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Summary

Different forms of decision-making in CFSP have been traditionally summarised under the heading of intergovernmentalism. This framework of intergovernmentalism constitutes a distinct contrast to Community-based procedures in the first pillar of the EU. However, due to the emergence of a number of new modes of policy-making in recent years, this theoretical characterization does not adequately reflect reality anymore. Although CFSP has not developed into a supranational direction as such, both its legal and living constitution increasingly show features of a “mixed-mode” policy area, in which intergovernmental bargaining co-exists with emerging processes of coordination and market regulation.

This Policy Memorandum provides a synopsis of the results presented in more detail in the respective working paper (D46).

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1 The Legal Constitution of CFSP: Change with and without Treaty Revisions¹

1.1 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). A number of substantial changes to the existing framework has been added in the Constitutional Treaty, elaborated first within the Convention, then finalised in the Intergovernmental Conference. Pending ratification, it 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.

In this context, 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 state governments, and also indicated that the Three-Pillar-structure which had initially been so heavily criticised, would represent a feasible formula.²

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

Still, a highly impressive dynamics has been triggered off in CFSP without formally changing the Treaties, i.e. under the general procedural rules of intergovernmental decision-making, which has nevertheless proved to be productive and pragmatic when translated into political reality; the changes may be classified into the following categories:

1.2.1 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

¹ This chapter is based upon the NEWGOV working paper 01/D51 “The Impact of Intergovernmentalism on the Evolution of CFSP”.

² Diedrichs, Udo (1996): National Views and European Cleavages: From the Single European Act to the Treaty on European Union, in: Franco Algieri und Elfriede Regelsberger (eds), Synergy at Work, Spain and Portugal in European Foreign Policy, Bonn, pp. 233-258.

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.³

1.2.2 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 Macedonia⁴ 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 2002.⁵ 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.⁶

1.2.3 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.

³ 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.

⁴ Council Joint Action 2005/724/CFSP of 17 October 2005.

⁵ 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.

⁶ Access to information by the EP depends upon specific conditions, see *ibid.*

A similar procedure is defined for the appointment of a special representative by the Council.⁷ 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".⁸

2 The Living Constitution of CFSP: Trends and Developments

2.1 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.

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

⁷ 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.

⁸ Rules of Procedure of the European Parliament, op. cit. Rule 86, paragraph 4.

2.2 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 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 measures 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. As a rule, almost all of the EC regulations adopted in the context of adopting, amending 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.

2.3 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 is 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.⁹ It states that the three institutions will engage in a conciliation procedure through a triad, in which they try to arrive at a common understanding on CFSP expenditure.

In practice, these arrangements have so far not worked in a satisfactory manner from the EP's point of view. The EP complained in the past that the Council report did not contain an adequate focus on the financial implications of CFSP, and insisted that these should be laid down in a separate document.¹⁰ 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.

⁹ 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.

¹⁰ 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.

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 ATHENA¹¹ 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.

2.4 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.¹² 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 needs.

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 perspectives. 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.

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

¹¹ Council Decision 2004/197/CFSP of 23 February 2004.

¹² 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.

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.

2.5 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.

Initially conceived as a network, the EDA 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*¹³ 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".

3 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;

¹³ 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.

4 Policy Recommendations: No Easy and Simple Solutions

Parting from the analysis presented above, this paper tries to take up the debate about reform and change in CFSP, sketching feasible options and strategies which render this area more efficient and accountable. Both aspects have been on the agenda of policy reform in CFSP since the mid-1990s. The standard formula for solutions thus has been to identify a need for enhancing democratic legitimacy via parliamentary control and efficiency via procedural reform, in the extreme sense in the direction of majority voting, which both so far have not generated impressive results. In this memorandum instead, we will take into account the empirical findings of the analysis above and try to be more differentiated in formulating recommendations.

The governance perspective allows for a sober and modest evaluation of the relevance of intergovernmentalism; its relevance not be exaggerated due to the fact that the 'real' modes of decision-making and steering reveal a high potential for variation and diversity. Under the umbrella of a basically intergovernmental institutional and procedural set-up, CFSP has developed a number of different practices and habits which feed the system with a high degree of flexibility and pragmatism.

The following policy options should be taken into account:

Efficiency

- Under the assumption that neither the Constitutional Treaty nor a comparable revision will enter into force in the short run, CFSP will have to work on the basis of the Nice system; thus, improvement of coordination between the Commission and the Council as well as better mutual harmonisation of views below the level of creating a common external service will be crucial. The Commission has submitted a number of proposals in this regard so far, but always stopped short of the High Representative for CFSP. However, it is particularly this post that could become an institutional entrepreneur in further pooling and coordinating resources and capabilities as well as institutional actors.
- The High Representative could be a permanent guest at the Commission College meetings, at least at those instances where proposals for EC legislation are adopted designed to implement common positions or joint actions. As a growing number of relevant legal acts in CFSP are adopted in the EC, the need for bringing these two spheres closer together will become more evident. At the working level, Council-Commission teams could be charged with the preparation of such legal acts, while in exchange the Commission should become more involved in the drafting of common positions or joint actions.
- The financing of CFSP requires a much more coherent action by the Council, the Commission and the European Parliament due to the fact that the funding of the operational dimension of CFSP is increasingly mixed and hybrid. The inter-institutional agreement provides for the trilogue, but its working is still not fully satisfactory. For that purpose, a permanent joint budgetary committee composed of representatives from the EP, the Council and the Commission should accompany expenses in CFSP and exercise control tasks.

Accountability

- Democratic control in CFSP is not just a task for the European Parliament, but an overarching political objective of relevance for national as well as EU actors. Instead of trying to copy national patterns of governance, accountability should respond to the peculiar nature of the CFSP system and include elements of a functional accountability.
- Functional accountability includes the participation of national as well as EU actors and the mutual check and balances of institutional arrangements. Information of national parliaments must be assured to the fullest extent possible. The same applies to the exchange of data and knowledge around the national bureaucracies. The EP should coordinate its positions more fully with national parliaments and their respective committees.
- The work of the EDA should be better supervised as this body is increasingly taking over key tasks in CFSP/ESDP. For this purpose, the EDA should become accountable to report to the EP (the AFET committee), as well as to national parliaments, should they wish so. This is not in the sense of creating a fully-fledged parliamentary control over the EDA, but of creating an audience of experts, interested public and media.

Innovation and Policy Change: Trying to Tighten the Soft Coordination

- Governance in CFSP changes much more substantially via practice than via Treaty reform; the emerging modes of coordination as well as the recent efforts in creating market structures reflect a high potential for innovation based upon cautious and subtle habits and adaptation of behaviour of actors. These processes should be strengthened and pushed.
- The Council should therefore try to formalize some elements of the capability improvement mechanism in the sense of creating better identifiable objectives for the single member states, and it should also introduce a mutual reporting mechanism in which the national governments should document their efforts for overcoming the shortages in civilian and military capabilities.
- The emerging market for defence procurement should also be translated into more binding patterns of interaction, starting with an obligation by all participating countries to have their performance evaluated and assessed, including possible soft sanctions in case of violating the rules of the regime for defence procurement. This should be applied in a step by step approach, starting with rather soft mechanisms such as naming and shaming, but open for tightening in a future stage.

As a consequence, the abovementioned options and proposals are designed less to draft the agenda for the next Intergovernmental Conference, but rather to exploit the institutional potential for change and reform inherent in the specific features of CFSP governance. The basically intergovernmental framework of this policy area would not stand in contradiction to these proposals, while becoming more and more affected by incremental steps towards more binding and more effective forms of steering below the level of supranational policy-making.