



Decision-Making Void of Democratic Qualities? An Evaluation of the EU's Foreign and Security Policy

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Abstract

The EU's foreign and security policy is often criticised for being undemocratic. The article addresses this contention from the perspective of deliberative democracy. The focus is on the procedural qualities of the second pillar decision-making processes as it is not only the quality of the outcomes that determine the democratic legitimacy of policy-making, but also the way decisions have come about. Against five criteria, the EU's second pillar procedure is assessed for its putative lack of democratic qualities. The evaluation shows that decision-making is dominated by secrecy and unelected officials who act extensively on behalf of national ministers without proper accountability mechanisms available. Whereas there are conditions conducive to deliberation, they are basically found outside the formal settings and among unelected officials. There are no institutionalised rules where the responsible politicians are obligated to justify policy choices in front of the citizens. Hence the second pillar is only likely to enhance elite deliberation.

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Introduction¹

Foreign and security policy is an issue area that is rarely subjected to democratic scrutiny. The EU's foreign and security policy (CFSP) is in this regard no exception. Whereas there may be some special instances with regard to operational information that requires confidentiality, there is no *principled* reason why foreign and security policy as such should not be subjected to the same type of democratic scrutiny as other policy areas. In fact, the content of security policy is increasingly disputed and not something citizens and parliaments are willing to blindly put in the hands of the executive (Sjursen 2007: 2). This challenge of executive dominance is indeed applicable in the EU where the democratic problem is that neither the European Parliament (EP) nor the national parliaments have proper control with decision-making in the foreign and security field. The aim of this article is to assess the second pillar CFSP/ESDP² decision-making system for its putative democratic shortcomings (or qualities), hence the following research question: *To what extent is it correct to hold that decision-making processes in the second pillar lack democratic control?*

This article is limited to the second pillar (i.e. Title V TEU). Moreover, it only deals with the internal processes of second pillar decision-making, that is, how the process of reaching decisions is organised and regulated. It neither addresses the democratic quality of the *content* of outcomes nor how policies are *implemented*. The second pillar does not produce legislative acts as such. In fact, most of the outcomes are declaratory in nature. In the following, I will neither be dealing with these aspects of CFSP policy-making nor with decisions taken in emergency/crisis situations. The focus is on the legal instruments available in the second pillar – *Common Strategies, Joint Actions, Common Positions* – as listed in Article 13 TEU.

Given the uncertainty of the Lisbon Treaty at the time of writing, the evaluation will be based on the Nice legal framework and include subsequent decisions (until the end of 2007) that affect the procedural qualities of the second pillar.

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² ESPD: European Security and Defence Policy.

Such decisions can, for instance, be inter-institutional agreements altering the provisions for institutional interaction and decisions changing the institutions' rules of procedure. The assessment is based both on official sources and secondary literature.

This article has five parts. In the next part, I substantiate the claim that democratic legitimacy is needed in the CFSP. In the second part I present the analytical framework containing five criteria for assessing democratic legitimacy from a deliberative perspective with accompanying indicators. The third part is devoted to the evaluation of the second pillar whereas the fourth and final part holds the conclusion.

The need for democracy in CFSP

Given that the EU's foreign and security policy as defined under the second pillar is intergovernmental in character, the democratic control and accountability procedures monitoring the executives' mandate to take decisions in this field should conventionally be a matter for national parliaments. However, over the last few years, studies have reported that with regard to second pillar decision-making there has been an increased concentration of activities, people and interaction mushrooming in Brussels (Smith 2003; Duke and Vanhooacker 2006; Sjursen 2007; Cameron 2007). This so-called 'Brusselsisation' means that "While the relevant competencies do remain ultimately at the disposal of the Member States, the formulation and implementation of policy will be increasingly Europeanized and Brusselized by functionaries and services housed permanently at Brussels." (Müller-Brandeck-Boucquet in Barbé 2004: 48). This mushrooming indicates that the centre of gravity is somewhat altered from national capitals towards Brussels and that the second pillar – despite its formal legal character – is arguably not so intergovernmental after all (Sjursen 2007; Duke and Vanhooacker 2006; Reiderman 2006: 58). The Brussels institutions enjoy a higher degree of autonomy from the democratic control of national institutions that may be defensible from a democratic point of view. If this is the case, it does not seem sufficient to vest democratic control of CFSP matters *only* in national parliaments or at the national level (cf. Wagner 2006: 211). Rather, democratic control in some shape or form must also exist at the supranational level.

Apart from the general assumption of deficient parliamentary control, what, more specifically, do the democratic shortcomings of CFSP decision-making consist in? How should we think about democratic control of the second pillar and what can and should be expected from the Union's foreign and security policy-making? Should it be subjected to other types of standards than what we usually expect from national foreign and security policy? In this article, I assess the second pillar from a discourse-theoretical/deliberative perspective which underlines the importance of testing policy proposals through inclusive and open discussions prior to actual decision-taking. In applying this democratic framework to the EU, I will then put the Union to same test as nation-states. Many will possibly argue that deliberative democracy is too demanding even for nation-states given the emphasis on deliberative processes prior to decision-making. The reason why I did not choose a less demanding and less comprehensive approach is due to the development of the second pillar in general, the informal processes of Brusselsisation in particular as well as the consequences decisions in this pillar have for affected parties. In other words, just because the most likely findings will be negative is not in itself a good reason to relax the normative standard. Rather, the democratic shortcomings are important to uncover, especially in a policy field that has steadily gained momentum and now plays an important role in the EU.

Now, many will perhaps argue that the nature of foreign and security policy is 'structurally different' from other policy areas and as such not compatible with ordinary democratic procedures of decision-making (Thym 2006). Due to the need for rapid reaction and confidentiality, the demand for democratic quality is difficult to meet and in many EU member states foreign and security policy is still the exclusive prerogative of the executive. I write this paper, however, 'as if' there is no difference between foreign and security policy, on the one hand, and other policy areas, on the other. And as said above, foreign and security policy have consequences for those affected and is in this sense not *practically* different than other policies.

Another reason for subjecting the second pillar to a democratic evaluation is that there are not many studies that have conducted this type of assessment of the CFSP. Whereas some look at the EP and its influence in foreign and security policy (Wagner; 2006; Diedrichs 2004; Crum 2006; Barbé 2004; Thym 2006) and other studies that look at national parliaments' role in the CFSP (Bono, 2005),

there are – as far as I know – not any studies that have conducted a *systematic evaluation* of the EU second pillar decision-making system. In this article, I do not limit the assessment to parliamentary control alone as this only amounts to a minimum common denominator shared by all democratic theories. Rather, the evaluative scheme applied here has a different focus in looking at the *policy-making procedure* as such and thus takes heed of how the second pillar as a decision-making framework performs *as a whole*. Moreover, the deliberative perspective underlines the need for institutionalising publicly accessible settings where decision-makers provide reasons and *justify* their decisions. The focus on procedural qualities, then, tells us something about the *preconditions* under which the EU's foreign and security policy comes about and whether these will at all increase the *likelihood* of *democratic* decision-making to take place.

Analytical framework

The analytical framework that will be applied in order to shed light on the above-mentioned research question was developed in a previous article (Stie, 2007) and is based on a deliberative approach to democracy (Habermas 1998, 2001; Eriksen and Weigård 2003, 2006, 2007a and b; Eriksen and Fossum 2002; Eriksen and Skivenes 2000).³ This framework was worked out with the aim of facilitating an assessment of *institutionalised decision-making procedures*. The crux of the normative argument is the importance attached to the *procedural qualities* of the decision-making procedure for the overall democratic legitimacy of policy outcomes. The bottom line is that in order to be democratically legitimate, decisions must be validated through a *particular type of process* which entails that they have been defended, tested and criticised argumentatively in a publicly accessible debate and that minority positions have been included, listened to and taken into consideration during the course of a collective and inclusive process.

³ The democratic yardstick is the Habermasian discourse principle: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses." (Habermas 1998: 107). Whereas the wording 'all possibly affected persons' has ideally a normative reach beyond the EU, it will here be confined to persons within the borders of the Union.

Deliberative democracy underlines the obligation decision-makers have to justify the decisions they make on others' behalf and that decision-making settings and procedures should be regulated in order to maximise the possibility for this to happen. This does, however, not mean that democratic deliberation is required at every stage of decision-making processes. Rather, "Deliberative democracy makes room for many other forms of decision-making (including bargaining among groups, and secret operations ordered by executives), as long as these forms themselves are justified at some point in a deliberative process." (Gutmann and Thompson 2004: 3). Hence, it puts reason-giving in the forefront without precluding the need for efficient decision-making.

From deliberative theory, then, five criteria have been derived: A deliberative-democratic decision-making procedure must: (1) facilitate *deliberative meeting places*; (2) include the viewpoints of *affected and competent parties*; (3) take decisions in *openness* so that the relevant information is accessible and the opportunity for public debate and scrutiny are possible; (4) provide mechanisms for *neutralising* and balancing asymmetrical power relations; and, finally, (5) have *decision-making capacity*.⁴

Criterion 1: Deliberative meeting places

To facilitate deliberation there must be places where actors can meet to discuss. Meeting places as such can have many purposes; some are merely for discussion and preparation of decision-making whereas others are joint discussion and decision-making forums. Others again may be allocated for negotiation/bargaining or conciliation. From a deliberative perspective, however, it is vital that there are some settings that are conducive to *democratic* deliberation.

I distinguish analytically between two categories of deliberative meeting places: Firstly, *democratic* deliberative meeting places are settings where the views of citizens/affected parties are included. Such meeting places are dominated by elected representatives. Further, they are conducted in openness (verbatim records and/or video streaming must be accessible), there is time allocated for discussion and there is a fair/equal distribution of speaking time and key

⁴ For further discussions of these criteria, see Stie (2007).

positions. Democratic deliberative meeting places are formally mentioned in the Treaties or in inter-institutional agreements describing their purpose. Democratic deliberative meeting places can be regulated for discussion only or both discussion and decision-making. The second category is *epistemic* deliberative meeting places where competent parties/experts meet to discuss matters relevant for decision-making.⁵ These settings are dominated by non-elected actors and are more or less publicly inaccessible. They are regulated for discussion only and have no decision-making power.⁶ There is one indicator for this criterion:

- There is at least one meeting place dominated by popularly elected representatives that is formally assigned to deliberation prior to final decision-making.

Criterion 2: Inclusion of affected and competent parties

From a discourse-theoretical perspective, democratically legitimate decisions have both a moral and a cognitive element, i.e. they should both be 'right' and 'true' in the sense that they are founded on the arguments of both affected and competent parties. Operationalised to present purposes this means that the views of affected parties can only be voiced by representatives that have been popularly elected. Competent parties are appointed officials/bureaucrats/experts possessing local, scientific or technical expertise. The indicators of inclusion are:

- The main decision-makers are *popularly elected* and have *veto* power over the final outcome.
- *Hierarchy of actors*: The *elected representatives* are the *key actors* when *discussing and deciding* how consequences and burdens are distributed. The involvement of *competent parties* is limited to preparing policy-making.

⁵ 'Competent parties' is used to describe all unelected actors participating in the preparation of decision-making. Hence they differ from 'affected parties' who are defined as representatives with a popular mandate (see below).

⁶ There may also be other types of meeting places. For instance, there may be meeting places for *legitimate bargaining*. These are dominated by elected participants and there is public access to documents after the session. There are also meeting places where there is *illegitimate bargaining*. These are dominated by competent parties or a non-representative selection of elected actors, they provide no access to documents and are completely informal.

Criterion 3: Openness and transparency

To facilitate public scrutiny and informed opinion-formation in the general publics, deliberation processes prior to decision-making must be as open as possible. The indicators of openness are:

- All the involved institutional actors and the public can get access to the policy proposal before it is finally decided.
- There are either open sessions or minutes available directly after important sessions in the decision-making bodies.⁷
- *Access to documents*: There is a digitally accessible register of documents (or other ways of ensuring easy access to documents).
- *Transparency of debates*: There are either verbatim records, video streaming of debates through the internet or minutes available in all official languages within one week after a meeting has taken place.
- *Intelligibility of votes*: There are available voting records which include information and explanation about who voted and what position they defended.

Criterion 4: Neutralisation of asymmetrical power relations

In order to increase the chances of argumentative behaviour in an as open and inclusive manner as possible, power neutralisation mechanisms are needed. Here, I distinguish between two broad categories. The first covers mechanisms that are internal to the procedure and detectable in the procedural set-up, i.e. ex ante mechanisms. The second category covers external mechanisms that kick in after the decision-making process is over, i.e. ex post accountability mechanisms. The indicators are the following:

- *Ex ante mechanism (1): Intelligibility of the procedure*: There is a *precise description of the rules* governing second pillar decision-making. The *Treaties* contain information about the main actors and what powers, rights and duties they have. In addition, there is information about the decision-making rule (unanimity/majority vote) and the sequencing of policy

⁷ Important sessions are decisive policy-making discussions – it is not sufficient to open the doors after choices have been made and only voting or some concluding remarks remain.

stages. The institutions' *rules of procedure and/or inter-institutional agreements* are in line with Treaty specifications.

- *Ex ante mechanism (2): Separation of powers:* The institutional actor presenting a policy proposal is not the decision-maker. Or better, popularly elected representatives can in some way hold the executive to account. There is a clear *legal division* between executive, legislative and judicial powers.
- *Ex post mechanism (1): Parliamentary control:* A parliamentary body has the right to scrutinise individual dossiers and to pass a vote of censure.
- *Ex post mechanism (2): Judicial review:* The judiciary has the right to scrutinise (and possibly sanction) not only adherence to procedural rules, but also the content of second pillar decision-making.

Criterion 5: Decision-making capacity

To make a difference, a procedure must produce outcomes. Decision-making capacity here refers to both formal and informal aspects. Hence the procedure and powers of the second pillar should both be *officially* described in the Treaties and decisions should also *actually* be taken within the formally assigned format in order to rule out that formal institutions are not merely rubber-stamping decisions taken in other forums and by other actors. The indicator of decision-making capacity is:

- There is *absence of informal networks* where powerful actors 'pre-cook' CFSP decision-making.

Methodological remarks

It should be noted that the focus on procedural qualities has its limitations with regard to the type of conclusions that can be drawn from the findings of the evaluation. The criteria only tell us something about the *likelihood for democratic deliberation to occur*, they cannot determine this decisively.

Under the first criterion, only *important* meeting places will be treated with full attention. A meeting place is important if it is directly involved in the preparation and determination of decision-making or if it in other ways is capable of influencing the agenda or outcome of CFSP dossiers. To determine empirically which meeting places that are important, I have relied upon the meeting places that are emphasised by formal sources as well as by the academic literature

dealing with CFSP decision-making. In this regard, the European Council, the Council working groups, the Political and Security Committee (PSC), the General Affairs and External Relations Council (GAERC) fulfil the definition.⁸ This means that Coreper is excluded although it is the formal clearing house before a dossier reaches the ministerial level. The reason for this is that in addition to the specialised nature of CFSP issues, Coreper has a heavy workload which reduces the time it has “...for detailed discussions on foreign and security policy matters and hence tends to accept recommendations from the PSC.” (Cameron 2007: 45).⁹

With regard to the Presidency, the Council Secretariat, the Policy Unit and the High Representative (HR) who obviously occupy central (political and administrative) roles in the CFSP and thus are important *participants* in CFSP decision-making, they are not described as important *meeting places* in the literature and are thus not included as such.

This is also the case with the Commission which, according to Article 27 TEU, shall be ‘fully associated’ and thus plays an important part *as an actor*, but is seemingly not so important *as a meeting place*. Apart from its budgetary powers in CFSP, the Commission’s influence *during the process of policy-making* rather amounts to its valued assistance and participation in Council meeting places and can consequently not be compared to the influence it exercises in the first pillar or in the implementation of second pillar decisions.¹⁰

⁸ I have put together all the CFSP working groups into one category. Hence not only are the 36 regular working groups treated together, the more specialised groups are also included in this category. While they are obviously not all alike, they share some common characteristics in that they all contribute to prepare decision-making, are more active in the beginning of the process and, more importantly from a democratic perspective, their members are unelected officials and hence representatives of competent parties.

⁹ Although not fully resolved, today there is certain division of labour where the PSC provides the content, whereas Coreper ensures legal consistency and inter-pillar coherence (Duke and Vanhoonacker 2006: 174).

¹⁰ The Commission is represented in all settings with the exception of the HR, Policy Unit, Council Secretariat, the Situation Centre, the Military Staff, the EU Special Representatives and EU Personal Representatives and EU Counter-Terrorism Co-ordinator (Spence 2006: 553).

Excluding the Commission and including the EP as an important meeting place may be controversial. The EP obviously lacks decisive competences in CFSP, but despite meagre powers, it has systematically followed up, acquired information and, more importantly, created a more open "...forum for debate on CFSP and [thus] (...) offers opportunities for discussing political alternatives and options." (Diedrichs 2004: 37). From a deliberative democratic perspective the EP's position is interesting not only because it is a directly elected setting/strong public, but also because the EP's informal practice may in the future – as in other policy areas – acquire more formal clout and thus contribute to make foreign and security policy more accountable to directly elected representatives.

One last, but important comment needs to be made with regard application of the criteria. Criteria 2-5 are aimed at the overall procedure. The first criterion, however, refers to a specific but crucial component of deliberative democracy, namely the importance of ensuring that there are meeting places regulated in such a way that democratic deliberation is likely to happen. I shall argue that the emphasis on safeguarding such meeting places represents the intake to a deliberative reading of the democratic Rechtsstaat. Now, from the presentation made above, the characteristics of meeting places seem more or less to be the same as criteria 2-4. It is correct that to determine the type of meeting place involves looking at what kind of members it contains, the degree of openness as well as whether there are procedural rules and practices that contribute to neutralise asymmetrical power relations. However, the indicators of meeting places are not co-extensive with the indicators of criteria 2-4. And whereas the findings resulting from the evaluation of individual meeting places *can* tell us something about the overall procedure, it should be remembered that the findings from a single meeting place is *not* necessarily and automatically valid for the whole procedure, but need to qualified in relation to the findings from the other criteria.

Assessment of the second pillar framework

Deliberative meeting places

European Council

As indicated above, the formal policy initiation and agenda-setting phase starts in the European Council which formulates general guidelines for the Council.

However, European Council meetings are prepared – under the auspices of the Presidency – by several Council bodies before it reaches the ministerial level.¹¹ The most important ones are the Political and Security Committee (PSC) and the High Representative (HR)/Policy Unit which contribute to prepare Presidency Conclusions and have a strategic position in all phases of CFSP decision-making. The European Council consists mainly of the heads of state and government. The Commission President also participates as a full member. The national foreign ministers as well as a Commission member assist their respective representatives (Article 4, TEU) and the HR¹², the Council Deputy Secretary-General, the Commission Secretary General, senior officials from the Presidency and the Council Secretariat as well as technical staff are also present (Hayes-Renshaw and Wallace, 2006: 168). The EP President addresses the European Council, but does not stay for discussions. In sum, then, the main actors are the national ministers. Given that they have a popular (even if indirect) anchoring we may say that the European Council can *potentially* be categorised as a democratic setting.

The meetings are, however, conducted in confidentiality (Hayes-Renshaw and Wallace, 2006: 181). An annotated (draft) agenda for the meeting is the only document available to the public before the meeting.¹³ After the meeting a press conference¹⁴ is held and the Presidency Conclusions¹⁵ become publicly available in all languages along with some background documents.¹⁶ In addition, Article 4 (TEU) commits the European Council to submit a report to the EP after each meeting (in addition to an annual report on the achievements of the Union). All in all, this is obviously not enough to enable the public to follow the meetings. European Council meetings last for two days and are usually conducted around four times a year (and at least twice a year, according to Article 4 TEU) in

¹¹ Formally and according to Article 2(3) of the Council's rules of procedure (Council 2006), it is the General Affairs and External Relations Council (GAERC) that prepares European Council meetings. In reality, however, it is the lower level bodies that take care of these preparations.

¹² When dealing with second pillar issues, the Secretary General of the Council Secretariat is called High Representative.

¹³ See Council rules of procedure (Article 2(3a)).

¹⁴ The Council has set up a video streaming archive of press conferences. See, <http://www.consilium.europa.eu/showPage.asp?id=1098&lang=en&mode=g>

¹⁵ See, http://europa.eu/european-council/index_en.htm

¹⁶ See <http://www.consilium.europa.eu/showPage.asp?id=1121&lang=en&mode=g>

Brussels. The member state holding the Presidency chairs the meeting and functions as a co-ordinator and consensus-builder. All the formal meetings are translated in all the official languages. The meetings have both a formal and a more informal side. In-between the formal plenary meetings, the Presidency conducts informal bilateral (so-called 'confessionals') or group talks in order to reach agreement on difficult matters. According to the Treaties, the European Council is an *official decision-making* arena where only the heads of state and government have a vote. Formally, decisions are taken by unanimity, but most decisions are taken by consensus (Hayes-Renshaw and Wallace 2006).

Lower level working groups

All the senior bodies in the Council hierarchy are assisted by working groups. There are **36 working groups**¹⁷ that are allocated for CFSP activities in addition to more **specialised ones**.¹⁸ Many of the regular working groups are not solely occupied with second pillar issues, but are joint EC-CFSP settings (Smith 2003). There are no fixed rules for the composition of working groups (Westlake and Galloway 2004: 220), but they usually consist of national experts as well as Commission representative(s) (DG RELEX).¹⁹ Hence, they contain only competent parties and are not eligible for the democratic category of meeting places.

The working groups meet once or twice a week and are chaired by the Presidency. As in the first pillar, these groups help drafting policy documents and otherwise prepare second pillar decision-making. Whereas the purpose of the meetings is consequently to *prepare/assist* decision-making, Duke and Vanhoonacker (2006: 169) estimate that 70 per cent of final decision-making in the GAERC is *already decided* in the working groups (through the 'A' point procedure). Whereas the working groups are more open than senior bodies (Juncos and Pomorska 2006: 4), none of the documents are publicly available and meetings are not conducted in openness.

¹⁷ See Spence (2006: 556).

¹⁸ Cf. EU Military Committee (EUMC), Committee for Civilian Crisis Management (CIVCOM), Nicolaidis Group, Antici Group, Relex/CFSP Counsellors working group, Politico-Military Group, Political-Military Affairs Committee (Polmil). In addition, the PSC is also daily supported by the network of European Correspondents.

¹⁹ The Commission is also present in the working groups dealing with military issues (Westlake and Galloway, 2004: 220).

Apart from the rule that all member states shall be represented and that a delegate from the Presidency shall chair the meetings, there are no formal rules of behaviour for the working groups.²⁰ There exist, however, quite strong informal rules/code of conduct that are highly compatible with deliberation and amount to presenting arguments in a clear and consistent manner, seriousness and willingness to listen to others, treating colleagues politely and understanding their dilemmas/problems (for an overview, see Juncos and Pomorska 2006: 9). Consequently, both the so-called consultation reflex²¹ and consensus-buildings norms are strong in the working groups.

All formal arenas seem to be surrounded by informal structures before and after the formal meetings – a feature that has only increased after the two Eastern enlargements due to many more participants (Juncos and Pomorska 2006: 6). In fact, “...drafting is often done informally.” (ibid). These informal structures range from lunch/dinner or other social events, corridor sessions, networks of formal and informal communications (e.g. e-mail lists), Presidency ‘confessionals’ to meetings with so-called ‘like-minded’ groups. The increasing number of informal meetings obviously affects the dynamics of formal meetings and in the words of one of the interviewees of Juncos and Pomorska (2006: 7): “As a result many issues appear ‘pre-cooked’ in the agenda, especially the sensitive ones”. So-called ‘like-minded groups’ prepare and co-ordinate their statements beforehand which reduces the deliberative potential in formal settings. The result seems to be “...fewer opportunities for deliberation in the formal meetings and more bargaining/information-type discussions.” (ibid. 2008: 4).

Senior-level body: The Political and Security Committee

The PSC is the ‘linchpin’ in second pillar decision-making and performs many of the same tasks as Coreper in the first pillar (Duke 2005; Cameron 2007: 45). In PSC meetings, the CFSP ambassadors (senior diplomats sent by their respective national foreign ministries and permanently based in Brussels) participate along

²⁰ Cf. Article 19(4) Council Rules of procedure.

²¹ That is, “...an automatic reflex of consultation brought about by frequent personal contacts with opposite number from the other Member States.” (Nuttall quoted in Juncos and Reynolds 2007: 132).

with representatives of the member states, the Council Secretariat (DG E and Policy Unit), the HR, the Commission (Head of Directorate A in DG RELEX) and frequently also the External Relations Commissioner (and other interested Commissioners). The EP is excluded. In sum, the PSC is a setting for competent parties and has thus only the potential of being defined under the epistemic version of meeting places.

PSC meetings are not open to the public and there are also no documents from such meetings available on the Council website. There is, however, an online CFSP calendar with an overview of previous (since 2006) and forthcoming meetings in the various Council bodies, including the PSC.²²

On the basis of consultation with home capitals, coordination of national positions with their fellow colleagues, PSC members offer military and political advice that contribute to the definition and preparation of dossiers.²³ In addition, it oversees the CFSP working groups, the EU Military Committee and the implementation of dossiers, it conducts extensive contact with all involved bodies within the EU as well with NATO. Formally, the PSC is supposed to report to the foreign ministers via Coreper, but in practice they usually assist the ministers directly (Cameron 2007: 45). In sum, the PSC's position is crucial during all phases of CFSP decision-making and is consequently under heavy time pressure due to an extensive work agenda. This means that the formal PSC meetings conducted twice a week are accompanied by daily informal meetings. The ambassador from the country holding the Presidency chairs the meeting.²⁴

As the working groups, the PSC meetings are conducted according to informal convention rather than formal rules. Also the PSC is characterised by a strong 'consultation reflex' and willingness to reach consensus in order to facilitate agreement (Juncos and Reynolds 2007: 132, 141). The informal rules of behaviour are strong and delegates quickly learn that they have to follow them in order to

²² See, <http://www.consilium.europa.eu/showPage.asp?id=390&lang=en&mode=g>

²³ See Article 25 TEU and further elaborated in Council Decision 2001/78/CFSP, OJ L-27/2.

²⁴ An exception to this rule was made in 2002 when Denmark was holding the Presidency, but due to its opt-out of ESDP, the chair was taken over by Greece (see Hayes-Renshaw and Wallace 2006: 83). Also the HR can chair the meetings.

influence the agenda. In short, the informal rules of behaviour mentioned under the working groups also characterise the PSC. This means that the increased number of participants after Eastern enlargement as well as a tight schedule have resulted in more *informal* meetings where the features compatible with a deliberative interaction mode is seemingly dominating whereas the *formal* meetings have become more streamlined and the time for discussions is discouraged (Juncos and Reynolds 2007: 141-3).

The decision-making rule is unanimity, but prior consensus-building means that votes are rarely taken; "Instead, the Presidency will sum up the discussion and if no delegation expressly objects, the said decision is considered to be carried." (Juncos and Reynolds 2007: 141). It should be noted though that the PSC is not an official decision-making arena, hence decisions taken here are not final.

Ministerial level: General Affairs and External Relations Council (GAERC)

It is the GAERC Council that takes the decisions in CFSP matters and it is the ministers of foreign affairs who represent the member states.²⁵ The defence ministers only "...meet at the fringes of the GAERC." (Wagner 2006: 201). In addition, the HR and the Commission are present and PSC members can also assist their respective foreign ministers. In sum, however, we may say that GAERC is primarily occupied by participants with at least indirect popular foundation and is thus eligible for the democratic category of meeting places.

At the Council website, there is an access point for agendas/background notes/briefings for all Council configurations.²⁶ The result is, however, far from impressive as there are currently no GAERC documents available.²⁷ Whereas the other Council configurations often offer publicly available minutes, this is not the case with GAERC when dealing with CFSP matters (although some minutes have

²⁵ If a minister cannot attend s/he can be substituted by her/his deputy or Coreper ambassador.

²⁶ See, http://www.consilium.europa.eu/cms3_applications/applications/newsRoom/loadBook.asp?BID=104&LANG=1&cmsid=1228

²⁷ October 2008.

partial access).²⁸ Hence it is possible to find out what documents are relevant, but access to the texts is unobtainable.²⁹

GAERC meets once every four to six weeks and the minister from the member state holding the Presidency chairs the meetings. On the basis of the agenda prepared by the Presidency assisted by the Secretariat, the meetings are usually divided into general affairs and external relations reflecting the hybrid character of the Council configuration. As in the first pillar, the agenda is divided into an 'A' and 'B' list which means that only highly contentious issues reach GAERC as 'B' points and hence warrant the full attention of the ministers. According to Duke and Vanhoonacker (2006: 169), 90 per cent of the items are agreed at lower levels and appear as 'A' points on the ministerial agenda. Ambos (2004: 167) holds that "Without doubt the GAERC is an important player within the CFSP decision-making procedures. However, it is not really a true agenda-setter, but rather the 'converter' of EU foreign policy actions that are mainly decided by the Presidency and/or the European Council and prepared by the Political and Security Committee (PSC)." This point notwithstanding, GAERC is the formal decision-making arena and the ministers can at any point ask to change items from 'A' to 'B' points. In addition, they have veto power. Only unanimously agreed items will pass (Article 24 and 25 TEU).³⁰ In order to show disagreement, member states can file a 'constructive abstention' which means that they abstain from voting without blocking a unanimous decision (Article 23 TEU). If a constructive abstention is followed by a formal declaration, the member state in question is not obliged to apply the decision, but must accept that it commits the others. The Member State must then refrain from any action that might conflict

²⁸http://register.consilium.europa.eu/servlet/driver?lang=EN&page=Result&typ=Minutes&fc=REGAISEN&ff_SOUS_COTE_MATIERE=PV+CONS&ssf=DOCKEY+ASC&ff_COTE_DOCUMENT=+%2F08&srm=50&md=400&cmsid=552

²⁹ See for instance,

http://register.consilium.europa.eu/servlet/driver?lang=EN&typ=Minutes&fc=REGAISEN&ff_SOUS_COTE_MATIERE=PV+CONS&ssf=DOCKEY+ASC&ff_COTE_DOCUMENT=+%2F08&srm=50&md=400&cmsid=552&rc=18&nr=116&page=Detail

³⁰ In cases where a Joint Action and a Common Position result from a Common Strategy, GAERC can use qualified majority voting. This is also the case when adopting a decision based on a Joint Action or Common Position and when appointing a Special Representative (cf. Article 23(2)).

with Union action based on that decision. However, the consensus norm is also strong at the ministerial level and votes are rarely taken (Hayes-Renshaw and Wallace 2006).

Also GAERC is characterised by informal sessions in-between the formal meetings. Due to the high number of people attending formal GAERC meetings, the "...ministers find it difficult to enter into substantive discussion on more sensitive matters with such a large audience." (Westlake and Galloway 2006: 54). The attendance of ministers in the formal setting has consequently decreased and they appear instead for informal lunches and leave the formal settings for their deputies (ibid). In an effort to rectify this tendency, there are now a 'restricted' setting within the formal format of GAERC meetings which usually only contain the minister and two officials from each delegation (Reiderman 2006: 67).

As above, enlargement and tight timetables resulted in the fear of inefficiency and deadlock and led the Council to adjust its Rules of Procedure. This means that the room for discussion in formal meetings has decreased merely by the fact that there is now not much time for it (Juncos and Pomorska 2008: 11). In addition, prior co-ordination in 'like-minded delegations' is also common in GAERC meetings (ibid). This practice obviously reduces the likelihood of deliberation to take place in formal GAERC meetings as the incentives for deliberative interaction is canalised into the informal meetings which have a more frank atmosphere. However, given the almost complete absence of openness of GAERC meetings the potential deliberation going on is normatively downgraded to the category of epistemic deliberation as it only takes place among elites with no possibility for public intervention. Whereas the duty to justify positions is firmly institutionalised for internal purposes towards fellow participants, the public is provided more or less with a 'fait accompli' in a press conference after the final decision is taken.

The European Parliament – a potential strong public?

Formally, the EP has no *ex ante* powers to participate and/or monitor the formulation of *individual* CFSP decisions, but it provides an open setting for continuous discussion on these matters that interested and affected parties can follow. The EP's involvement in the second pillar is regulated in Article 21 (TEU) which grants the Parliament a *general* right to be 'regularly informed' and 'consulted' on the 'main aspects and basic choices' of the CFSP and the

Presidency is obligated to 'ensure that the views of the EP are duly taken into account'. Further, the Parliament is entitled to 'ask questions' and 'make recommendations' and it shall hold 'an annual debate on progress in implementing' CFSP.

Apart from the annual report, the right to be 'regularly informed' is institutionalised to the degree that the Presidency, the HR, the Commission and sometimes also the foreign ministers come to Parliament to answer questions and participate in discussions (Diedrichs, 2004: 36). Even if the Council has no duty to take heed of the EP's position, the latter actively comments and follows up with own-initiative reports, debates, resolutions, recommendations etc. Within the EP, it is first and foremost the Foreign Affairs, Human Rights, Common Security and Defence Policy committee (AFET) and its Subcommittee on Defence (SEDE) that deal with CFSP/ESDP issues and it is here the more thorough discussions take place. This is also the case when the HR comes to the committees versus when he appears before the EP in plenary session where the interaction is more 'ritualistic' (Crum 2006: 394).

In this way, the EP has carved out a place for itself also in CFSP. Although it lacks "...the formal power to censure, it is adept at exploiting the power to embarrass." (Reiderman 2006: 64). The EP is not afraid to express its opinion and has usually a more principled stance than the more diplomatic approach of the Council (Crum 2006: 390). If the EP is able to pair such statements with refusal to sign and thus preventing international agreements with third countries to come into force - a right it enjoys via the first pillar assent procedure - the EP *may* acquire leverage towards the Council by undermining "...the unity of the stance of the EU vis-à-vis third countries." (ibid). What is more, through its rules of procedure³¹ the Parliament seemingly tries to unilaterally change the current situation and make the HR and the Presidency more accountable to it (Diedrichs 2004). The rules of procedure thus go further than present practice, but present practice has again extended the very limited obligations the Council has towards the EP under the Treaties and inter-institutional agreements.

³¹ Cf. chapter 13 EP's rules of procedure,
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20081022+0+DOC+PDF+V0//EN&language=EN>

Having said this, it should be noted that when Council representatives (first and foremost Solana) appear before the EP, they more or less control the agenda. This is also the case regarding the setting of the meetings where for instance Solana prefers informal gatherings to inform MEPs on sensitive issues he is prevented from discussing publicly. He "...holds regular informal exchanges with the EP President, the Presidents of the party groups and the political co-ordinators in the Foreign Affairs Committee. Parliamentarians are generally happy to oblige on such informal occasions, even if they realize that these encounters are of limited political use and may actually undermine the effectiveness of formal exchanges." (Crum 2006: 394). In sum, MEPs are more informed than the general public, but there are obvious obstacles to a proper parliamentary monitoring of the decision-making process.

As we have seen, there are several meeting places where deliberation is likely to occur. This is the case in the working groups, the PSC and the EP. The European Council and GAERC meetings are less likely deliberative meeting places as especially the time factor and the fact that they are official decision-making settings induce the propensity for bargaining. However, the working groups and the PSC work under the 'shadow of the vote' which could have increased the *possibility* for bargaining also in these settings. With regard to the difference between epistemic and democratic deliberative meeting places, the only two settings that were preliminarily eligible for the democratic category due to (indirect) popular anchoring - the European Council and the GAERC - did however not qualify for the democratic category due to the secrecy of the meetings.

Inclusion

How do the legal provisions and practical organisation of the second pillar affect the inclusion of affected and competent parties' views? According to the Treaties, the main CFSP decision-makers are the European Council and the Council which both consist of ministers and thus have an indirect popular link (when acting as EU decision-makers). Although the lower level bodies in the Council hierarchy dominate the preparatory process, the European Council and the GAERC still have final veto power. Hence from the outset, the second pillar fulfils the requirement that the main decision-makers (with veto power) should be popularly elected. However, when looking closer at the actual key actors of CFSP

decision-makers – that is, those actors who participate and contribute to *mould* a dossier *collectively* throughout the procedure – it is not the ministers who play the first violin. They are only partly involved in policy-formation (see Cameron 2007: 41-2; Juncos and Pomorska 2008: 3). Since this is not their main job they are not ‘hands-on’ on an everyday basis which results in the situation that perhaps apart from the Presidency minister, the number of elected participants satisfactorily involved in CFSP decision-making is close to zero. The low frequency of meetings makes the possibility for a collective will-forming process difficult at the ministerial level. Hence, the ministers become heavily dependent upon Council officials/advisers, especially officials in the senior bodies such as the PSC, the Council Secretariat and the HR. The result is that the second pillar is dominated by appointed or unelected actors. Having said this, Hayes-Renshaw and Wallace (2006: 184) note that “...real political discussions can and do still occur, although probably now more frequently at the lunch or dinner table than at the plenary negotiating table.” This is, however, only a marginal consolation. The domination of competent parties should also be seen in relation to the democratic problem of putting the entire decision-making process in the hands of the national executives without suitable involvement of parliamentarians to counter such executive dominance. In sum, the vast majority of involved actors in the CFSP represent competent- and not affected parties.

Openness

One minimum criterion of openness is that the policy proposal is available to all the involved institutional actors prior to decision-taking. From the official, Treaty perspective, this requirement is met as the European Council, the Council and the Commission are all acquainted with the content before the process is concluded. If we, however, take into consideration the EP, the national parliaments and the publics the situation is not satisfactory as they are not properly involved. True, the conclusions resulting from European Council meetings are available and give an indication of where the Union is headed in CFSP matters, but unlike Commission proposals launched within the Community framework, the principles, general guidelines and common strategies resulting from European Council meetings are of a much less concise character than the legislative proposals presented in the first pillar. It more or less follows from the above that there are no open sessions or minutes resulting from important decision-making settings.

Access to documents

According to Article 255 (TEC) and further elaborated in Regulation 1049/2001, the Council³² is obliged to make documents connected to decision-making publicly available through a digital register.³³ As noted, however, access to relevant documents attached to individual CFSP-dossiers is almost impossible to obtain. According to the Council's rules of procedure (Article 17(3-4)), it is up to the Council/Coreper to decide (unanimously) on whether Common Strategies, Joint Actions or Common Positions should be published in the Official Journal. Apart from the general online summaries of adopted acts, some meeting agendas as well as the Council's annual CFSP report to the EP, CFSP decision-making is more or less conducted in secrecy. In foreign and security policy the above Regulation allows for significant exceptions to the openness rule (see especially Articles 4 and 9 of the Regulation).

Whereas the Regulation commits the institutions to list all the documents in the register so that it is possible to know that they exist, access to the content is rare. According to the 2007 Council's annual report on access to documents (p. 10³⁴) "350 (...) sensitive documents were produced in the period concerned, 26 classified as "SECRET UE" and 324 as "CONFIDENTIEL UE". Of these, 3 "SECRET UE" document and 61 "CONFIDENTIEL UE" documents are mentioned in the register..." To get hold of documents not listed in the register, interested parties may apply to the Council Secretariat for disclosure.³⁵ Only persons with the sufficient security clearance can evaluate and decide whether applications for such documents are accepted. Of all applications received by the Secretariat in 2007 18,1 per cent concerned CFSP and 6 per cent ESDP matters (ibid: 14). Of these, the accepted applications amounted to 18,4 per cent for CFSP and 9,6 per

³² The Regulation also covers the Presidency and the European Council.

³³ See Articles 11 and 12 of the Regulation. The Council's online register was established in 1999 and the provisions on access to documents are followed up in the Council's Rules of Procedure, mainly in Annex II. For online register, see, <http://www.consilium.europa.eu/showPage.asp?id=1279&lang=EN>

³⁴ See, http://consilium.europa.eu/uedocs/cmsUpload/ACCESS_int.en08.pdf

³⁵ If the applicant is denied access recourse to the ECJ and/or the Ombudsman is possible.

cent for ESDP issues. In other words, a rather limited result for affected parties to get acquainted with second pillar decision-making.

In addition to the categories of classified documents in the Regulation, the Council (and the Commission) also operates with a second system of classified documents referred to as 'restricted' documents.³⁶ Documents falling under this label are for internal circulation. They are not covered by the Regulation and are therefore not on the public register. This means that it is not possible to know that these documents exist unless one has inside sources. The 'restricted' category has a lower security level than the three others, but the fact that it is excluded from the overall legal framework of the Regulation may make it tempting for the Commission and the Council to group documents they do not want the public to see in this category.

This policy obviously gives the public as well as the EP and national parliaments meagre conditions for making an informed opinion about CFSP policy-making. Through an inter-institutional agreement, the EP has, however, the right to send a special committee consisting of the EP President, chair of AFET and three additional MEPs to the Council to see classified documents³⁷. They are, however, in many instances under the obligation not to reveal what they have read: "Information classified not as 'top secret', but merely as 'secret' or 'confidential' may, by agreement, be further distributed to members of the Foreign Affairs Committee meeting, if necessary, in camera." (Corbett et al. 2007: 147). Consequently, "...the provisions create an unusual situation of discrimination among the members of Parliament in that only a few persons have access to sensitive information." (Diedrichs 2004: 43). In sum, most CFSP/ESDP documents are exempt from the public eye during the decision-making process.

Transparency of debates

European Council meetings are conducted in confidentiality and no verbatim records, minutes or video transmissions are available for outside actors. However, the "...well-informed and interested observer can piece together a

³⁶ See Council Decision (2001/264/EC, section II, § 4) and Commission Decision (2001/844/EC, ESCS, Euratom, Article 16(1)).

³⁷ See Inter-institutional agreement, 2002/C-298/01 and EP's Rules of Procedure, Annex VII.

pretty complete picture from information gleaned from several national or institutional sources at a later stage.” (Hayes-Renshaw and Wallace 2006: 181).

According to Articles 5 and 6 of the Council’s Rules of Procedure, Council meetings shall not be open. The only exceptions to this rule are found in Article 8, but are, in CFSP matters, not very helpful. The only open setting in relation to CFSP is when the GAERC discusses the Council’s 18 months work programme (Article 8(4)), but this does obviously not give outsiders substantive information on individual dossiers.

For ordinary citizens the second pillar decision-making system is an impermeable process. To a large extent this is also the case for the EP as well as the national parliaments. Neither formal nor informal settings are conducted in openness.

Intelligibility of votes

According to Article 9 in the Council’s Rules of Procedure, the results and explanations of votes in CFSP matters are only available if the Council or Coreper decide unanimously to make them public. In the first pillar, explanations and results of votes in the Council are usually published on the website, but this is not the case for second pillar issues. The Council’s annual CFSP report to the EP lists all adopted second pillar acts during the relevant year, but does also not provide explanations or results of votes.

Neutralisation mechanisms

Ex ante: Intelligibility of the procedure

Although the CFSP area has gone through a process of legalisation (Smith 2003: 37), the Treaty provisions do not give an exhaustive picture of the nature of the decision-making process on a par with for instance the co-decision procedure in the first pillar where stages of decision-making process are indicated with successive readings and clear definitions of when and how a dossier is concluded. The sequencing of the decision-making procedure is only very schematically described in Article 13. The CFSP/ESDP policy-making process is a much more insulated and less ‘formal’ process than in the first pillar. Moreover, the phases of the policy-process are more compressed and not clearly distinguishable for outsiders.

The presentation of CFSP/ESDP on the Council's website is however relatively good. There is information on the bodies involved, the annual CFSP report etc. It is seemingly not the lack of presentation that is the foremost problem, but rather that the second pillar decision-making framework is complicated, a fact that is only exacerbated by the cross-pillarisation character of the foreign policy field (Bono 2006: 439; Cameron 2007: 57).

Ex ante: Separation of powers

The second pillar has no clear divisions between policy-initiator/agenda-setter and legislator. All member states as well as the Commission³⁸ have the right of initiative (Article 22 and Article 14(4) TEU), but the Commission has no voting rights. Formally, policy proposals originate at European Council meetings although the agendas of these meetings are heavily dominated by lower level Council bodies (Westlake and Galloway 2004: 223). There is obviously a difference between the European Council and the Commission (or any of the national governments for that matter) with regard to how comprehensively the agenda-setting phase is conducted. The European Council only meets four times a year and the meetings last around two days. The policy formulation phase is more or less exclusively situated in the Council and even though the Commission also plays an important role it is not the agenda-setter. The EP, the national parliaments and the ECJ have no formal powers according to Title V TEU. In sum, the second pillar framework seriously blurs the principle of separation of powers as the Council (and the European Council) is both legislator and executive (the latter together with the Commission). There is, in other words, no legal separation of powers in the second pillar (Bono 2006: 435).

We may, however, also add that the pillar system is in itself a challenge to a proper separation of powers. Although formally separated, the problem is cross-pillarisation resulting from the fact that the legal boundaries between the first, second and third pillars are difficult to exercise in practice or that "...the legal form no longer captures the reality of decision-making." (Bono 2006: 439). Hence, supranational first pillar issues of trade and development often affect the more

³⁸ Except in military issues.

intergovernmental second pillar (Ketvel, 2006: 84)³⁹. The institutional and legal dispersion of EU foreign policy into all three pillars only adds to the deficiency of not properly distinguishing between executive and law-making competences within the second pillar system.

Ex post: Parliamentary control

As we have seen above, the EP's general right of information and consultation does not cover specific aspects of *concrete* CFSP-dossiers. Hence, the EP is deprived of formal rights not only to properly monitor ongoing policy-making, but has also no formal rights to scrutinise and possibly censure *individual* dossiers ex post. However, through its Community budgetary powers, the EP has, according to Article 28 (TEU), formal power over CFSP administrative expenditure and non-military/defence operative expenditure (unless the Council unanimously decides to cover expenditure over the member states' budgets).⁴⁰ Hence, the EP has partial budgetary power which it has used to enhance its standing in the CFSP. Even if limited, many seem to agree that its powers exceed beyond what is formally set out in the Treaties due to its ability to exploit its budgetary and assent powers (Barbé 2004: 55, 60; Reiderman 2006: 64). This is also confirmed by the aforementioned inter-institutional agreements on budgetary discipline and access to sensitive documents respectively. The above powers notwithstanding, the EP does neither have the appropriate discretion to scrutinise nor to censure CFSP/ESDP decision-making.

Regarding national parliaments the situation is similar. Officially, there are only the general Treaty-statements that it is up to national constitutional systems to decide the scrutiny powers the individual parliament will have in CFSP and that the involvement of national parliaments is encouraged.⁴¹ National parliaments have seemingly more power than the EP in CFSP/ESDP (Reiderman 2006: 64), but the major problem is that they do not have a 'collective overview' (Bono 2006:

³⁹ This is also visible in the fact that the resources (financial and personnel) used for the implementation of CFSP dossiers are mainly drawn from the first pillar (cf. the tension between the HR and Commissioner for External Relations).

⁴⁰ In 1997, the EP, the Commission and the Council concluded an inter-institutional agreement on budgetary issues with regard to CFSP. This agreement was extended to a general agreement covering all budgetary issues in 1999 (OJ, C-172, 18.06.1999) and revised in the 2006 (OJ, C-139, 22.10.2006).

⁴¹ Protocol 9 annexed to the Treaties (OJ C-321 E/1).

440). Hence they may have some powers to hold their own government to account, but the secrecy of CFSP/ESDP decision-making renders it impossible for national parliaments to scrutinise the positions of the other member states (ibid). There is also significant variation when it comes to the depth and character of national parliamentary control in the member states (Wagner 2006: 204-5; Bono 2005, 2006). Moreover, none of the national parliaments seem to have neither the formal nor a de facto possibility to exercise democratic control, certainly not ex ante, but also not ex post (see Bono 2005, 2006; Barbé 2004).

The Conference of the Community and European Affairs Committees (COSAC) is also briefly mentioned in the Treaties, but does not have any rights in CFSP/ESDP issues and has mostly exclusively concerned itself with institutional questions. The other relevant inter-parliamentary setting, the WEU Assembly⁴², has no formal powers, but has continued its practice of debating and making recommendations on ESDP decisions even after the old WEU transferred its operational capacities to the EU at the end of 2000 (Bono 2006: 440). It also debates and responds to an annual CFSP report drawn up by the HR, but the HR has no obligation to take the Assembly's views into account.

As we have seen, the EP has no real formal clout and only a limited de facto role in CFSP decision-making. The absence of EP competence is not compensated by the involvement of national parliaments. Since there is a lack of inclusion regarding the dimension of the affected (neither the European Council, the Council, the EP nor national parliaments are 'hands-on'), it is crucial that there is a proper parliamentary control ex post. From the above, it cannot be concluded that this is the case with regard to CFSP policies.

Ex post: Judicial review

In contrast to the first pillar, CFSP decisions are not under the jurisdiction of the ECJ and citizens and other affected parties can in general not appeal to the Court to consider decisions taken within this framework (Duke and Vanhoonacker 2006: 177). This is the short story of Article 46 TEU. In the longer story, Article 47 nuances the picture in the sense that it requires CFSP issues to be coherent and not violate provisions governing Community competence in TEC. This means

⁴² Officially it is called 'the interim European Security and Defence Assembly'.

that the Court has indirect influence on the CFSP in exercising the right to review whether a CFSP dossier encroaches upon Community law and decision-making procedures (Ketvel 2006: 91-2). Over the last few years, this has become more frequent as the policy areas in the first, second and third pillars overlap thus rendering the right legal basis under which decisions shall be taken a question for the ECJ. Whereas there have been quite a few cases of this kind regarding the third pillar (see Hillion and Wessels 2008; Ketvel 2006), there has only been one⁴³ such case in the second pillar, namely the ECOWAS⁴⁴ case. On the basis of Article 230 TEC, the Court ruled that the CFSP decision should be annulled as it should not have been adopted under the second, but the first pillar. For these competence questions, it is only member states and EU institutions that appeal to the ECJ. In sum, despite having no jurisdiction in the second pillar (Article 46 TEU), the Court has nevertheless – on the basis of Article 47 TEU – considered the procedural aspects of CFSP decisions. It has neither interpreted provisions nor evaluated the validity of CFSP cases. In sum, the second pillar does not allow for proper judicial review of CFSP decisions and is thus “...inadequate to meet the basic demands of fundamental rights protection once action taken at Union level affects individuals.” (Spaventa 2008: 237).

Decision-making capacity

Can the legal provisions and practical organisation of the second pillar ensure that decision-making is conducted within the assigned arrangement as described in Title V or are the actual decisions taken somewhere else? Given the nature of foreign and security policy, it is possible that there are secret settings that seldom appear in the literature, but where the ‘actual’ decisions are taken. For instance, small states worry that an informal group of the largest member states (variably

⁴³ It should be noted that also *Hautula* belong to the second pillar framework (Case T-14/98, *Hautula v Council* [1999] ECR II-2489). Here the Court reviewed the legality of a Council decision rejecting the plaintiff access to CFSP documents (Ketvel, 2006: 83). The Court ruled that the plaintiff be given partial access to documents.

⁴⁴ Case C-91/05 *Commission v Council*, judgement of 20th May 2008. The Commission filed a case against the Council regarding the CFSP decision supporting the moratorium on small arms and light weapons in West Africa. ECOWAS follows the Commission’s reasoning in the third pillar Airport Transport Visa case (Case C-170/96, *Commission v Council*, ECR 1998, I-2763) that if a decision can be adopted both in the Community and the intergovernmental third pillar, the former should be chosen. The Airport case was rejected by the ECJ.

called the 'Directoire'/'Quint'/the EU-3 depending on the states involved) 'actually' decide the EU's foreign and security policy. While the influence of the large states cannot be ruled out, Hill (2006) notes that although they obviously often take the lead, dividing interests hinder the formation of a permanent setting outside the second pillar. On the basis of the above, it is consequently possible to confirm that decisions on CFSP dossiers are taken within the European Council/Council framework, but the relationship between the pillars are blurry. This is particularly evident with regard to the legal basis of the EU's foreign policy where there can be tension between the Community and second pillar competences. Hence decision-making capacity in CFSP is arguably dependent upon a good relationship between the Council and the Commission⁴⁵ as well as with the EP in budgetary issues. It should also be remembered that although the member states realise that their foreign policy usually have more weight when conducted together, CFSP is a *common-* not a *single* policy – it still belongs to the intergovernmental structure of the Union where the member states enjoy more sovereignty than in the Community pillar (Reiderman 2006: 71) and hence where co-ordination in situations requiring rapid reaction is more difficult to achieve in the EU than on a nation-state level.

Concluding remarks

The underlying assumption in this article has been that as long as the Union takes decisions that have consequences for those who are bound by them, there is no *principled* reason that can *normatively* trump the requirement that also CFSP policy-making should be subject to democratic scrutiny. It was further argued that despite its formal intergovernmental character, the increasing 'Brusselsisation' of the second pillar warrants subjecting the EU's foreign and security policy to the same kind of democratic standards as nation-states. Based on an evaluative scheme developed from a deliberative perspective, the second pillar was consequently put to a democratic test.

⁴⁵ According to Cameron (2007: 57), 90 per cent of the foreign policy toolbox originates from first pillar instruments, e.g. troop deployments or diplomatic demarches are dependent upon such resources.

The evaluation revealed that the conditions for decision-making in the EU's foreign and security field are not very conducive to democracy. The main reason for this is the lack of popularly elected representatives who are involved in decision-making on a daily basis. The problem is not that unelected delegates contribute to prepare the work of the Council. Every modern decision-making body is dependent upon a qualified staff to reduce complexities and provide expert advice and, of course, it is impossible to draw exact boundaries between preparatory work and decision-making. That bureaucrats influence decision-making is beyond doubt, clearly unavoidable and obviously desirable. The problem starts if those who claim to speak on behalf of affected parties are reduced to rubber-stamp representatives. The main problem is consequently the *extent* to which the Council officials act on behalf of the ministers. In addition, all CFSP meeting places are almost completely sealed off making it impossible for the general public to follow the discussions and form an informed opinion about the CFSP/ESDP policy-making. Whereas the duty to justify arguments and positions towards fellow ministers and delegations inside the European Council and GAERC is solidly institutionalised (epitomised in the 'consultation reflex' and consensus-building norms), the general public and other interested parties are, on the other hand, cut off with a press conference after decisions are taken. This is more or less a 'fait accompli' as there are only weak accountability mechanisms to appeal to in order to annul a CFSP decision.

Whereas the conditions for *democratic* deliberation are insufficiently met, this is not necessarily the case regarding *epistemic* deliberation. Especially the *informal* meetings among participants in the Council working groups and the PSC seem to be highly conducive to deliberation. In making distinctions between affected and competent parties as well as between epistemic and democratic types of meeting places, the evaluative framework applied in this article provides analytical tools to say something about what kind of deliberation that is likely to occur. As shown in this article, it is a misunderstanding that more deliberation necessarily equals more democratisation. Deliberation can also simply be a mode of interaction without the normative underpinnings indicated in theories of deliberative democracy. Decisions taken by competent parties cannot be labelled democratic however deliberatively they have been reached. The evaluative framework applied in this article takes us some way in providing the tools to take heed of such normative distinctions when conducting empirical analyses, but points to the need for a more nuanced and precise usage of the concept of

deliberation. The underlying 'plea' in this article is that 'democratic deliberation' should be limited to deliberation that takes place within institutionalised decision-making settings for the purpose of reaching binding decisions and which satisfy certain procedural qualities. This is not meant as a principled argument in the sense that democratic deliberation never occurs but in institutionalised decision-making settings. Rather, it is a pragmatic argument put forward for the sake of avoiding misunderstandings between the different meanings of deliberation and most importantly to keep an analytical distinction between 'democratic deliberation' and 'epistemic/elite deliberation' when deliberative theory is approximated to real-life circumstances and applied in empirical studies.

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