



Assessing Democratic Legitimacy from a deliberative perspective

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Abstract

In this article, I outline an analytical framework allowing for an assessment of the democratic legitimacy of the decision-making system of the EU's second pillar with reference to five criteria. The criteria are developed on the basis of a discourses-theoretical reading of a deliberative perspective on democracy. Empirical indicators for each criterion are specified and discussed. With this analytical framework the institutional and procedural aspects of the second pillar decision-making system can be evaluated for its democratic qualities or lack thereof.

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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 to why foreign and security policy as such should not be subjected to the same type of democratic control and scrutiny as other policy areas. In fact, "...it is becoming increasingly difficult to argue that foreign, security and defence policy should be the prerogative of the executive, and that democratic accountability and openness should be set aside when such matters are discussed." (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. More concretely, "...security and defence politics impacts on citizens' lives in many ways: recruitment policy determines how much (if any) time young men must spend as conscripts, and the defense budget influences how much the government can dedicate to social policy, etc. The most tremendous impact, however, results from decisions on the actual deployment of troops in military missions because, in addition to their political and fiscal repercussions, citizens' lives are then put to risk." (Wagner, 2007: 3; see also Lord, 2007). In sum, foreign and security policy – as is the case in other policy areas – cannot escape the fact that decisions in this field also involves making normative choices and prioritisations about who will be affected and how they will be affected (that is, the distribution of goods, burdens and risks). This warrants subjection to democratic control.

The aim of this article is to develop an *analytical framework* for a normative assessment of the second pillar CFSP/ESDP decision-making system. In doing so I rely upon a deliberative approach to democracy and, more specifically, a discourse-theoretical version of deliberative democracy (Habermas, 1998, 2001; Eriksen, 2003, 2006, 2007a and b; Eriksen and Fossum, 2002; Eriksen and Skivenes, 2000).

Deliberative democracy has long remained an idealised and principled theory mostly populated and dominated by political philosophers. Many political scientists have presumably sympathised with the insights and normative principles of deliberative democracy, but found them difficult to use in empirical investigations due to the fact that they are formulated on a high level of abstraction. One of the main critiques of deliberative theory and, arguably rightfully so, is thus that it does not devote time and effort to spell out how the ideals of deliberation and decision-making may be applied to real-life conditions. The ideal procedure of argumentation where all actors adhere only to the force of the better argument is not a realistic goal². There is, in other words, a problem/challenge of feasibility – a "...missing link between democracy

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² Even if we can argue that political philosophy's preoccupation with idealised conditions do not make the insights very useful or applicable for political science studies of empirical conditions, it should be noted that it is a misunderstanding that the ideal procedure as such is intended for empirical conditions: "...even under favourable conditions, no complex society could ever correspond to the model of purely communicative social relations." (Habermas, 1998: 326). Rather, "The point of the idealised procedure is to provide a model characterisation of free reasoning among equals, which in turn can serve as a model for arrangements of collective decision-making that are to establish a framework of reasoning among equals. Using the model, we can work out the content of the deliberative democratic ideal by considering features of public reasoning in an idealised case, and then aiming to build those features into institutions." (Cohen, 1999: 369).

as a legitimation principle and as organisational principle in discourse theory." (Eriksen, 2006: 12). Over the last few years, however, several attempts have been made to approximate theories of deliberative democracy to real life conditions and to spell out what the normative principles demand at an empirical level (Eriksen and Weigård, 2003; Eriksen and Fossum, 2002; Fossum and Menéndez, 2005; Steiner et al., 2004; Nanz and Steffek, 2005³). This process of 'operationalising' deliberative democracy is still in its infancy. In order (also) to contribute to this ongoing project, I develop an *analytical framework* for empirical studies of democratic legitimacy in *institutionalised decision-making settings*, hereunder the EU's second pillar decision-making system.

The article has two main parts. In the first part the deliberative version of democratic legitimacy is spelt out. The focus is on specifying the normative standard against which decision-making procedures will be assessed. The second part contains the analytical framework. Firstly, five normative criteria of democratic legitimacy are presented. These are: (1) inclusion, (2) openness, (3) neutralisation of asymmetrical power relations, (4) deliberative meeting places and (5) decision-making capacity. Secondly, empirical indicators for these five criteria are developed and discussed.

Part I: What is democratic legitimacy?

The modern idea of democracy basically amounts to the notion of the self-governing human being and a just society where free and equal individuals give themselves laws which in the next step can be seen as legitimate constraints on their actions. How can this ideal scenario honouring the principle of individual autonomy be translated to real life circumstances? Under conditions of pluralism where there is no prospect of reaching a consensus on how everyone should live their life, the way to *determine* whether decisions are legitimate cannot merely be about their substance. The chance that everyone will find a policy proposal equally good is unrealistic. Consequently, given that the substance of a proposal cannot function as the sole motivation to support a decision, the deliberative argument is that the legitimacy of decisions must first and foremost rest on the decision-making procedure itself⁴. The assumption is that if an issue has been properly treated in a fair process, the likelihood that those who were opposed to the outcome will nevertheless respect it as a legitimate constraint on their behaviour despite the fact that their position was rejected in the final decision-taking moment. The deliberative approach assumes that if there is a prospect for such a fair process preceding decision-making, majority vote can be democratically legitimised. Moreover, when the requirement of a prior process is respected, majority votes "...therefore represent only temporary stops in the continuous discussion about what should be done. Such a procedural interpretation of the majority principle makes it consistent with the concept of freedom when not applied to irreversible decisions. In this way discourse theory allows the individual to submit to laws that are not correct." (Eriksen, 2006: 13; cf. also Chambers, 2004a: 397). Without such prior

³ See also number 2 and 3 of the journal *Acta Politica*, 2005, Vol. 40, which are both devoted to the operationalisation of deliberative democracy.

⁴ I rely on an understanding of deliberative democracy which is not simply procedural, but which also acknowledges that the procedure itself is grounded on a certain minimum normative foundation. This foundation amounts to the principle of equal worth of persons, i.e. that for a decision-making procedure to be legitimate it must honour the principle that individuals are equals in the sense that they all have a right to justification when laws and regulations limit their actions. In other words, "*Procedural-independent standards are needed for securing a fair process.*" (Eriksen, 2006: 10, see also p. 11; Eriksen, 2007b). See Forst (2001) on the right to justification. For a discussion on procedure versus substance, see Gutmann and Thompson (2002).

processes, on the other hand, the actual act of voting becomes nothing more than an arithmetic number at a given point in time (Eriksen, 2007b: 92-3). Consequently, if fair procedures are established they can provide the reason and motivation for minority positions to support majority decisions and can thus compensate for the unrealistic prospect that everyone will come to agreement on the substance of a decision. How can we reach this goal?

We must first of all identify the normative/democratic standard that must be respected. In discourse theory this amounts to the discourse principle: "*Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.*" (Habermas, 1998: 107). The discourse principle establishes that legitimate decisions are those that can be consented to after withstanding scrutiny and critique by those who are going to be bound them. In representative democracies it is, however, not the case that all citizens and all affected parties are involved in actual decision-making. Hence the formulation "... *could agree to...*" is inserted in order to indicate that the principle can be used as a hypothetical litmus test for assessing the legitimacy of actual decisions (ibid, my emphasis; see also Eriksen 2007b: 93). It should immediately be added that the hypothetical test cannot replace actual public discourse (ibid). A viable democracy cannot do without public debate where policy proposals are tested and discussed in front of and involving the public at large. What is more, the discourse principle implies that legitimate decisions are achieved linguistically if certain conditions for discourse are met. When translated to the institutional and procedural level, the discourse principle contains "...*four ideal claims on institutions and processes: freedom, rationality, equality and publicity.*" (Eriksen, 2007b: 95, 96)⁵. The bottom line is that democratically legitimate decisions have been *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 account during the course of a collective and inclusive process (Chambers, 2004b). Decisions that are to be labelled democratic cannot escape elements of the four procedural requirements presented above. But how, more concretely, can these ideal claims be approximated to non-ideal conditions?

The answer to this question is not unique to deliberative theorists as they draw on the already well-established practices and principles underpinning the modern democratic Rechtsstaat. It is no coincidence that this model has been so successful – its viability is based on a strong emphasis on establishing and maintaining checks and balancing mechanisms such as basic rights catalogue (citizens are given participatory rights also against political authorities), separation of executive, legislative and judicial powers, competence catalogue, separation of state, market and civil society and introduction of separate decision-making-, accountability-, electoral- and representation procedures. These are standard mechanisms aiming at ensuring that not only the strong and powerful, but also weaker and less resourceful groups get to

⁵ "*The reciprocal deliberations are free in the way that the participants are bound only by the results and premises of their own deliberation. The institutions are not tyrannical and do not impose norms and conditions on the citizens that they themselves do not approve of. The deliberations are rational in the way that the parties justify their standpoints and their proposals. It is a justificatory burden in relation to unequal treatment and it is the power of the arguments that governs collective decision-making. The parties are equal, i.e. all speech-competent individuals can participate and promote their views on equal terms. Differences in relation to power and resources should either be compensated for or eliminated. This can be done, for example, by means of appointing advocates for those who are in a less favourable position. The deliberation take place in public, and the outcomes of the deliberations are legitimate only when they have been approved of in a free discourse with identical or at least mutually acceptable reasons.*" (Eriksen, 2007b: 95-6).

influence decision-making processes. In a deliberative reading, the purpose of these mechanisms, then, is to induce – to promote and protect – argumentative behaviour as far as possible. Ideally, an assessment of the second pillar system should not be done in isolation from the larger EU context within which it is situated, but the parameters of this article do not allow for such a comprehensive approach and compromises must consequently be made. The task of the next section is to present more concrete assessment criteria that can put us in a position to determine whether the second pillar decision-making system fulfils the ideal claims listed above.

Part II: Analytical framework

How to assess democratic legitimacy

How can we approximate a decision-making procedure so that it is institutionally and procedurally equipped to produce outcomes at a satisfactory level of democratic quality? To concretise the necessary preconditions, I have synthesised and further developed criteria from Eriksen and Fossum (2002)⁶, Eriksen and Skivenes (2000), and Eriksen and Weigård (2003, chapter 10). In short, a deliberative-democratic decision-making procedure must:

1. *Include* the viewpoints of *affected* and *competent* parties;
2. Take decisions in *openness* so that the relevant information and documents are accessible and the opportunity for public debate and scrutiny are possible;
3. Provide structures and procedures for *neutralising* and balancing asymmetrical power relations;
4. Facilitate *deliberative meeting places*;
5. Have *decision-making capacity*.

Normative criteria of democratic legitimacy

What do these criteria entail and why is each of them important and necessary in order to fulfil the preconditions for democratic legitimacy? Before delving into the individual criteria it should be noted that whereas all five criteria are important in determining *empirically* the democratic quality of decision-making procedures, *normatively* the fifth criterion is not constitutive of democratic legitimacy as such, but rather instrumental in bringing it about. The four other criteria are constitutive, that is, normatively they are all necessary procedural conditions for the realisation of the discourse theoretical version of democracy defended here. If we were to nuance the picture even more, it could be argued that the inclusion of affected parties is the normative source feeding or ‘explaining’ the importance of the other criteria. The reason for this is that, from a discourse theoretical point of view, the only entities possessing moral significance in and of themselves are individuals (not communities or polities) (see Stie, 2002). Hence, democracy is meant as a framework aiming at the realisation of a type of collective self-government that respects this moral status of all involved and affected individuals. In this sense, openness, neutralisation mechanisms and deliberative meeting places are derived from the moral status of affected parties and stand in the service of its realisation. I have also added inclusion of competent parties as a necessary criterion of democratic legitimacy. Competent parties bring quality and knowledge into the decision-making process, but if affected parties are not included a polity governed solely by competent parties is nothing but a

⁶ See also Fraser, 1992.

technocracy and epistemic deliberation is nothing but elite deliberation. Hence normatively, the inclusion of competent parties is also derivative of affected parties.

1. 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. In institutional and procedural terms this means that decision-making bodies must be able to include the viewpoints of those individuals who are going to be bound by the decisions as well as the relevant (local, scientific or technical) expert perspectives. Let us first look at the inclusion of citizens or affected parties.

It is the degree to which a polity is capable of including affected parties that represents the real quality test because there is no basis for *democratic* policy-making unless citizens are not somehow recognised as rights-holders/co-authors of binding law. Consequently, the requirement to include affected parties is at the same time both the most important and the most difficult criterion to satisfy, for how do we know that all relevant views have been heard and included in the debate when modern democracies are based on representative systems? How can citizens be recognised as co-authors of decisions when they are never present to make them?

In the literature there are different answers to this question. With regard to the level of broad-based participation or direct citizen involvement outside general elections, deliberative theory parts significantly from republican inspired theories defending direct/participatory democracy. Unlike the latter, discourse theory is not based on the requirement that everyone has to participate in decision-making, but rather that everyone's views, needs and interests have access to the debate as it is neither possible nor (arguably) desirable in large and complex polities that everyone should participate directly (Eriksen and Weigård, 2003: 210-2). In discourse theoretical terms, the point is not the number of people who participate, but how well all views are represented in the discussions, i.e. the 'representativity of opinions' (Eriksen and Skivenes, 2000: 28)⁷. In fact, too many participants can disturb and obstruct the process and hence also the quality of the debate under non-ideal conditions (Eriksen and Weigård, 2003, 210-2). The key argument is to include the plurality of needs, interests, preferences, facts and positions so that an as qualified as possible decision can be made.⁸ To ensure this, discourse theory relies on the existence of satisfying procedures: "[T]he democratic procedure no longer draws its legitimizing force only, indeed not even predominantly, from political participation and the expression of political will, but rather from the general accessibility of a deliberative process whose structure grounds an expectation of rationally acceptable results." (Habermas, 2001: 110).

⁷ The logical consequence of the participatory model is that it makes the legitimacy of political decisions dependent upon the actual participation of all (or at least a significant majority of) citizens. This is possible neither practically nor normatively. Normatively because citizens also have a right not to participate or engage in politics if they so desire. It is, of course, detrimental also from a discourse theoretical perspective if citizens do not take part in elections and public life in general as even representative democracy is defined and dependent upon a certain level of participation and engagement to be deemed democratically legitimate (Eriksen and Weigård, 2003: 148-9).

⁸ "What is important to its notion of public reasoning is not so much that everyone participates but more that there is a warranted presumption that public opinion is formed on the basis of adequate information and relevant reasons, and that those whose interests are involved have an equal and effective opportunity to make their own interests (and their reasons for them) known. As an ideal, inclusion allows for maximum expression of interests, opinions and perspectives relevant to the problems and issues for which a political body seeks solutions." (Nanz and Steffek, 2005: 370).

Since discourse theory does not rely mainly on direct participation from citizens, it is, consequently, not random *who* participates in the deliberative process. The reason for this is due to the very important difference between *democratic deliberation* and *epistemic deliberation*. Just because actors involved in decision-making adhere to the logic of arguing this does not necessarily mean that these decisions can be deemed democratic, that is, the actors must be of a certain kind. The gap between affected parties and decision-makers must be squared by "...the parliamentary principle of establishing representative bodies for deliberation and decision-making." (Habermas, 1998: 170). There is, in other words, a parliamentary bias in the discourse theoretical version of deliberative democracy demanding that a democratic procedure cannot do without the active participation of *popularly* elected representatives. Only they can be regarded as the spokespersons of affected parties in institutionalised decision-making settings because they can be controlled and potentially dismissed in the next election. This does not mean that all decision-makers must be popularly elected, it only means that they must have a central position and be 'hands-on' throughout the decision-making process. The obvious reason for this is due to the fact that public decision-making is never only about finding scientifically correct answers, but also about applying such knowledge and hence make (political and ethical) choices about how burdens and benefits should be distributed among affected parties. Public decision-making cannot therefore be left to bureaucrats and experts alone as this will amount to nothing more than technocracy or epistocracy (Eriksen, 2007a: 16). *Democratic* deliberation, as opposed to *epistemic* deliberation, can only be fulfilled if it contains active participation by elected representatives.

It is, however, also important that decisions exhibit a certain cognitive quality. Expert knowledge is an intrinsic and increasingly more important part of every modern governance structure as modern societies are complex, differentiated and specialised. To include competent parties – scientific, local, technical experts – when decisions are taken is therefore a way to meet this challenge. Competent parties represent a manifold group ranging from government officials/advisers, bureaucrats, scientific, technical and judicial experts to representatives of NGOs/civil society organisations. The requirement of including competent parties alludes to the epistemic element of deliberation and underlines the importance of ensuring quality and rationality in decision-making.

In sum, there is a normative hierarchy between representatives of affected and competent parties as the latter are subordinate to the former in the sense that affected parties' representatives should be the main decision-making actors whereas the competent parties have a more facilitating and advisory role in providing and mediating knowledge, viewpoints and information.

2. Openness and transparency

"Transparency (...) is regarded as an absolutely essential component of (...) liberal democratic systems (...). **Information is the currency of democracy.**" (Curtin, 1997: 23, my emphasis). The principle of openness and transparency is crucial for establishing a democratic dialogue between official political bodies and the wider public and for the latter to perform any kind of enlightened and informed critique and scrutiny of ongoing legislative processes. In other words, to facilitate public scrutiny and thus actual opinion-formation in the general publics, deliberation processes leading up to decision-making must be as open and transparent as possible. This criterion thus concerns how well the political system has institutionalised 'direct' communication and accountability with the general publics in the sense of providing easily accessible

and unambiguous information on actual cases. This is needed in order for citizens, civil society- and other social/economic actors to have a fair opportunity to form their position and participate in opinion-formation processes in the public sphere. In the wider picture this, of course, serves the important task of establishing and maintaining a European public sphere by providing the means to free opinion and will formation.

The principle of openness is consequently inherently linked to democracy as a precondition for the establishment and maintenance of realistic accountability mechanisms as well as to give citizen participation outside general elections any realistic basis. To meet this end, the principle of transparency requires that policy related documents and information are easily accessible and understandable. On a more detailed level, decision-making bodies also have a responsibility and duty to present background information about the case in question, i.e. the substantial elements pertaining to the nature and characteristics of the case. For the official political institutions this means that their rules and procedures are designed and organised to inform and communicate to the general publics the relevant aspects of decision-making processes, i.e. both procedural and content specific aspects. This includes open meetings or easily accessible verbatim records of meetings, openly announced agenda, decision-making rules, actors involved, when and if affected parties should be consulted as well as the results from open hearings, relevant laws, regulations, costs and benefits analyses, administration practices and other policy areas that will be affected, expert reports, other relevant documents and knowledge about the case. Nanz and Steffek (2005: 375) make a general distinction between background and policy documents, where the former provide “...*information on an issue or problem and policy documents provid[e] information on political options and proposals.*” Background documents are thus less important than policy documents and the level of transparency is higher if easy access to the latter is made possible.

Openness does not only concern the extent to whether documents and information are available, this criterion also prescribes that information should be easily accessible, that is, easy to get an overview of the main points, what is at stake etc. Sometimes it can almost seem as an intended strategy to provide enormous amounts of information in order to overwhelm or preoccupy the public, stakeholders or opposing parties with processing all the information. Decision-making bodies therefore have a duty to present the main points, dilemmas and/or inter-related issues as clearly as possible. To achieve such a goal, a public and digitally accessible register of documents is a vital tool (cf. Curtin, 2000). In addition, the competing political visions and solutions should be communicated to the public so that citizens can get an overview over the relevant choices and alternatives available. Finally, in a multilingual polity, it is also a requirement that citizens are able to express themselves and that political authorities communicate with them in a language they understand and master.

3. Neutralisation of asymmetrical power relations

Under this criterion I distinguish between two broad categories of power neutralising mechanisms. The first covers mechanisms that are internal to the procedure and hence detectable in the procedural set-up. I call these *ex ante* mechanisms. The second category covers external mechanisms that kick in after the decision-making process is over. These are labelled *ex post* accountability mechanisms.

The ex ante mechanisms cover all those (formal, but also informal) rules that contribute to induce argumentative behaviour in an as open and inclusive manner as possible. The rules governing the decision-making procedure under investigation should be easily accessible and understandable both to the involved actors as well as the public at large. The crux here is that information about how the decision-making procedure functions – its rules, stages, applicability etc. – must be regulated and easily accessible in writing preferably in the constitution (describing the normal decision-making method(s)) or in ordinary statutes (special procedures). In addition, it must be predictable, understandable and consistent – that is, from the general guidelines it must be possible for citizens to get an unambiguous overview of the rules and different stages/phases of a decision-making process, but the outcomes of policy processes must not be predictable from these guidelines.

The demand is also that the rules have a particular content⁹. Firstly, the procedural set-up as well as its functioning should reflect an explicit duty to explain and give reasons for positions and decisions towards fellow institutional members, to other institutional actors as well to the public at large. This involves precise rules and regulations on when/how often as well as what kind of setting decision-makers must attend. Secondly, the division of labour between the institutional actors should respect the principle of separation of government powers both informally as well as formally in the constitution. Thirdly, the involvement of representative institutions must be underlined in the legislative process, i.e. recognition of the parliamentary principle. Fourthly, the procedure should be organised so that the process has roughly the following sequencing: argumentation, potential bargaining and final decision-making. Fifthly, inter-institutional agreements as well as the rules of procedure organising the internal life of each institutional actor should be in accordance with the above principles.

In addition to ex ante mechanisms, the democratic Rechtsstaat also offers well-functioning accountability mechanisms that can be activated after a procedure is closed. In knowing that ex post accountability measures can be triggered if an actor does not adhere to the prescribed rules, this can make her stick to argumentative behaviour rather than ceasing the opportunity to deviate from such behaviour in cases where her immediate self-interest can be satisfied without adhering to the logic of arguing. Ex post accountability mechanisms such as judicial review, parliamentary scrutiny, ombudsman, as well as the right to petition etc. are thus mechanisms that have proven to be helpful in neutralising asymmetrical power relations.

4. Deliberative meeting places

For decisions to be taken deliberatively there must be arenas where such discussion can take place. In other words, the relevant decision-making bodies must facilitate forums for the exchange and scrutiny of arguments. Here I distinguish analytically between two types: *democratic* deliberative meetings places where the views of citizens/ affected parties are included, and *epistemic* deliberative meeting places where the views of competent parties/ experts meet to discuss matters relevant for decision-making.

⁹ By 'particular content' we are still on a principled level. The point is not to prescribe in detail (for instance whether a polity should have a consensus instead of a majoritarian system) how the organisational set-up should look like, but to ensure that certain foundational principles (e.g. separation of powers etc.) are respected.

A *democratic* deliberative meeting place is not just any kind of setting where people gather. Rather, the nature of a democratic deliberative meeting place is *political* – it is an *open* and *public* setting where decision-makers and citizens engage in discussions on matters of common concern¹⁰ and where policy alternatives are formed and articulated. Democratic deliberative meeting places are therefore manifestations of how and where the views of citizens/affected parties are included. They do not merely present information to the general public outside the institutionalised complex of decision-making bodies, they must also be open to information and viewpoints from the outside. This means that even if a discussion forum of experts can be deemed deliberative in the sense of being dominated by an argumentative mode of interaction, it does not qualify as a democratic deliberative meeting place since it lacks the inclusion of citizens and hence the democratic aspect of deliberation (Eriksen, 2007a: 22). The archetypical theoretical example of a democratic deliberative meeting place is naturally the parliament.

To be more specific, a democratic deliberative meeting place is approximated to how Bovens (2006) describes a practice of public accountability¹¹. According to him, to qualify as “...a practice of public accountability (...), there should be an actor who provides information about his conduct to some forum; there should also be explanation and justification of conduct – and not propaganda, or the provision of information or instructions to the general public. The explanation should be directed at a specific forum – and not be given at random. The actor must feel obliged to come forward – instead of being at liberty to provide any account whatsoever. There must be a possibility for debate and judgement by the forum, and an optimal imposition of (informal) sanctions or rewards – and not a monologue without engagement. Finally to qualify as **public** accountability, there should be public accessibility of the account giving – and not purely internal, discrete informing.” (ibid: 12). It is underlined that the obligation to explain and justify can be both formal and informal.

The understanding of public accountability not only as a process, but also as a social relation which requires a particular type of setting and interaction among the actors, illustrates why Bovens’ definition represents a suitable approximation of what should be expected from a democratic deliberative setting. In placing the core of public accountability on the *relationship* between actor and forum, he ties the conduct of actors with decision-making powers so tightly to a framework setting characterised by debate, justification, judgement and possibly sanctions which squares well with the rather demanding discourse theoretical notion of democratic decision-making.

However, as we have seen, the cognitive element of policy-making is highly important in order to reach rational decisions and expert discourses should therefore be included in the formal legislative processes. Consequently, an *epistemic* deliberative meeting place refers to forums where competent parties/ expert participants *formulate, and exchange* views in an argumentative and reasoned manner. Such a setting is perhaps less public and political than a democratic deliberative meeting

¹⁰ Cf. the difference between institutionalised deliberation settings and the unorganised, spontaneous deliberations taking place in the general public spheres.

¹¹ It should be noted, however, that Bovens (2006: 13, 31) himself underlines that his concept of public accountability is restricted to ex post facto governance processes – hence basically *after* the decision-making process is over. Whereas I do not use Bovens’ overall analytical framework, I shall nevertheless argue that his *definition* of public accountability is applicable also for ex ante input processes – including individual meeting places – because the type of practice he describes between the actor and the forum not only emphasises the importance of ensuring congruence between affected parties and decision-makers, it also gives us an indication of how it can be achieved.

place, but it is not exempt from such requirements. The point is that in legislative processes an epistemic deliberative meeting place is subordinate to the democratic deliberative settings in the sense that it is not here actual decision-making is supposed to take place. Opinions, arguments, criticism and concerns should be raised, aired and forwarded in order to prepare the ground for the formulation of policy proposals, but since an epistemic deliberative meeting place is not equipped with decision-making capacity it can afford to be less public and less political than a democratic deliberative meeting place (cf. Eriksen, 2007a: 16). It is less political in the sense that the discussions are more focused on scientific and technical information rather than assessments of moral and ethical-political considerations. The discussions are, however, political in the sense that they are related and relevant to the given policy proposal in terms of pointing at possible dangers, consequences and outcomes connected to different alternative avenues of such proposals. It is less public in the sense that it does not have to be responsive to the arguments from the wider public sphere. It has, however, a publicity responsibility in making its reports, deliberations and opinions easily accessible for everyone interested. This means that meetings may be held behind closed doors, but the minutes of the meetings should be available.

In analytical terms there is also a general distinction between *voting*, *bargaining* and *deliberative* meeting places. In a voting arena there is hardly any prior deliberation or bargaining. A voting setting does therefore not provide for the possibility of collectively moulding a common understanding which can form the basis for agreement on policy proposals. This is more or less also the situation in bargaining settings although here there is a longer process of exchanging positions/threats before a decision is finally taken. In a bargaining setting, the actors get acquainted with each other's positions, but it is the relative strength of the various actors that decide the outcome. In other words, in both voting and bargaining settings a process of *collective* will-formation is missing, opinions and arguments have not been tested. The direct outcome of a voting setting is nothing more than an arithmetic fact signifying the majority at a given point in time whereas the direct outcome of a bargaining setting is a compromise. It is only deliberative settings that can produce more consensual outcomes. Now, in a decision-making process there are usually many types of settings - some are better described as deliberative (democratic or epistemic), and some more accurately as bargaining or voting sites. This does not mean that the procedure under evaluation cannot be deemed democratic if not all relevant and important meeting places are deliberative in the democratic definition. That would obviously be an unrealistic requirement. It would, however, be impossible to argue that a decision-making procedure could be democratic if none of the relevant settings had deliberative-democratic qualities.

5. Decision-making capacity

This fifth and last criterion is not constitutive of democratic legitimacy as such, but rather instrumental in bringing it about. A legislative procedure must also have decision-making capacity - in an institutional setting, deliberative processes must end in an outcome (whatever the quality of the decision). Decision-making capacity here refers to both formal and informal aspects in the sense that the procedure in question must be formally inscribed and recognised in the constitutional document as (one of) the ordinary decision-making procedure(s) describing its general principles, guidelines, rules and the institutions involved must be assigned clear competencies. In addition, it must have *de facto* (or informal) power in the sense that the institutions involved are equally equipped with capabilities of fulfilling the intentions prescribed in the constitution. If we find that a procedure scores well on the four first criteria, it is

important that actual decision-making takes place within the framework of that procedure. Otherwise, it functions simply as a rubber stamp legitimising decisions taken in other forums or by other actors. What is more, decision-making capacity involves efficiency meaning that deliberations must be followed by a final decision within a reasonable time frame. It is also important that the procedure is relevant – it must have discretionary powers in policy areas that are central and commonly considered important, not just peripheral or second-order to a polity's overall legislative activity. The task is therefore to consider the relative importance of foreign and security policy for the EU as a self-standing polity.

Empirical indicators

What, then, should we look for in the empirical material in order to assess to what extent the five criteria of democratic legitimacy have been fulfilled? What kind of institutional arrangements and procedures should one expect to find? Deliberative democracy is first and foremost a legitimacy principle. This means that one should be agnostic toward organisational arrangements. What works in democratic terms in concrete empirical settings cannot be determined a priori. Whereas context sensitivity is important and will be decisive for the overall assessment, I shall nevertheless argue that with regard to the four first criteria there is a certain minimum level. Consequently, eight core indicators are developed to assess if this minimum level of democratic legitimacy is reached. Methodologically, this means that at this first stage, the criteria will be treated as 'either-or' categories.

Minimum level of compliance for the first four criteria

Inclusion: Firstly, the most central actors must in some way or the other be subjected to periodic elections. This is the most basic component towards the fulfilment of an egalitarian law structure. Hence, the **first** minimum indicator is that the main decision-makers are popularly elected¹². The **second** minimum indicator is that the elected representatives are seated in a body that has formal decision-making clout, that is, veto power over the final outcome.

Openness: The **third** minimum indicator is that both involved institutional actors and the general public get access to the policy proposal. Deliberative democracy underlines the importance of process, hence the **fourth** minimum indicator is that there are either open sessions or minutes available directly after important sessions in the decision-making bodies. 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.

Neutralisation mechanisms: The **fifth** minimum indicator concerns the existence of a precise description of the rules governing the relevant decision-making procedure in the Treaties. One way of finding out whether the description is precise is to compare it with the institutions' rules of procedure and see if these describe the procedure in a compatible manner. The **sixth** minimum indicator concerns the principle of separation of powers and requires an insurance that the institutional actor presenting

¹² Contrary to proponents of direct deliberative polyarchy, the version of deliberative democracy defended here requires that there must be some kind of congruence between affected parties and decision-makers and that this is not feasible without arrangements ensuring direct elections of representatives to the most important decision-making bodies. In other words, the availability of and access to networks and a plethora of deliberative settings are important, but not sufficient.

a policy proposal is not also the sole decision-maker, or better, that popularly elected representatives can in some shape or form hold the executive to account. The **seventh** minimum indicator is the possibility to appeal to an independent judiciary. This involves considering *who* can appeal, that is, Union citizens, third country nationals, legal persons, national institutions, EU institutions etc. An independent judiciary should have the right to scrutinise (and possibly sanction) not only adherence to procedural rules, but also the content of decision-making in the second pillar.

Deliberative meeting places: The **eight** minimum indicator demands that there must be a setting(s) that is formally assigned to discussion prior to decision-making.

For this initial evaluation, it is not necessary to consider the procedure's decision-making capacity as the fifth criterion is not constitutive of democracy as such.

Having established the procedure's compliance with the minimum requirements, more fine tuning is needed as democratic legitimacy is seldom a question of 'either-or', but rather of scale. Methodologically, the criteria are therefore no longer treated as 'either-or' categories, but rather as continuums indicating the *degree* of democratic legitimacy.

Beyond the minimum

1. Inclusion of affected and competent parties

The first minimum requirement demanded that the main decision-makers are elected. Beyond the minimum this also requires considering the likelihood that the rules and regulations underpinning the various electoral laws will contribute to an electoral process where the citizens can make an informed choice about what issues are relevant and at stake concerning the EU's foreign and security policy and to what extent elections can at all function as a control mechanism to hold decision-makers accountable for their activities in this policy field. This does not warrant a full evaluation of all the national and EP electoral systems, it suffices to appraise the likelihood that with regard to foreign and security policy, these elections processes are not merely second-order (cf. Reif and Schmitt, 1980).

Having determined the number and involvement of elected participants/actors (i.e. representatives of affected parties) in decision-making, we must also get an overview of the participation of other policy-making actors (i.e. representing competent parties) such as bureaucrats, experts, diplomats and other civil servants. The main task here is to compare the relative importance of the two groups by assessing when during the policy cycle and in what way representatives of affected and competent parties respectively are included in the decision-making process. As argued above, the normative hierarchy between representatives of affected and competent parties warrants that elected parties are the key actors when it comes to discussing and deciding how consequences and burdens should be distributed whereas the involvement of competent parties should be limited to preparing and facilitating policy-making.

2. Openness and transparency

Settembri (2005) provides five indicators or attributes of openness which I have borrowed for the operationalisation of this criterion: (1) access to documents (2) transparency of debates, (3) intelligibility of votes, (4) physical access and (5) clarity of

interests. Of these indicators the three first ones are the most important as they together provide citizens with the means to follow the decision-making process.

A democratic decision-making procedure is characterised by full and easy access to relevant documents, both background and policy documents. A good way to fulfil this requirement is through a *centralised* and *digitally* accessible *register* where all documents are stored and publicly available. Openness of debates is achieved mainly through two means and preferably in combination: *verbatim records* (minutes are not satisfactory) and *video streaming* through the EU's internet site. If there is voting, the result must be attached to the verbatim records and accompanied by an *explanation* which includes information on how each representative voted. Both video streaming and verbatim records should be available in all official languages at least one week after the meeting has taken place. Physical access and clarity of interests also contribute to openness, but they cannot alone render a procedure democratic. Physical access to the meetings is arguably more efficient if it is granted to the media.

3. Neutralisation of asymmetrical power relations

Ex ante neutralisation mechanisms

Firstly, it is important that the second pillar decision-making procedure is properly described in the Treaties. This means unambiguous information on which *actors* should be involved and what *powers, rights* and *duties* they have. The description should entail information about how and when the *different stages* of the procedure start and end (both the length of the stages and when the procedure can be closed). What is more, the formal and informal *sequencing* of the second pillar procedure should approximate the following order: *argumentation, bargaining* and final *decision-taking*. This means that each stage/reading of the procedure should also approximate this chronology so that there is always time and space allocated for discussion prior to (potential) bargaining. In addition, there must be an outline of *decision-making rules* (unanimity/veto, majority vote etc.). To get an idea of how well the institutional actors respect and follow these rules, recourse to their respective *rules of procedure* can give an idea of how well they harmonise with the letter of the relevant Treaty articles.

The rules of procedure can also tell us something about how the internal lives of the institutions are organised. They can, for example, provide information about the rules to keep the *agenda, timetable, speaking time, actors* involved, appointment/selection of *chairpersons/committee leaders, code of conduct* to ensure respectful interaction among decision-makers, *rules for informal/preparatory meetings, regular and additional hearing, inquiry* and *consultation* procedures, *explicit duty to justify* positions and decisions toward fellow members as well as to a bigger audience.

The same indicators can be used to look at the relationship and interaction between the institutional actors in order to assess how the principle of separation of government powers is respected. Through sources such as the Treaties, *inter-institutional agreements* and similar documents it could be possible to get an impression of whether there is a fairly clear division of labour between a policy-initiating actor having (more or less) agenda-setting monopoly and a decision-making actor evaluating, adopting or rejecting policy proposals. In this relation it should be underlined that from a discourse theoretical perspective on deliberative democracy, the aforementioned parliamentary bias warrants active participation of elected representatives. This means that a satisfactory level of parliamentary control extends beyond mere consultation and information and covers a formally recognised right to evaluate and potentially reject proposals during the decision-making process.

Ex post accountability mechanisms

Ex post accountability mechanisms are audit and complaint mechanisms that kick in after a dossier is closed. We have already considered the existence of an independent judiciary under the minimum requirements. Other mechanisms to be considered are parliamentary control, ombudsman and the right to petition.

Parliamentary control is not only important during the policy-making process, it is crucial that parliaments are provided with the necessary means to conduct a formally and de facto scrutiny also after decisions have been made. Firstly, this amounts to an explicit executive duty to provide reasons and explanations for decisions. The executive cannot decide *not* to respond to parliamentary queries about concrete policy decisions. To enhance the likelihood of a *credible* parliamentary power to sanction the executive, there should also be a parliamentary prerogative to go for a 'vote of censure'.

In contrast to the judiciary, the *ombudsman* is a soft law mechanism, but can nevertheless function as an efficient and useful complaint/audit mechanism. To assess its potential as power neutraliser, we need to know (as was the case with the judiciary) if it has the mandate to scrutinise (and possibly 'sanction') adherence to procedural rules or whether it can also consider the content of second pillar outcomes. It is also important to know whether all types of actors (ranging from Union citizens, third country nationals, legal persons, national institutions, all EU institutions etc.) can file a complaint with the Ombudsman.

Finally, citizen *petition* also represent a possible audit channel for citizens to hold decision-makers accountable. This is not a necessary democratic control mechanism, but it has at least in theory the potential of influencing the foreign and security policy-making arena. In a prioritised order, the possibility for national parliaments (in addition to the judiciary) to scrutinise decisions is more important than ombudsman and petition. A positive response obviously increases the democratic quality of the procedure.

4. Deliberative meeting places

Above, I distinguished (analytically) between two different types of *deliberative* meeting places: democratic and epistemic. Both settings are characterised by deliberation as the dominant interaction mode, but in an epistemic deliberative meeting place only competent parties are present whereas a democratic meeting place must also contain representatives of affected parties. In other words, the *type of actors* is relevant for the categorisation. To determine empirically the quality of a given setting, the first task is to find out what kind of actors dominate and have access to the relevant setting. If it only contains non-elected bureaucrats and/or experts, the setting falls – in the first round – into the category of an epistemic setting. We know for certain that the setting does not qualify as a democratic deliberative meeting place, but we do not know if it qualifies for the label epistemic deliberative or some other type of meeting place. If, on the other hand, it is mainly a setting dominated by elected representatives it qualifies – preliminary – for the democratic category of deliberative meeting places.

There are, however, also settings consisting of actors who are more difficult to define, for instance consultation arenas where representatives from NGOs, civil society organisations and other types of citizen interests are present. Whereas they clearly do not represent pure profit or capital interests, it can always be questioned how strong

the grassroots link is and on behalf of how many people the organisation really speaks¹³. With the data required for this analytical framework, it is, however, impossible to determine conclusively the role of these actors. Moreover, even if inclusive settings are important and valuable, it should be noted that direct participation of non-profit organisations does not necessarily make decisions more democratic precisely because it can give a false impression of representativeness. The only way to evaluate settings containing non-profit organisations is to look at the access criteria for participation. Is it possible for all kinds of organisations to enter? Do the access rules favour organisations defending the same position or can opposing views also enter? However, due to the above uncertainties even a setting characterised by a plurality of non-profit organisations can hardly be defined as a *democratic* deliberative meeting place as the actors are not elected and cannot be held to account by affected parties. At best, the inclusion of non-profit organisations contributes to democratise a setting, but they are not in themselves a sufficient factor to render an arena eligible for the democratic category.

What is more, a democratic deliberative meeting place is one that is formally mentioned in the Treaties and further elaborated in the institutions' rules of procedure and/or inter-institutional agreements in a way that is not in conflict with the treaty provision. In any case, the rules should contain a statement of the purpose of the setting, information on which actors should be included (must be dominated by elected representatives), what kind of powers, rights and duties they have including an explicit duty to justify and explain their positions, clear rules for selection of chair person and, finally, that the agenda and speaking rules respect the principle of equality among the actors. The optimal situation is obviously when a setting is thoroughly described in the Treaties, but there are, however, also settings that have many democratic qualities and that should consequently not be dismissed prematurely. A setting that is mentioned in the institutions' rules of procedure or in inter-institutional agreements but not in the Treaties can therefore also qualify as democratic given that the above requirements are met. The bottom line is that completely informal settings do not qualify for the democratic category.

At this point we should keep in mind that discourse theory neither expects deliberation all the way through the decision-making process, nor does it dismiss bargaining as such. Rather, it qualifies *when* and under *what kind of circumstances* bargaining is acceptable. If it follows after one or several settings where the preconditions for democratic deliberation are maximised, institutionalised bargaining settings where issues can be finalised within a shorter time frame, are legitimate. *Legitimate* bargaining settings are therefore formally regulated, dominated by a representative selection of elected decision-makers and they appear after one or several settings that are regulated for discussion. Since bargaining is about the distribution of goods and burdens and since it occurs in a decision-making framework where the end product is usually binding law, the actors must be elected representatives. From a discourse theoretical perspective, competent parties do not have the normative authority to bargain for settling outcomes with binding effect. Moreover, a legitimate bargaining setting can be closed during session in order to easier facilitate agreement among the participants, but the discussions must be recorded either through verbatim records or video transmission that become available to the general public after the meeting is over. In sum, we could instead realistically

¹³ Cf. also the Commission co-optation practice.

expect that democratic deliberative qualities will be on display at different junctures of the process, i.e. prior to bargaining and decision-taking/voting.

It should be underlined that data on the procedural and institutional aspects only tell us so much about the deliberative democratic qualities of meeting places. We know that a setting does not qualify for the democratic category unless it contains elected representatives, but readers will most likely wonder how we can determine the *deliberative* aspect of these meeting places. This is not an easy task and it should be reiterated that this type of assessment cannot give confirmatory answers to whether a setting is actually dominated by deliberation, bargaining and/or any other type of interaction mode. One tool is to look closer at the rules for the proceedings of the meeting. Is there for instance a chair person to enforce equality among the participants, e.g. that every participant gets the chance to speak or that there is a fair balance between opposing parties to get their views heard etc.

The analytical framework can give answers to whether the institutional and procedural preconditions are more or less likely to maximise (or hinder) democratic deliberation to occur. In other words, it evaluates the procedural preconditions. If the setting is formally described or if it is somehow possible to find out what its purpose is, this can presumably give an indication of whether it is devoted to discussion, bargaining, voting or combinations of these. Although this is not necessarily a very reliable source of what is *actually* going on, it nevertheless provides us with information on what is *supposed* to be going on and henceforth helps us to single out those settings whose purpose is not discussion, but bargaining.

5. Decision-making capacity

To evaluate a procedure's ability to produce political decisions we look for three things. Firstly, that the procedure and powers of decision-making are *formally* described in the Treaties and that decisions falling under the procedure are also *actually* taken within the parameters of the institutions and rules to which they are legally assigned. The first indicator coincides somehow with one of the indicators for ex ante neutralisation mechanisms and concerns whether the procedure is formally recognised as an ordinary decision-making procedure in the Treaties describing the assigned policy areas, competencies and general guidelines. In order to determine the de facto status of the procedure, the second indicator looks for the existence (and, if yes, the strength) of competing informal arrangements and settings where the actual decisions are taken as these would turn the formal arrangement into pure 'rubber stamping'.

Secondly, decision-making capacity also requires that decisions are taken with a certain level of *efficiency*. To determine whether the procedure produces decisions within a reasonable time limit, the duration of dossiers should be compared to the duration of dossiers under similar procedures. Hence, efficiency is thus relative to how well the other procedures score.

Thirdly, in order to determine the *relevance* of the procedure we must evaluate how important foreign and security policy is for the EU as a polity. To determine the relevance we should look at the number of second pillar dossiers that have been completed and compare the number with the number of completed dossiers under other decision-making procedures over a certain time period. These numbers obviously tells us something about the relative importance and standing of decision-making in foreign and security policy in comparison to other policy areas dealt with

at the EU level. The time dimension can also indicate whether foreign and security policy have become more or less important over the years in comparison with other EU policy areas. Another indication of relevance is to look at the nature of decisions in the second pillar, that is, what kind of legal status they have and how binding the decisions are.

Concluding remarks

In this article, I have outlined an analytical framework allowing for an assessment of the democratic legitimacy of the decision-making system of the EU's second pillar with reference to 5 criteria. The criteria are developed on the basis of a deliberative perspective on democracy, and draw in particular on the works of Habermas, Eriksen, Eriksen and Fossum, Eriksen and Skivenes, and Bovens. Empirical indicators for each criterion are specified and discussed.

The next step is to apply this evaluative framework to the second pillar decision-making system. The existing literature is not too optimistic with regard to the democratic prospects of foreign and security policy, especially since the EP only has a limited role to play in this pillar. Arguably, this poses a challenge to the discourse theoretical model of democracy as it has a strong parliamentary emphasis. However, normative standards cannot – for this reason – be compromised. As mentioned in the introduction, it is important to specify the democratic shortcomings in this field as foreign and security policy has steadily gained momentum and today plays an important role for the EU. This is particularly so as there have been few, if any, systematic assessments of the democratic qualities of the EU's foreign and security policy.

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