

Beyond Parliament's Reach?

The Role of the European Parliament in the CFSP

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I Introduction

The European Parliament is confident of its democratic credentials. Portraying itself as the true embodiment of the citizens' will, it has been empowered repeatedly by national governments in consecutive Treaty reforms and has successfully shifted the institutional balance in its favour in the day-to-day management of inter-institutional decision-making.¹ Despite this remarkable success the EU's Common Foreign and Security Policy (CFSP) continues to defy calls for enhanced parliamentarization. As early as 1986, when the Single European Act incorporated the previous practice of European Political Cooperation into the legal framework of the present European Union, the European Parliament (EP) 'reiterated its serious doubts over the separation between Community activities and Political Cooperation' and 'believed it necessary, in this new stage, for Parliament to be more closely associated with the work of Political Cooperation by means of mechanisms that will be established in due course'.² Surprisingly, at first sight, not much has changed to this day, with the Parliament still being largely excluded from the course of the CFSP which remains by far the most intergovernmental area of European decision-making.

This article explores the role of the EP in the European Union's CFSP with a view to identifying the conceptual reasons underlying the EP's pervasive exclusion from decision-making in foreign and security policy. The constitutional status quo of the Treaty of Nice lays the starting point for our survey, whose course not even the Constitutional Treaty would have altered substantially (section II). The EP's budgetary powers are the only instrument through which it can exercise measurable influence on the course of the CFSP

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¹ See, among others, the assessments by B. Rittberger, 'The Creation and Empowerment of the European Parliament' (2003) 41 *JCMS*, pp. 203-226 and A. Maurer, *Parlamentarische Demokratie in der Europäischen Union* (Nomos, Baden Baden, 2002).

² Resolution of 11 December 1986 on the Single European Act (OJ 1987, C 7/105), paras 25 and 27.

– albeit with considerable drawbacks on its standing in the eyes of the Council lamenting the EP’s reluctance to provide ‘adequate’ financial resources (section III). A closer look at the living constitution of institutional activities in Brussels and Strasbourg reveals a reinforced activism of the MEPs in the foreign policy field, although its substantive contributions may not necessarily transcend the ‘virtual’ world of parliamentary discourse and influence the actual decision-making in the Council (section IV). The continued involvement of national parliaments in the CFSP does not substantially alter the situation (section V). Eventually, national constitutional arrangements confirm that the EP’s limited role in the CFSP is not necessarily an atypical deviation from the orthodoxy of the Community method but follows an underlying constitutional rationale of executive prerogatives in foreign affairs (section VI).

II Status Quo: Parliamentary Vacuum

The primary responsibility for the formulation of Europe’s Common Foreign and Security Policy lies with the national foreign ministers meeting within the Council. The EU Treaty empowers the Council to take the decisions necessary for defining and implementing the CFSP on the basis of the general guidelines defined by the European Council.³ In practice, most decisions are being prepared with great care and foresight in the Political and Security Committee (PSC), which has increasingly evolved into the political ‘mind’ of the CFSP in recent years. Its twice-weekly meetings of CFSP ambassadors, positioned in Brussels, have contributed pivotally to the continued convergence of the national foreign policy preferences on the basis of a permanent and institutionalized discourse for which academic observers have coined the term ‘Brusselization’.⁴ In PSC meetings, as in the Council, the representatives of the Member States, the Council Secretariat and the Commission are constantly present and contribute actively to the formulation of common positions. The European Parliament on the contrary is not represented – neither physically by a representative nor virtually through reference to its positions and opinions.⁵

³ Art. 13(3) TEU.

⁴ See C. Reynolds, ‘Irreconcilable Differences? National Convergence and Divergence in the CFSP’ in D. Mahncke, A. Ambos and C. Reynolds (eds), *European Foreign Policy: From Rhetoric to Reality?* (Peter Lang, Brussels, 2005), pp. 43–60 at pp. 50–2; G. Müller Brandeck Bocquet, ‘The New CFSP and ESDP Decision Making System of the European Union’ (2002) 7 EFA Rev, pp. 257–282 at p. 261 and, originally, D. Allen, ‘Who Speaks for Europe?’ in J. Petersen and H. Sjursen (eds), *A Common Foreign and Security Policy for Europe?* (Routledge, Oxford 1998), pp. 41–58.

⁵ During my postgraduate judicial service traineeship I attended the meetings of the PSC between May and October 2004. Other participants confirm that my observation constitutes a permanent feature.

This situation is of course not satisfactory for the EP, but it does not come as a surprise from the point of view of primary law. Indeed, the Treaty on European Union constitutes its ‘second pillar’ on the CFSP largely as a parliamentary vacuum – in contrast to the Parliament’s regular involvement in foreign policy decisions under the ‘first pillar’ of the EC Treaty, which covers development cooperation, association policies, international environmental law and, albeit with limited parliamentary involvement, the Common Commercial Policy. According to Article 21 TEU the Parliament’s constitutional status in the CFSP currently is limited to being ‘regularly informed’ and ‘consulted on the main aspects and basic choices’ of the CFSP. The Council Presidency holds the vague obligation to ‘ensure that the views of the European Parliament are duly taken into account’. This legal status quo under the Treaty of Nice is identical to Amsterdam’s Article 21 and Maastricht’s Article J.7 TEU and even corresponds to the earlier provisions under the Single European Act.⁶ The continued limitation of parliamentary involvement in the CFSP illustrates that the EP could not emulate in the CFSP its impressive success in extending its powers to ever more policy fields and establishing equal co-decision in the legislative procedure. Instead, the Treaties of Maastricht, Amsterdam and Nice follow the footprint of the Single European Act.

Not even the entry into force of the Constitutional Treaty would change much in this respect, since it continues the tradition of almost exclusive deliberation and decision-making in the Council without direct parliamentary participation. Its respective rules on parliamentary information and consultation in the CFSP correspond largely to the present system. Some minor adaptations only clarify that the association of the EP with the CFSP cover the European Security and Defence Policy (ESDP), establish the new Union Minister for Foreign Affairs as the institutional interface between Council and Parliament and double the number of general debates on the progress in implementing the CFSP.⁷ This conservatism of the Constitutional Treaty would not have come as a surprise, if it had been the end result of the negotiations after the final compromises behind the closed doors of the Intergovernmental Conference (IGC), where national foreign ministers and heads of state or government shield their prerogatives in foreign policy against parliamentary incursions.

⁶ Article 30(4) of the Single European Act and the more detailed rules in the Decision of the Foreign Ministers of the Member States meeting within the European Political Cooperation on the Occasion of the Signature of the Single European Act on 28 February 1986 already comprised the features of the present Art. 21 TEU.

⁷ Art. I 40(8), I 41(8), III 304 Treaty establishing a Constitution for Europe. The present Art. 21 TEU does not explicitly name the ESDP, but extends to the latter in practice and when interpreted systematically in the light of Art. 17 TEU which construes the ESDP as an integral part of the CFSP. In a similar vein, the explicit rule on the role of the present High Representative and future Foreign Minister (as well as EU Special Representatives) in Art. III 304 Constitutional Treaty codifies the present practice described in section IV below.

But surprisingly not even the European Convention with its dominant parliamentarian composition had foreseen an extension of the parliamentary scrutiny with its Working Group on External Action simply stating that the present rules ‘were satisfactory’.⁸

Of course, one might have considered various reform options in line with the underlying rationale of Council dominance in the CFSP, such as an involvement of the EP in the adoption of international treaties or the agreement on long-term policy orientations enshrined in common strategies.⁹ But the Convention decided not to do so. Anticipatory obedience towards the presumed wishes of the ultimate decision-takers in the IGC may have played a role in this respect, with the Convention trying to avoid any proposal which might have served as a pretext for the IGC to depart substantially from its draft. But the willingness to strengthen the role of the EP in the external aspects of Community policies, in particular through the extension of the consent requirement for the conclusion of international agreements under the EC Treaty, indicates that the EP’s limited role in the CFSP is also based on substantive considerations.¹⁰ The persistent exclusion of parliamentary scrutiny of the CFSP in the various Treaty amendments over the past 20 years between the Single European Act and the project of the Constitutional Treaty hint at underlying conceptual differences between the formulation of foreign policy decisions and legislation in the field of domestic policies (more details in section VI below).

More specifically, Article 21 TEU does not foresee any involvement of the EP in the adoption of *individual* CFSP measures, such as joint actions, common positions or common strategies. The European Parliament is officially not even informed about the topics under debate in the Council (even if it could reinforce the flow of information about ongoing political discussions on the basis of its budgetary rights¹¹). Instead, the Treaty only provides for regular information and consultation ‘on the main aspects and basis choices’

⁸ Recommendation 10 of Working Group VII ‘External Action’, Final Report, 16 December 2002, doc. CONV 459/02. Also Art. 39, 40 and III 205 of the Convention’s final Draft of 18 July 2003, doc. CONV 850/03 do not go further than the eventual rules; both available at <european.convention.eu.int>.

⁹ See J. Mittag, ‘Die Parlamentarische Dimension der ESVP: Optionen für den Verfassungsvertrag’ (2003) 26 *Integration*, pp. 152–162 at pp. 157–160; and D. Thym, ‘Reforming Europe’s Common Foreign and Security Policy’ (2004) 10 *ELJ*, pp. 5–22 at pp. 13–5 for more details.

¹⁰ Art. III 325(6)(a)(5) of the Constitutional Treaty requires parliamentary consent to agreements ‘covering (policy) fields’ which foresee parliamentary consent for domestic legislation. Under the present Art. 300(3) EC only the ‘amendment’ of existing legislation subject to co-decision entails a parliamentary consent requirement for international Treaties – a rather minor reform step at first sight, which nonetheless would have considerably extended the EP’s power in practice.

¹¹ See section III below.

of the CFSP. From a legal point of view, such general information and consultation on the main lines of development falls even short of the ‘consultation procedure’ under the EC Treaty, which gives the EP at least a formal say during the adoption of individual measures – with disregard of the consultation mechanism resulting in an annulment by the Court of Justice.¹² But the EP ‘does not consider itself adequately consulted’ on the basis of the existing general mechanism of information and consultation. It ‘emphatically rejects the *a posteriori* approach followed by the Council so far of merely submitting a descriptive list of CFSP activities carried out in the previous year, and considers such a practice as clearly infringing Article 21 (TEU) as far as prior consultation of the European Parliament is concerned’.¹³ That assertion may be contested by the Council on legal grounds¹⁴ and may not be tested before the Court which has no jurisdiction over the CFSP.¹⁵ It therefore constitutes primarily a bargaining chip in the political haggling with the Council about the actual conduct of inter-institutional relations.

III Budgetary Powers: Democratic Blackmail?

In the 1860s, the Prussian parliament was a rather powerless parliamentary assembly with its budgetary powers being one of its few ‘hard powers’. In a protracted dispute with Chancellor Bismarck, it tried to use its refusal to finance military reform as a leverage to extend its powers – and lost when the Iron Chancellor effectively disrespected the parliament’s constitutional prerogatives.¹⁶ The situation of the European Parliament is different, since no-one disputes its constitutional rights as co-legislator and budgetary authority under the EC Treaty. However, a limit parallelism with the Prussian situation exists since, in the field of the CFSP, budgetary powers constitute its only hard power. According to Article 28 TEU administrative CFSP expenditure shall be charged to the EC budget, while the Council may decide to finance operative expenditure by alternative means, in particular national contributions. It is not surprising that the EP tried to use its prerogatives under the EC

¹² Case 138/79, *Roquette Frères v. Council*, [1980] ECR 3333.

¹³ Report on the annual report from the Council to the European Parliament on the main aspects and basic choices of CFSP (Rapporteur: Elmar Brok), 14 April 2005, doc. P6 TA PROV(2005)0132 (draft report A6 0062/2005), para. 1.

¹⁴ The Treaty does not specify whether the information and consultation on major developments in the field of CFSP under Art. 21 TEU concerns *past* actions (in line with the previous institutional practice) or *future* projects (as the EP now assumes). The Interinstitutional Agreement of 1999, to which the EP also refers in the paragraph cited to substantiate its legal argument, takes up the wording of Article 21 TEU and only foresees quarterly ‘meetings’ (not: reports) on a priori consultation in the modified 2003 version (see *infra* note 24).

¹⁵ See Art. 46 TEU.

¹⁶ For more details <en.wikipedia.org/wiki/Otto_von_Bismarck>.

budgetary procedure as a means to get its foot in the door of CFSP decision-making and extend its powers beyond the limited information and consultation rights described above. Despite some success in this respect, the Council has recently reinforced extra-budgetary means of financing in an attempt to avoid being taken hostage by Parliament.

A closer look at the Community budget for 2005 reveals the background of the dispute between Parliament and Council: Title 19 of the Community budget for the financial year 2005 on external relations covers commitments of roughly EUR3.5 billion (excluding the European Development Fund), of which only EUR62.6 million or less than 2 per cent are attributed to Chapter 19.03 on the Common Foreign and Security Policy.¹⁷ The Commission had originally proposed a CFSP budget of EUR55 million; Parliament reduced that amount to EUR52.6 million at first reading, while the Council demanded the EUR62.6 million which the institutions eventually agreed upon following the identical compromise for the 2004 budget.¹⁸ In 2006, the institutions appear to be playing along the same lines with the Commission having proposed commitments of EUR53.6 million for the CFSP. Considering the overall amount of the EC's external relations budget, it is self-evident that these funds alone do not allow the CFSP to 'strengthen the security of the Union in all ways' as stipulated by Article 11(1) TEU.

This course of events is no coincidence. It results from an extended and 'exasperating'¹⁹ quarrel between Council and Parliament in the 1990s when the financing of the CFSP was subject to long and difficult discussions, which have been described by other authors.²⁰ They eventually resulted in the agreement on the 1997 Interinstitutional Agreement (IIA) on provisions regarding financing of the Common Foreign and Security Policy which was later integrated in the 1999 IIA on the present financial perspective.²¹ In accordance with point 39 of the 1999 IIA, failure to agree on the amount of CFSP expenditure results in the amount contained in the previous budget being entered in

¹⁷ See OJ 2005, L 60/II 1031 1151.

¹⁸ See the various references at <europa.eu.int/eur lex/budget/www/index en.htm>.

¹⁹ J. Monar, 'The Finances of the Union's Intergovernmental Pillars – Tortuous Experiments with the Community Budget' (1997) 35 JCMS, pp. 57–78.

²⁰ Besides the article by Monar, note 19 above, more details maybe found in the contributions by E. Dardenne, 'Le Parlement européen et le financement de la PESC' in M. Dony (ed.), *L'Union européenne et le monde après Amsterdam* (Université libre de Bruxelles, 1999), pp. 291–313; R. Wessel, *The European Union's Foreign and Security Policy* (Kluwer, Dordrecht, 1999), pp. 220–223; and, most recently, the conceptual analysis on general conclusions from the protracted dispute by A. Maurer, D. Kietz and C. Völkel, 'Interinstitutional Agreements in CFSP: Parliamentarization through the Backdoor?' (2005) 10 EFA Rev, pp. 175–195.

²¹ Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure (OJ 1999, C 172/1); for the 1997 IIA see OJ 1997, C 286/80.

the new one (or the amount in the Commission's preliminary draft budget, in case that is the lower). Moreover, the IIA foresees that only 20 per cent of the CFSP budget may be reserved for urgent actions, which have not yet been agreed by means of CFSP decision. Since the CFSP is by its very nature about the short-term reaction to urgent crises, the last aspect considerably constrains the necessary flexibility of the CFSP budget. Any transfer from other chapters, in particular the Emergency Aid Reserve of EUR223 million in Chapter 31.02.04 of the 2005 budget, requires the consent of the Parliament in accordance with the financial regulation, since external expenditure continues to be qualified as non-compulsory expenditure – a categorization which one might contest.²²

The 1999 IIA does not limit itself to laying down compromise rules for the course of the budgetary procedure. It also complements the EP's information rights under Article 21 TEU by specifying that whenever a CFSP decision entailing expenditure is adopted by the Council, it will 'immediately and in each case' send the EP a financial statement detailing the costs envisaged (*fiche financière*).²³ Thus, the EP gets for the first time involved – albeit only in the form of information a posteriori – in the adoption of individual CFSP measures (in addition to the general information and consultation mechanism of Article 21 TEU). But Parliament was not satisfied with this IIA rule. The rapid realization of the ESDP, not foreseen at the time of the compromise on the IIA, led to new tensions during the budgetary procedures for the financial years 2002 and 2003. On both occasions, the EP obtained further concessions from the Council. First, the Council agreed to a specification of its information obligations under point 40 of the IAA with specific deadlines and the promise of 'early warnings whenever possible' about forthcoming measures.²⁴ One year later, Parliament and Council agreed on holding at least five joint

²² On the qualification of external action as non compulsory expenditure see Annex IV to the 1999 IIA; this is contestable insofar as the financing requirements for CFSP missions result necessarily from CFSP measures (which have no legislative character, but are legally binding) adopted in conformity with the EU Treaty as the regular definition for compulsory expenditure. The decision to transfer funds from the Emergency Aid Reserve to the CFSP budget for non compulsory expenditure requires parliamentary approval under Art. 26(2), 24(4) of the Financial Regulation (OJ 2002, L 248/1); for transfer of compulsory expenditure the Council has the final say under Art. 24(3). The 1999 IAA is, as any IIA, not legally binding *sensu stricto*, but any move to depart from its rules before the negotiations for the next financial perspective (see below), would entail immense inter institutional difficulties.

²³ Point 40 of the 1999 IIA.

²⁴ See the Joint Declaration of 25 November 2002 attached to the minutes of the Council (ECOFIN) meeting of 25 November 2002, Council doc. 14742/02 of 11 December 2002 – in return for the EP's agreement to the partial financing of the first civilian ESDP mission, the European Union Police Mission EUPM in Bosnia Herzegovina. On the context of the negotiations see also U. Diederichs, 'The European Parliament in CFSP: More than a Marginal Player?' (2004) 2 *The International Spectator*, pp. 31–46 at p. 39.

consultation meetings a year.²⁵ These reform steps may not bring the big leap forward, which Parliament might desire, but they are building blocks for enhanced parliamentary involvement in the CFSP.

Nothing guarantees however that Parliament will eventually gain ever more rights in the CFSP through its budgetary powers. From the Council's standpoint, the granting of minimal funds (when compared to the overall external relations budget) is an annoying stumbling block for the realization of the CFSP and ESDP. Indeed, the Council is not prepared to yield to Parliament's 'democratic blackmail' and increasingly has had recourse to extra-budgetary means of financing through national contributions. After some internal debates, in which the potential role of the EP in the regular budgetary procedure was one of the arguments voiced, the Council for example opted against the financing of the administrative costs of the European Defence Agency through the Community budget.²⁶ Legally, this deviation from Article 28(2) TEU – that administrative costs of the institutions 'shall be charged' to the Community budget – is tenable, since the European Defence Agency is not an integral part of the Council Secretariat, but possesses a legal personality of its own – even if there are precedents for budgetary financing of European agencies in similar situations.²⁷ The situation is legally even more clear-cut for military ESDP operations whose operational expenditure may not be charged to the Community budget under Article 28(3) TEU. In accordance with the principle of 'costs lie where they fall', each Member State finances its own military personnel and equipment; only 'common costs' may be charged to the extra-budgetary ATHENA mechanism established by the Council in 2004 beyond parliamentary influence.²⁸

On the occasion of the first large-scale military ESDP operation – EUFOR Althea in Bosnia-Herzegovina – the common costs amounted to almost EUR72 million – more than the overall CFSP budget for the year 2005.²⁹ Since these common costs concern primarily the installation and operation

²⁵ Exchange of letters referred to in the minutes of the Council (ECOFIN) meeting of 24 November 2003, Council doc. 15200/03 of 5 December 2003 and described in Commission working paper COM(2004)498 final of 14 July 2004, para. 42.

²⁶ See Art. 12 19 of Council Joint Action 2004/551/CFSP (OJ 2004, L 245/17).

²⁷ Although the the European Agency for the Management of Operational Cooperation at the External Borders established last year under Art. 62, 66 EC also possesses legal personality, it is at least partly financed through the Community budget; see Art. 15, 29 of Council Regulation 2004/2007/EC (OJ 2004, L 349/1).

²⁸ For financing by the Member States in accordance with the gross national income scale see Art. 25 of Council Decision 2004/197/CFSP (OJ 2004, L 63/68; with later amendments) and its analysis by D. Scanell, 'Financing ESDP Military Operations' (2004) 9 EFA Rev, pp. 529–549.

²⁹ Despite a narrow definition of common costs excluding accommodation and transportation under Art. 12 of Council Joint Action 2004/570/CFSP (OJ 2004, L 252/10) and without regard to the much higher national expenditure for troops and equipment.

of headquarters, locally hired personnel, communication, public relations and auditing costs, one may argue whether they could (contrary to troop deployment and the purchase and operation of military equipment) be qualified as not having military or defence implications in the meaning of Article 28(3) TEU, thereby being eligible for EC budget financing, if the Council so decides. In its report on the basic choices of the CFSP of April 2005, Parliament does indeed call for an end to the present practice when it ‘stresses once again that joint costs for military operations within the framework of ESDP should be funded from the Community budget . . . and not from a subsidiary budget’.³⁰ It may be no coincidence that this claim is being made at a time when the institutions are chartering the political terrain for the negotiations on the 2007–2013 financial perspective and the IIA accompanying it.³¹ Experience with democratic blackmail (Parliament using its budgetary rights as a leverage for more parliamentary involvement) indicates that there may be tough negotiations ahead. We will have to see whether the EP is more successful than in the European Convention and the 2004 IGC, which not only confirmed the budgetary status quo in the CFSP but moreover granted the Council a right of unilateral recourse to the EC budget without parliamentary veto rights for ‘urgent financing of (CFSP) initiatives’ under Article III-313(3) of the Constitutional Treaty.

IV The Living Constitution

No constitutional document is set in stone, but evolves dynamically in the course of time. The CFSP is no exception in this respect and the absence of judicial control by the Court of Justice gives the institutions an additional factual leeway to interpret the Treaty provisions flexibly.³² Indeed, the progressive implementation of the CFSP in recent years has been characterized by institutional and political dynamics to which – through the ambitious realization of the ESDP in particular – political and institutional structures are constantly adapted in response to the identification of lessons learnt and the emergence of new challenges.³³ As long as the constitutional provisions are

³⁰ Report of 14 April 2004, *supra* note 13, paras 45–49 at 47.

³¹ In its working paper on the 2006 IIA, the Commission limits itself to codifying the existing agreements in the field of CFSP; see COM(2004)498 final of 14 July 2004, paras 41–42.

³² The primacy of political control by the institutions over judicial control by the Court does not hinder the abstract normative character of legally binding CFSP rules as ascertained by Wessel, *supra* note 20, in chapter 2 and, less enthusiastically, I. Govaere, ‘The External Relations of the EU – Legal Aspects’ in Mahncke et al. (eds), *supra* note 4, pp. 97–115 at pp. 103–5: ‘political giant – legal dwarf.’

³³ Two careful analyses of the progressive development of the CFSP’s institutions have recently been provided by A. Ambos, ‘The Institutionalisation of CFSP and ESDP’ in Mahncke et al. (eds), *supra* note 4, pp. 165–192; and E. Regelsberger, *Die Gemeinsame Außen- und Sicherheitspolitik der EU* (Nomos, Baden Baden, 2004).

constantly undergoing a reality check (a result of which will be the gradual emergence of a stable institutional setting), the chance of the EP contributing to the shaping of the eventual inter-institutional balance should not be underestimated, and arguably has increased after the preliminary failure of the Constitutional Treaty with the new insecurities it entails in the field of the CFSP in particular. The Parliament's attempt to use its budgetary rights as a leverage for greater involvement in CFSP decision-making is a first illustration of its attempt to try to extend its powers under the living constitution.³⁴ The effective use of the existing consultation mechanism and its general institutional standing may prove similarly effective in this undertaking.

Participation in (legislative) decision-making processes and budgetary prerogatives (described above in sections II and III) are certainly two important parliamentary functions in any democratic system. But the power to elect and control the executive is of similar importance, with the political dramas over the Santer and the Barroso Commission illustrating the effectiveness of the EP's powers in this respect. The Commission's limited role in the CFSP³⁵ does however entail a corresponding weakness of the EP's election and control functions – even if the Commissioner for external relations, Benita Ferrero-Waldner, promised to 'develop the closest possible working relations with the EP' and 'to pay very careful attention to all observation and recommendations of the EP (in the field of CFSP)' during her nomination hearing in the EP.³⁶

Instead, the Brussels-based CFSP executive in the Council Secretariat, under the guidance of its Secretary General/High Representative (SG/HR) Javier Solana, largely evades parliamentary scrutiny. He is appointed by the Council unanimously in accordance with Article 207(2) EC. The prior consultation of the EP, let alone a consent requirement mirroring the Commission investiture, is not foreseen. The EP's Rules of Procedure may self-consciously foresee a hearing of the candidate designate, but the renomination of Javier Solana and his identification as future foreign minister by the Council in June 2004 took place behind closed doors, frustrating the Parliament's pretensions of influence.³⁷ Interestingly, the Intergovernmental Conference even detached the institutional fate of the foreign minister from the political survival of the Commission by making clear that only the European Council, not Parliament, may officially end his tenure as far as his 'CFSP hat' is concerned, even if he has to lay down his Community hat as Commissioner for external relations

³⁴ See also the intelligent conclusions by Maurer, Kietz and Völkel, *supra* note 20.

³⁵ According to Art. 18(4) TEU the Commission is 'fully associated' with the CFSP.

³⁶ See her answers to the general question no. 7 and the specific question no. 4 in deliberate avoidance of the promise to act as a spokesperson for the EP's CFSP proposals in the Council <www.europarl.eu.int/press/audicom2004/index_en.htm>.

³⁷ See Art. 85 of the EP's Rules of Procedure in contrast to the Council Press Release on the meeting of Heads of State or Government on 29 June 2004, Council doc. 10995/04.

after a successful motion of censure by the EP.³⁸ This exclusion of parliamentary appointment-and-recall powers extends to EU Special Representatives and Heads of Commission delegations, where both the Council and the Commission reject the EP's call for the introduction of appointment hearings reflecting US-style senatorial hearings of future ambassadors.³⁹

The absence of an effective EP participation in the nomination procedure for the SG/HR and other senior CFSP personnel does not exclude regular contact and debate during their respective terms in office, be it on the basis of the Parliament's information and consultation rights under Article 21 TEU and the 1999 IIA described above or through voluntary cooperation schemes. During the fifth legislature from 1999–2004, Solana, as SG/HR, attended ten meetings of the EP Committee on Foreign Affairs, AFET (French acronym for *affaires étrangères*), including a high-profile debate on the draft European Security Strategy on 10 September 2003 and complemented by 11 appearances of the SG/HR before the EP plenary. Besides, the former Commissioner for external relations Chris Patten appeared 22 times before AFET, as well as national foreign or defence ministers on 54 occasions and 8 presentations by EU Special Representatives. A closer look at the frequency of hearings and debates shows increased activities towards the end of the legislature, which signals a reinforced focus of AFET on monitoring the CFSP. This trend has been facilitated by the reduction of activities related to the 2004 enlargement, for which AFET held a coordination responsibility, and will be further enhanced by the creation of a new Sub-committee for security and defence, SEDE (French for *sécurité et défense*). Even if the EP formally has only information and consultation rights, the intensity and regularity of debate with the SG/HR and other officials ideally results in effective scrutiny through intensity⁴⁰ – although the exact degree of influence is of course difficult to measure.

From the point of view of third countries, which are not always aware of the idiosyncrasies of the EU's institutional balance with its asymmetric distribution of parliamentary powers in different policy areas, the influence of the EP in CFSP-related issues is arguably even more accentuated. Numerous senior representatives of third states and international organizations appeared before the EP plenary in the past legislature and exchanged their political views

³⁸ See Art. I 26(7), I 28(1) of the Constitutional Treaty and on the double hatted structure of the foreign minister: Thym, *supra* note 9, at pp. 18–22.

³⁹ Art. 86 of the EP's Rules of Procedure foresees a hearing of EU Special Representatives in contrast to Art. 18(5) TEU. Commissioner Ferrero Waldner rejected the EP's plea for parliamentary hearings of the heads of Commission delegations in her answer to specific question no. 3, *supra* note 36.

⁴⁰ The importance of public parliamentary debate for decision making by ministers and civil servants is also highlighted by Eileen Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, Oxford, 2002), at pp. 323–324.

with AFET, including the NATO Secretary General on three occasions, the UN High Commissioner for Human Rights and the President of the International Criminal Court. Parliament's interparliamentary delegations moreover constitute a genuine element of 'parliamentary diplomacy', in whose context MEPs feel free to voice their opinion plainly without being constrained by the diplomatic customs or the prior, and often cumbersome, alignment of national positions in the Council; the 'Taiwan policy' of the EP is a telling example in this respect.⁴¹

Any citizen or journalist visiting the AFET website⁴² will come across its various policy reports, which in the years 2004 and 2005 (after the new focus on the CFSP following the conclusion of the 2004 enlargement) covered many topics of general public concern: EU engagement in Iraq, relations with Russia, the European Security Strategy, EU-India relations, the code of conduct for arms exports, Afghanistan, the Southern Caucasus, and Guantanamo.⁴³ Most of the topics were being discussed in parallel in the Council, the PSC, the various Council working groups or subject to deliberations in the Commission directorates-general dealing with external relations. Legally speaking, the said AFET's reports are own-initiative reports and therefore not part of a formal consultation procedure, which in the case of CFSP decision-making does not exist with the view to the adoption of individual measures.⁴⁴ One may speak of a 'virtual' parliamentary reality or 'parallel worlds' in the EP and the Council, since AFET reports are not officially linked to latter's decision-making. Nonetheless, politically convincing contributions by Parliament in particular may in practice have an impact on CFSP policy: the content is shared with the SG/HR and other officials attending AFET meetings and may be read by national or European civil servants in foreign ministries, the

⁴¹ See the case study by Y. Lan, 'The European Parliament and the China Taiwan Issue: An Empirical Approach' (2004) 9 EFA Rev, pp. 115–140. Similarly, on the EP's 'human rights diplomacy' in the 1980s, M. Smith, *Europe's Common Foreign and Security Policy* (Cambridge University Press, Cambridge, 2004), at p. 171.

⁴² Online at <www.europarl.eu.int/committees/afet_home.htm>.

⁴³ AFET reports on: EU-India relations: a strategic partnership (Rapporteur: E. Menéndez del Valle), doc. A6 0256/2005; the European Union and Iraq – A Framework for Engagement (Rapporteur: G. Dimitrakopoulos), doc. A6 0198/2005; EU-Russia relations (Rapporteur: C. Malmström), doc. A6 0135/2005; the European Security Strategy (Rapporteur: H. Kuhne), doc. A6 0072/2005; on the Code of Conduct on Arms Exports (Rapporteur: R. Romeva i Rueda), doc. A6 0022/2004; Afghanistan: challenges and prospects (Rapporteur: A. Brie), doc. A5 0035/2004; EU policy towards the South Caucasus (Rapporteur: P. Gahrton), doc. A5 0052/2004; the Guantanamo detainees' right to a fair trial (Rapporteur: O. Andreasen), doc. A5 0107/2004.

⁴⁴ Own initiative reports are not explicitly foreseen in the Treaty and one might argue from the strict point of view of delegated powers that these reports have no legal base, but it is accepted nowadays that such autonomous initiatives fall within the wider political responsibilities of the EP; cf. M. Hilf and F. Schorkopf, 'Das Europäische Parlament in den Außenbeziehungen der Europäischen Union' (1999) 34 *Europarecht*, pp. 185–202 at pp. 197–198.

Council Secretariat or the Commission. The simple electronic accessibility in comparison to the 'secretive' decision-making in the Council moreover makes EP reports a valuable source of information for ordinary citizens, national parliamentarians, journalists and members of the academic community. Thus, the EP may well have an indirect influence on CFSP decision-making under the living constitution.

V Involvement of National Parliaments

From a traditional intergovernmentalist standpoint, the persistent limitations of the role of the EP in the CFSP follow the intergovernmental integration logic which denies the exercise meaningful democratic control by the EP over national governments acting in the Council. Instead, national parliaments are best positioned to scrutinize the actions of national foreign ministers on the basis of their respective constitutional control functions.⁴⁵ The high politics of the CFSP and issues of war and peace related to the ESDP touch upon core assumptions of national sovereignty whose exercise at European level against the will of individual Member States would reconstitute the ultimate constitutional authority at European level and deplete the statehood of the Member States.⁴⁶

Indeed, national parliaments continue to exercise substantial rights in foreign and security policy in the era of the CFSP, which are particularly pronounced in the field of defence. Even after consent to a military EU operation by its foreign minister in the Council, the Member States' commitment of military personnel or assets continues to 'be based on their sovereign decision'.⁴⁷ National parliaments therefore retain control over the deployment of military personnel, thereby also assuming the primary political responsibility for potential fatalities. Their constitutional rights are particularly pronounced in countries like Germany, Sweden and many new Member States with explicit constitutional rules on parliamentary consent to important military

⁴⁵ See amongst others A. Moravcsik, 'Reassessing Legitimacy in the European Union' in J.H.H. Weiler, I. Begg and J. Peterson (eds), *Integration in an Expanding Union* (Blackwell, Oxford, 1993), pp. 77-97; and with a view to the second pillar, Denza, *supra* note 40, at p. 325.

⁴⁶ See the pointed description of the EU's 'third pillar' on police and judicial cooperation in criminal matters as international law – in contrast to supranational Community law – based on limited mutual recognition without general harmonization as 'a way of preserving national identity and statehood in a single European judicial area' by the German constitutional court in its judgment on the European Arrest Warrant of 18 July 2005, Case 2 BvR 2236/04; English press release available at <www.bundesverfassungsgericht.de>.

⁴⁷ Presidency Progress Report on Strengthening the Common European Policy on Security and Defence, Annex 1 to Annex IV, Presidency Conclusions, Helsinki European Council, 10-11 December 1999 <ue.eu.int/en/info/eurocouncil>.

operations.⁴⁸ But also in countries such as the United Kingdom or France, where the decision on military activities is an executive prerogative, national parliaments exercise a de facto control in political terms as witnessed *inter alia* by the debates on the Iraq War in the British House of Commons.⁴⁹

National parliaments also retain the primary responsibility over national defence spending which remains outside the realm of the EC budget and the EP's budgetary powers in line with Article 28(3) TEU. The reinforced coordination of public defence procurement at European level through the European Armament Organization⁵⁰ (OCCAR) or the future coordination of armaments policy by the European Defence Agency⁵¹ undoubtedly serve the European interest by facilitating better deals with industry through combined purchasing power and by allowing for practical gains because of the interoperability of common equipment. They do however constrain the autonomy of national parliaments which are confronted with intergovernmental defence deals which may not be legally binding on them but nonetheless exercise strong pressure to pay the bill in order not to stand in the way of the joint undertaking. The protracted procurement of the A400M military transport aircraft – where Portugal and Italy dropped out of the project along the way and Germany reduced the number of its orders due to budgetary constraints (with Parliament explicitly refraining from an even stronger reduction in order not to stop the European project) – is an excellent case study in this respect.⁵² The same applies *mutatis mutandi* to the other areas of extra-budgetary financing of ESDP activities described above.⁵³ While the European Parliament is excluded, national parliaments face an uphill struggle against the tardy information flow and the opacity of decision-making in Brussels with the various Council committees and the PSC laying the ground for most decisions before

⁴⁸ Besides German constitutional law (*Bundesverfassungsgericht*, Judgment of 12 July 1994, joint Cases 2 BvE 3/92, 5/93, 7/93, 8/93, [90] BVerfGE 286) the constitutions of Belgium (Art. 167(1)), the Czech Republic (Art. 43(2)), Denmark (§19), Finland (Section 93(1)), Hungary (Art. 19(3)(j)), Ireland (Art. 28(3)(1)), Lithuania (Art. 67(20)), Poland (Art. 26(2), 117), Slovakia (Art. 86(1)) and Sweden (Art. X §9(1)) explicitly require parliamentary consent. Following the Iraq experience, the Spanish parliament has recently adopted a law requiring parliamentary consent to future missions in September 2005.

⁴⁹ See G. Krishna and J. Eagleshan, 'Blair Rocked by Common Debate on Iraq Dilemma', *Financial Times*, 27 February 2003.

⁵⁰ Established by an international Treaty of 12 November 1996 outside the EU context by France, Germany, Italy and the UK to which Belgium and Spain later acceded and which entered into force on 28 January 2001; see <www.occar.ea.org>.

⁵¹ On its tasks in the armament field see Art. 5(3.2) of Council Joint Action 2004/551/CFSP (OJ 2004, L 245/17).

⁵² M. Odell, 'Military Transport Aircraft: European Deal Ends Years of Wrangling Over Funding', *Financial Times*, 13 June 2003.

⁵³ See section III.

they reach the political level of foreign ministers and are subject to parliamentary scrutiny in national capitals.⁵⁴

In exercising their control function, national parliaments may of course agree on various forms of horizontal cooperation such as interparliamentary conferences on CFSP and ESDP matters which are explicitly encouraged by the Constitutional Treaty and may be organized regardless of the latter's fate on the basis of national parliamentary autonomy, following the COSAC example of European affairs committee meetings.⁵⁵ In the same vein, the EP and national parliaments may reinforce their coordination and dialogue through joint committee meetings, an exchange of best practices or a common dialogue with Council representatives.⁵⁶ But eventually their combined influence may not transcend the respective powers under the EU Treaty and national constitutions. The continued activities of the WEU assembly, which claims an original role in overseeing the ESDP,⁵⁷ on the contrary confuse the credibility of parliamentary activities in European foreign affairs, since it neither has the institutional insight of the EP nor the political clout of national parliaments under the respective constitutional settings at national or European level. Therefore it might not be the worst option, if the human, financial and administrative resources spent on its annual plenary session in Paris were redirected towards closer coordination of the activities of national parliaments and the EP as the principal agents of parliamentary responsibility in the EU.

VI Conceptual Basis: Foreign Affairs and the Executive Prerogative

Intergovernmentalists may generally view the EP as the wrong arena for democratic control of the CFSP and instead point to the continued, albeit cumbersome, role of national parliaments described above. The supranational integration logic on the contrary has accepted an empowered EP as an institutional actor and source of democratic legitimacy in its own right. But even from its point of view the limited role of the EP in the CFSP need not necessarily be qualified as an atypical deviation from the orthodoxy of the Community method. There is instead an underlying constitutional rationale

⁵⁴ Similarly, A. Laschet, 'Parliamentarisation of the European Security and Defence Policy', DCAF Working Paper No. 82 of July 2002 <www.dcaf.ch>; more generally on the difficult position of national parliaments in the EU, Maurer, *supra* note 1; and P. Dann, 'Looking Through the Federal Lens: The Semi Parliamentary Democracy of the EU', Jean Monnet Working Paper 5/2002 <www.JeanMonnetProgram.org>.

⁵⁵ Art. 10 of the Protocol (No. 1) on the Role of National Parliaments in the European Union annexed to the Constitutional Treaty and on COSAC <www.cosac.org>.

⁵⁶ As now foreseen in the EP's Report, *supra* note 13, at paras 3-5.

⁵⁷ See <www.assembly.weu.org> and the harsh criticism by Laschet, *supra* note 54, at pp. 5-6.

for its limited role in the CFSP, reflecting a similar position of many national parliaments vis-à-vis the executive in national constitutional settings. Thus, the special institutional structure of the CFSP does not contradict the supranational structure of Community integration, but complements it with a sector-specific adaptation – even if the present institutional architecture clearly does not reflect a constitutional masterplan of ideal institutional design and may be modified in various respects. More specifically, three substantive arguments and a cursory comparison of national constitutional arrangements support a limited role of the EP in the CFSP.

First, the gradual extension of the Community method to ever more policy areas in recent years should not simply be repeated in the foreign policy field, since it has been developed for the management of the internal market and corollary areas of positive integration such as environmental policy or consumer protection. The Community method's regular and well-known decision-making process originates in a Commission proposal and is agreed upon by Council acting on a qualified majority basis and in equal co-decision Parliament (Article 251 EC). The main regulatory instrument of Community integration are legal rules published in the Official Journal, transposed and implemented by national legislators and administrations and interpreted uniformly by the European court system – complemented by financial support systems administered by the Commission. By and large this system functions surprisingly well. So why not extend it to the CFSP? The character of foreign policy is structurally different from the management of the internal market: it is not primarily about law making, but about political positioning in favour or against something. A common position on the support of civil society in Belarus for instance will not be respected by the addressee only because it is published in the Official Journal.

Instead, foreign policy is by its nature strategic. It requires the identification of strategic goals, the development and constant adaptation of methods of realization and their implementation or enforcement in practice. It may be called diplomacy, but in any case it differs substantially from the legal method of integration in the single-market field for which the Community method was developed and is generally well suited. The permanence of foreign policy decision-making does in contrast require a continued integration of the experiences, contacts and clout of national foreign ministries represented in the Council and its working groups which the Commission alone arguably may not replace – in the same way as the effective recourse to national military and civil capabilities via national governments in the Council is essential for the success of any military or civil ESDP operation. If foreign policy is for these reasons substantially different from the management of the internal market, the CFSP may with good reasons not emulate the other areas of EC activity where the Community method with its central role for the EP has been con-

stantly expanded in recent years. Instead, the CFSP may develop and fine-tune its original institutional design.⁵⁸

Closely linked to the strategic character of foreign policy are the second and third arguments against a general parliamentarization of the CFSP. These concern the necessary confidentiality and flexibility of decision-making in foreign affairs. The transparency and public accessibility of the parliamentary process is rightly regarded as a major ingredient of modern democratic systems. But again foreign policy is different: the general communication of strategic assessments, alternative fallback plans and potential bluffs through parliamentary involvement would obviously hinder the effectiveness of European action. Moreover, the public recognition of the internal lines of debate among the different (national) actors in the Council would counteract the aim of building a truly common European foreign policy out of the concerto of national positions. The close and generalized involvement of the EP in the adoption of individual CFSP decisions, reflecting the various readings of the legislative procedures, can therefore not be extended to the CFSP – although the confidentiality argument should not be overstretched, since there are ways of involving at least some MEPs on the basis of confidentiality.⁵⁹ Similarly, the necessary flexibility of foreign policy which may have to react within hours or days to new developments or unforeseen crises limits the options of parliamentary involvement in the decision-making process.

In this respect, the European situation does of course not differ from the national context where by and large the same arguments underlie the limited role of most national parliaments in the foreign policy field in national constitutional settings. From a historic perspective, the limitation of parliamentary powers in foreign affairs is of course a continuation of former royal privileges – as is illustrated so well by the British legal concept of foreign affairs as a ‘Crown prerogative’.⁶⁰ But the rules in the new constitutions of Central and Eastern European states and the example of Germany, which defied calls for a wide-spread parliamentarization of foreign affairs after the traumatic experience of the Nazi period, suggest that limited parliamentary involvement in

⁵⁸ Generally on the understanding of the CFSP as ‘rationalised intergovernmentalism’, W. Wessels, ‘Nice Results: The Millennium IGC in the EU’s Evolution’ (2001) 39 *JCMS*, pp. 197–219; and his excellent overview of the constitutional reform of CFSP over time in W. Wessels, ‘Theoretical Perspectives: CFSP beyond the supranational and intergovernmental dichotomy’ in Mahncke et al. (eds), *supra* note 4, pp. 61–96.

⁵⁹ Point 3.3 of the IIA of 20 November 2002 concerning access by the EP to sensitive information of the Council in the field of security and defence policy (OJ 2002, C 298/1) specifies the modalities for restricted access to confidential information by a selected committee of five AFET members or a wider circle of MEPs.

⁶⁰ A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* (13th edn, Longman, London 2003), chapter 15.

foreign policy is indeed a general constitutional feature.⁶¹ At the same time, the variety of constitutional rules on the deployment of armed forces abroad⁶² and a similar diversity concerning the conclusion of international agreements⁶³ show that the common thread of limited parliamentary involvement in foreign policy does not translate into a institutional blueprint which the CFSP might follow indiscriminately. Instead, the EU needs to develop its own specific and unique inter-institutional system.⁶⁴

VI Conclusion

The EU Treaty construes the CFSP largely as an intergovernmental domain with only limited information and consultation rights being granted to the EP under Article 21 TEU, which are moreover confined to ‘the main aspects and basis choices’ of European foreign policy. This general association of the EP with CFSP decision-making falls even short of the ‘consultation procedure’ which dominated first pillar EC law-making until the 1980s, in contrast to which the CFSP does not foresee any official parliamentary involvement in the adoption of individual measures. Budgetary powers are the only instrument through which the EP may exercise any measurable influence. On various occasions, the EP had recourse to its prerogatives under the budgetary procedure to get a foot in the door of CFSP decision-making and secured some, albeit minor, extensions of its information and consultation rights. Such attempts of democratic blackmailing did however provoke counter-measures by the Council. Consistently frustrated by the tardy and scarce flow of financial support for the CFSP from the EC budget, the Council has reinforced extra-budgetary means of financing, in particular through recourse to separate national contributions (e.g. for the European Defence Agency) and new

⁶¹ The German example is illustrated by the finely balanced 1993 decision of the constitutional court, *supra* note 48, which explicitly limits the parliamentary consent requirement to military operations and deliberately excludes a general parliamentarization of foreign policy. A survey of developments since 1949 in Germany is given by R. Wolfrum, ‘Auswärtige Beziehungen und Verteidigungspolitik’ in P. Badura and H. Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht, Zweiter Band* (Mohr Siebeck, Tübingen 2001), pp. 693–718.

⁶² See *supra* notes 48–49 and accompanying text.

⁶³ S. Riesenfeld and F. Abbott (eds), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Kluwer, Dordrecht, 1994).

⁶⁴ The drafting history of the Constitutional Treaty will continue to offer important insights in reform options regarding the allocation of executive powers among the Commission and the Council, the degree of parliamentary scrutiny and judicial control; for more details see I. Pernice and D. Thym, ‘A New Institutional Balance for European Foreign Policy’ (2002) 7 *EFA Rev.*, pp. 369–400; and my analysis of the draft constitution in Thym, *supra* note 9, at pp. 9–18.

budgetary Union instruments (such as the ATHENA mechanism for military operations).

A closer look at the living constitution reveals reinforced activities of the EP through its Committee for Foreign Affairs (AFET). The latter maintains a constructive dialogue with various key actors of the CFSP, including Javier Solana, and contributes actively to the policy debate with various own-initiative reports on key aspects of European foreign policy. While not being embedded in a formal decision-making procedure, the EP may thus nonetheless influence the position of governments, civil servants, third states and civil society. Paradoxically at first sight, the prospect of the failure of the Constitutional Treaty may improve the authority of the EP in this respect, since its constructive participation as budgetary authority and source of legitimacy will be required for any attempt to enhance the CFSP and the ESDP on the basis of the current Treaty. More generally, it is however not surprising that the EP could not extend its ever-growing institutional influence in European decision-making to foreign and security policy. The specificities of foreign policy in comparison to law-making in the single-market field argue for an enhanced role of national governments which national parliaments and the EP are largely left to scrutinize and control in accordance with the respective constitutional rules at national and European level. Reflecting similar constitutional settings in the Member States, the formulation and articulation of individual foreign policy decisions will therefore largely remain an executive prerogative beyond the Parliament's reach.