff which would be available for operations, while leaving the final decision upon the member states. At the same time it became clear that the pledges made by the governments would by far not be sufficient to cover the need.

The Helsinki Force Catalogue revealed a number of strategic gaps and lacks which has to be overcome unless ESDP would suffer from an early and sudden loss of credibility. As the door towards more binding supranational mechanisms in decision-making was not open, a particular process of capability improvement was developed that should avoid naming certain countries and their deficits, but was designed to increase the pressure on the governments so as to make them act. The first element of this process has been the existence of regular reports on ESDP by the Presidency since 1999, describing the state of the art, the gaps and the perspec-

³⁵ Commission Européenne : Stratégie de Coopération et Programme Indicative, 2003-2007, République Démocratique du Congo – Communauté européenne, 2. September 2003; and Commission Européenne: Addendum au Document de Stratégie de Coopération et Programme Indicatif national, Communauté européenne et République démocratique du Congo, 21. Juni 2005.

³⁶ Lindley-French, Julian: Combined and Joint? The Development of a Security and Operational Doctrine for the European Union, in: Reiter, Erich/ Rummel, Reinhardt / Schmidt, Peter (eds), Europas ferne Streitmacht, Chancen und Schwierigkeiten der Europäischen Union beim Aufbau der ESVP, Hamburg, Berlin, Bonn, 2002, Forschungen zur Sicherheitspolitik, Vol. 6, pp. 86-118.

tives. Since December 2001, the European Capabilities Action Plan was inaugurated officially by the European Council which led to the creation of panels composed of national experts who should discuss the existing lacks and gaps and try to find solutions for sensitive capability deficits. ECAP allowed to mobilise technocratic expertise from the ministries of defence and also triggered an expert discourse on the capabilities of ESDP which created a kind of semi-public pressure upon the member states for improving their national capabilities.

The coordination of the panels was entrusted to a Headline Goal Task Force, which was supported by the EU Military Staff.³⁷ As a next step, in 2003 a new stage in the definition of the headline goals was envisaged which led to the adoption of the Headline Goal 2010 in June 2004, focusing more on qualitative improvements, the higher spectrum of the Petersberg tasks, and multi-national projects between the member states in order to mobilise synergies.³⁸

Since March 2003 the Capability Development Mechanism (CDM) started to operate including mid-year progress reports as well as since 2004 the publication of the Capabilities Improvement Chart. Thus, due to the functional need for improving the military capabilities of the member states a process of reporting emerged, reflected in national media and expert publications, and hinting at the capabilities-expectations gap in European security and defence policy. There is no explicit naming of specific national deficits so that no naming and shaming is taking place, which would be unacceptable for member states governments. On the other hand, the information and the data on defence spending regularly published, allow for comparisons and for identification of compliers and non-compliers. This is less a question of objective criteria which may be applied, but much more of a political discourse where the level of ambition of a country is compared to the real performance. So far the mechanism has proved to be of little effectiveness, mostly due to its cautious approach and to the political resistance against binding obligations. On the other hand, there seems to be a mechanism of good practice or following examples, which could be seen in the initially French-British initiative on the battle groups of February 2004, which was hastily taken up by Germany and in November of the year led to broader initiatives that included almost all EU countries.

3.5 Regime-Building in CFSP and ESDP: Creating a Market without a Supranational Authority

The creation of the Defence Agency has so far had a double effect: it has introduced a new institutional player in the CFSP/ESDP arena, and it has led to the creation of a specific regime under the authority of the Agency: an emerging European procurement and defence equipment market. It is more or less the experiment of creating market structures by opening national procurement systems not through the Monnet method, but by a strict intergovernmental set of rules and principles to which participant countries subscribe. The EDA has been put in charge of four main tasks:

- defence capabilities development,
- armaments cooperation,
- the defence technological and industrial base and
- the defence equipment market, research and technology.

³⁷ Schmitt, Burkard: European Capabilities Action Plan, Briefing Paper, EU Institute for Security Studies, Paris 2005, p.1ff.

³⁸ Council of the European Union, Headline Goal 2010, approved by General Affairs and External relations Council on 17 May 2004 endorsed by the European council of 17 and 18 June 2004.

It is a crucial actor in the process of capability improvement, and responsible for the coordination of the ECAP, and it is also the supervising authority for the defence equipment market.³⁹

Initially a child of the Convention, the Agency has been put on the agenda of the European Council in July 2003 and its establishment was approved before the draft Constitutional Treaty entered the negotiations at the IGC in 2003/2004. The European Council of Thessaloniki defined the objective of creating an intergovernmental agency which was established on 12 July 2004 after a preparatory phase had been concluded. The High Representative was installed as the head of the EDA, while a chief executive should manage its daily work, and the Council would preserve a guiding and supervising function. The steering board of the EDA is composed of the defence ministers or their representatives who gained thus for the first time a formal arena in the EU institutional set-up, but which could lead to tensions with the foreign ministers in the Council.

The EDA, initially conceived as a network, has increasingly become a focus for defence cooperation among the member states. The Western Europe Armaments Group soon disappeared, while the EDA became a crucial player in the creation of a EU defence market. On the 1 July 2006 the regime for a European defence equipment market entered into force, which tried to open national procurement systems and includes until today 22 out of 25 member states. The basis of the market is the *Code of Conduct on Defence Procurement*⁴⁰ which constitutes a voluntary commitment by the participating states on the opening of their defence markets. It is explicitly non-binding, intergovernmental and aimed at encouraging competition based upon reciprocity between the participating states. Member states will offer – with some exceptions - fair and equal opportunities to suppliers in other participating countries, thus accepting tenders to be published by the EDA on the Electronic Board Bulletin (EBB). This would constitute a first cautious step in the direction of overcoming the impediments of Art. 296 TEC, that has prevented the application of the single market to goods in defence equipment. The crucial question will be to know whether market structures can develop under such a regime without binding rules and a strong supranational authority supervising the application of the rules established, and whether the EDA could grow into a regulatory agency that would be able to compensate for the lack of such an authority. The gains in efficiency could in the end represent an incentive for the governments to further open their national procurement markets, or they will choose increasingly multi-national projects where their home companies are represented so that there is a certain "juste retour".

4 Conceptualising Change: Hybridisation, Mixture and Innovation?

The trends and developments observed within the CFSP and ESDP since the early 1990s lead to a number of conclusions that might enable us to answer the question of new versus old modes of governance in this particular policy area.

- First of all, it seems ever more plausible to define modes of governance in a policy-specific and a time-dynamic perspective. CFSP has its own rules and traditions in decision-making, and it will develop forms and modes which are typical for its path of institutional evolution, which does not exclude innovative elements at all;

³⁹ Keohane, Daniel: Europe's new defence agency, Centre for European Reform, Policy Brief, London 2004.

⁴⁰ Code of Conduct on Defence Procurement: The Code of Conduct on Defence Procurement of the EU Member States participating in the European Defence Agency, approved on 21 November 2005, available at: <http://www.eda.europa.eu/reference/eda/EDA%20-%20Code%20of%20Conduct%20-%20European%20Defence%20Equipment%20Market.pdf>

- In general, the impact of intergovernmentalism is highly visible in CFSP, but has not blocked a process of differentiation which leads to more sophisticated ways of decision-making than traditional intergovernmentalism would expect. These emerging trends are highly fragile and cautious, due to the intergovernmental nature of CFSP, but they nevertheless constitute highly innovative phenomena.
- The traditional conceptualisation of CFSP as an intergovernmental policy area is not out of date or out of touch, but experiences regular phases of reinforcement in case of major crises (like Yugoslavia or Iraq). Nevertheless, beyond times of an outstanding and dramatic crisis, the political and institutional reality of CFSP is open for innovation which leads beyond intergovernmentalism.
- Still, a major source of innovation and dynamics lies in the creation of the ESDP, which has not, as many observers expected, strengthened the intergovernmental nature of CFSP, but led to new windows of opportunity by opening up new fields of activities. Crisis management operations rely on mixed sources of financing, even when they are primarily military in nature; the creation of a defence equipment market is an experiment without example in the EU.
- Extremely soft forms of coordination might even be identified in ESDP when it comes to the capability improvement mechanism.
- A regime for the creation of a market on defence procurement has been established, which leaves open an exit option for all participating states, but also represents a window of opportunity for a further reaching processes of regulatory policy-making in the future.
- The legal spheres of action and application have so far not been mixed up, but they have grown further together; the creation of the first double-hatted special representative might be a sign of growing coherence even until reaching the stage of creating a European external service *avant la lettre*.
- Differentiation of instruments applied in the sphere of CFSP has dramatically increased since the early 1990s. Today, more diversity is visible in the range of acts adopted under CFSP. Particularly interesting seems the increase in agreements under CFSP for including third countries in crisis management operations, and the growing correlation of Common Positions and EC regulations for economic sanctions.
- The result is a CFSP which has not developed into a supranational direction as such, but uses the range of possibilities included in the Treaties and operates in a pragmatic, flexible and sometimes mixed way, not by confusing legal spheres of application, but by combining instruments from these spheres and opening paths to increasingly using joint or common resources.