

# CFSP Forum

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## Note from the Editor

Karen E. Smith, London School of Economics, Editor

Happy new year! This issue of *CFSP Forum* continues our tradition of publishing pieces by new scholars: most of the contributors here are young academics or PhD students. As always, we welcome further contributions, especially from the new generation of EU foreign policy scholars.

This issue opens with an article reflecting on the implications for EU foreign policy of the recent Russia-Ukraine dispute over gas. Two articles on aspects of the EU's security policy then follow, while the last two articles analyse the EU's institutional structure and the CFSP.

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## EU Foreign Energy Policy: In The Pipeline?

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The recent dispute between Russia and the Ukraine appears on the surface to be merely another of the tussles between the two countries that have been occurring since the end of the Cold War. However, Russia's retaliatory tactics can be understood as a direct result of the EU's visibly fragmented energy policy. The absence of a Union-level energy policy undermines the EU's economic, political and strategic initiatives in the region and beyond. Despite the congruence between the CFSP's objectives and the security demands inherent in ensuring Europe's energy supply, energy does not presently feature as a foreign policy goal of the EU. This is a major shortcoming as the development of an EU energy policy has obvious *foreign* policy implications. A comprehensive energy policy must first be identified as a Community-wide requirement and secondly be recognised as a form of EU foreign policy in which third parties and regional security concerns are deeply implicated.

### Energy dependency

Energy and environmental issues are inextricable. Energy concerns promote fears of increased dependence on external supplies while 'green issues' prompt questions about the depletion of these same supplies and associated global degradation. The EU possesses a reputation as a formidable environmentally-conscious actor. However, with an expanding energy market, the EU remains dependent upon its peripheries for its energy, and susceptible to disruptions in the

security of that energy supply.

The EU's demand for energy has increased by 1-2% per year since 1986. At this same level of growth, the European Commission forecasts that the Union's dependence on gas and oil imports to meet its energy requirements will rise from 50% to 70% by 2030.<sup>1</sup> Equally, European oil production is slowly declining, primarily in the North Sea, from current outputs of 7 millions barrels per day (mmbd) to less than 3 mmbd by 2030.<sup>2</sup> Despite the leverage associated with being the largest energy market in the world, rising import dependence is now an undeniable feature of Europe's energy landscape.

Both EU and non-EU member states are facing rising dependence upon all traditional energy sources (oil, gas and coal). Recent indications at both the EU and national levels suggest shifting attitudes to the alternative source of nuclear power and renewable sources of energy.<sup>3</sup> Nuclear energy and renewables aside, fossil fuels continue to dominate the European energy market, and while they do so, the *security* of energy supply becomes all-important. Security of supply denotes the security concerns involving third party energy sources and the methods of transit and transport by which energy is imported in both short (oil) and long-term contracts (gas). Security of supply clearly reveals the connection between energy issues as a principally market-based area and the foreign policy issues entailed in regional security questions that accompany the transit of energy. As noted by Gault, 'energy security is inextricable from broader economic and foreign policy challenges and solutions.'<sup>4</sup>

EU states currently rely upon energy imported from four main regions, three of which border its enlarged or prospective periphery: Russia, North Africa, the Caspian regions and the Middle East. Because all four of these areas suffer economic and political instability, Europe's dependent situation compels the EU as an actor 'to pay close attention to political and economic developments in the countries of the periphery.'<sup>5</sup> While the Middle East produces 45% of the EU's oil imports, the rising role of Russia now supplying 40% of Europe's natural gas is of equal significance.<sup>6</sup>

### Security of supply

The EU has spent the past decade liberalising the energy markets of its various member states. This has produced good results by which the private sector has greatly increased the EU's internal energy transportation system, allowing it

to match the increase of external energy sources. However, far less effort has been put into defining a comprehensive energy policy at the EU level that reconciles both the foreign policy side effects and the economic challenges of the energy sector. The first attempt to detail the emergence of energy and its security problems is the European Commission's Green Paper, *Towards a European Strategy for the Security of Energy Supply*, which correctly identified that 'the Union suffers from having no competence and no community cohesion in energy matters'.<sup>7</sup> However, the Green Paper confirms that as long as energy policy remains a national competence, there can be little consensus on European energy policy that finds agreement on its security components at the EU-level, with continuing confusion over the management of energy's commercial and political components.

A more encouraging attempt to allow EU foreign policy and security to take note of Europe's energy dependence is the 2003 *European Security Strategy*. It states: 'Energy dependence is a special concern for Europe. Europe is the world's largest importer of oil and gas... account[ing] for about 50% of energy consumption today.' However, the strategy only identifies energy security in the briefest of sentences, naming other threats as 'more diverse, less visible and less predictable' without explicitly linking energy to such threats. 'Regional conflicts' are mentioned in subsequent paragraphs but the threat to regional stability is examined only in connection to weapons of mass destruction (WMD) rather than the dangers associated with energy demand and supply.<sup>8</sup> Energy is neither identified as a source of neighbourhood insecurity, nor as part of the strategic culture to be developed by the EU to strengthen the instruments and capabilities of the CFSP and ESDP.

Additionally important but equally undeveloped is the Commission's 'EU Energy Supply Security and Geopolitics' report which explicitly links EU foreign policy and energy policy: 'EU foreign and security policy and external trade policy are crucial energy policy tools to achieve future security of supply.'<sup>9</sup> Like the Green Paper, this report makes a crucial observation, but shies away from exploring solutions. The Commission is correct to point out that the continued 'absence of a common direction in political-strategic issues could jeopardise the formulation of an EU security of energy supply policy and fuel the preference for national approaches.' However, the report fails to recognise that the development of a strengthened and ultimately collective EU position on energy sources and security of its energy supplies will

inevitably have significant implications for its foreign relations with energy-producing states that are the subjects of large-scale projects like the European Neighbourhood Policy (ENP) and Euro-Mediterranean Policy (EMP), or states engaged in Partnership and Co-operation Agreements like Russia.

The current frontier appears to be the desire to retain national competence over energy and the parallel reluctance to manage its commercial and security side-effects at the supranational level. Council documents produced in the final days of the British Presidency indicate a high level of EU commitment to formulating a European energy policy according to the three objectives of 'competitive markets, security of supply and environmental capability'. The Council then notes that 'national circumstances' must continue to be taken into account – a point that has so far produced only an EU-level energy *perspective*, rather than an energy *policy* capable of integrating both commercial and security issues.<sup>10</sup> There is a very basic lack of recognition that while energy continues to form a central part of the national foreign policy priorities of each EU member states, these same states are presently unwilling to upload this very policy area to the foreign policy forum of the EU itself.

Europe's energy market has already begun to have an impact on the EU's external trade relationship, and – like trade – will soon impact on its ability to conduct an efficient common foreign and security policy. This point cannot be overstated. Securing the supply of energy is a political and security issue, which must be addressed at the supranational level and must become a principle of the EU's foreign and security policy.

## EU-Russia relations

EU policy vis-à-vis Russia illustrates precisely the importance of building a foreign policy with a clear energy component. Russia is the EU's largest neighbour; the EU is 'Russia's most important trading partner and source of foreign investment' as well as its biggest energy market.<sup>11</sup> Ongoing difficulties have continued between the EU and Russia due to differing perceptions over control of European energy markets. This in turn has prompted a series of tacit but clearly chronic struggles over regional influence.

Over the past three years, Russia and the EU have engaged in complex negotiations over east-west energy cooperation under the auspices of

the Energy Charter Treaty, which Russia signed in 1994. Negotiations for a subsequent treaty, entitled the Transit Protocol began in 1999, in which three major disagreements over the transit of energy between the two blocs were clearly revealed for the first time. These three major disagreements include the REIO clause (Regional Economic Integration Organisation) introduced by the EU in the final stages of the negotiations, the so-called concept of 'right of first refusal' and transit tariffs – all of which remain unresolved.

A parallel forum in which these and other tensions continue to undermine effective energy cooperation is the EU-Russia Energy Dialogue, established in 2000 by Presidents Putin and Prodi. The *Fifth Progress Report of the EU-Russia Energy Dialogue* suggests a number of points of common interest, including the increased price of raw materials on the international market, 2004 enlargement, Russia's ratification of the Kyoto Protocol, and the EU's support for Russian accession to the WTO.<sup>12</sup>

These issues, particularly the WTO question, have provoked serious rifts. During negotiations for Russia's accession to the WTO, the EU argued strongly that if Russia were to become a member of the WTO it must adjust its subsidised domestic gas prices. While Russia steadfastly opposed this requirement, the EU was prepared to ultimately deny Russia entrance to the WTO unless Russia yielded. Having done so, Russia (and other former Soviet republics) now regards the EU's stance on energy issues as overly-interventionist. Subsequent political events including EU enlargement and recent regime changes in former ex-Soviet republics have contributed to Russia's growing anxiety about its market and regional authority.

What emerges from this is not only an ongoing problem of trust between Russia and the EU but a chronic inability to trust the energy policies of either side that are explicitly directed at 'transit countries' of central Europe like Ukraine, Belarus, Georgia and Turkey through which energy passes in pipelines and by which energy is mediated in these intermediate markets. The central issue that the EU-Russia energy dialogue has yet to tackle (in any forum) is the degree and model of economic and political liberalisation in these transit countries. The EU desires an extension of the liberal processes by which it has opened its own energy markets to countries on its eastern and southern peripheries (as clearly seen in the objectives of the ENP and EMP). However, Russia stands opposed to what it perceives as an imposition of a generic EU-style model of

liberalisation upon these countries. The conundrum is that the liberalisation of transit countries appears to simultaneously run counter to Russian interests but bolsters EU policies; the EU gains an economic and political toehold in its peripheral areas while Russia's regional hold appears to be visibly undermined. Retaliatory energy tactics may be an obvious response on Russia's part, but in the absence of a central, supranational energy policy, there is presently little the EU can do about it.

Such rifts indicate that whilst the EU is able to operate as a unitary actor on trade and some political issues, in the absence of unitary energy policy it lacks the coherent clout that could otherwise permit it to deal effectively with Russia and other energy exporting parties. Further, EU-Russia tensions threaten to undermine the previous decade of progress achieved in various forums, and could potential undo the agreed principles of the EU-Russia Partnership and Cooperation Agreement. Energy proves itself in this way to be an issue embedded in the external affairs of the EU and as such must be tackled within the foreign policy and security frameworks of the CFSP.

### State of play

As noted, the majority of recent developments in Europe's energy markets have been largely economic in nature, normally undertaken to further the liberalisation of electricity and gas markets in EU member states. However, as illustrated, there have been only few recent political initiatives to tackle energy as a central issue and to connect it to wider security structures, and still fewer to approach it at as an explicitly EU-level policy area. The unadopted Treaty Establishing a Constitution for Europe was an exception, with the potential to provide a basis for developing a viable EU energy policy. The draft constitution outlined the following three points for creating an EU-wide energy programme:

- (a) ensure the functioning of the energy market,
- (b) ensure security of energy supply in the Union, and
- (c) promote energy efficiency and saving and the development of new and renewable forms of energy.<sup>13</sup>

However, the apparent clarity of these three aims is diminished by the degree of compromise evident in the following paragraph. Paragraph 2 outlines that any laws adopted on these points can only be arrived at 'after consultation of the

Committee of the Regions and the Economic and Social Committee'. This suggests a degree of delay and further filtering undermining the focus and efficacy of such laws. Further, such laws cannot undermine 'a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.' This provision is a political compromise which in effect undermines the practical reality of instituting a genuinely coordinated EU energy policy. It permits only an aggregate system led by national preferences. The reality is that the EU will continue to be heavily dependent upon energy imports; the point is to manage this dependence in a structured, cohesive policy that represents the EU as a unit, rather than a fragmented market of twenty five plus bilateral energy agreements.

Despite the political compromise underlining paragraph 2, it should be noted that the draft constitution represents an initial, Community level attempt at formulating points of common interest in one of the most hotly debated provinces of national policy. No other EU treaty has contained a separate section dedicated to outlining the principles of an EU energy policy. More importantly, the draft constitution could have provided the EU with a *communaautaire* policy in the event of third party disruptions of precisely the kind in involving Russia and the Ukraine. While Russia restored the gas flow to the European Union on 3 January 2006 after an interruption of a few days, this in no way diminishes the ongoing difficulties posed by energy as an issue area divided between national and supranational competence, lying between foreign policy and economic goals.◊

\* The author would like to extend grateful thanks to Adnan Amkhan for discussing some of the ideas contained in the article.

<sup>1</sup> Europe faces an increased dependence on imported oil from 52% today to about 85% in 2030, and an increased gas dependence of 36% today to roughly 63% in 2030. European Commission, *Green Paper: Towards a European Strategy for Security of Energy Supply*, Brussels, 29 November 2000, COM (2000) 769, pp. 20-1.

<sup>2</sup> Similar forecasts are made by the IEA, see for example International Energy Agency, *World Energy Outlook 2002*, Paris, IEA, 2002. Turkey, with whom membership negotiations may start in October 2005, is an exception. Following the completion of a pipeline from Azerbaijan, it is estimated that 10% of the world's tradable oil would pass through Turkey. This trend is reinforced by enlargement, in that a larger EU will require more energy, but new member states will not contribute significantly to its supply.

<sup>3</sup> *A Secure Europe in a Better World: European Security Strategy*, Brussels, 12 December 2003. Whereas the aim of EU is to 'increase share of green energy in total demand of primary energy from 6% to 12% by 2010', the current prospect is that no more than 9 to 10% is realistic (Report on Green paper on Energy, p. 8)

<sup>4</sup> John Gault, 'EU energy security and the periphery', in Roland



Dannreuther, ed., *European Union Foreign and Security Policy* (London, Routledge, 2004), p.170.

<sup>5</sup> Ibid.

<sup>6</sup> The major oil exporting countries of the Middle East include Saudi Arabia, Iran, Iraq, the United Arab Emirates, Kuwait and Qatar.

<sup>7</sup> European Commission, *Green Paper*. The results of the consultation were published as Communication of 26 June 2002 from the Commission to the Council and the European Parliament, p. 28.

<sup>8</sup> *A Secure Europe in a Better World*, p. 3-4.

<sup>9</sup> European Commission, *Study on Energy Supply and Geopolitics* (TREN/C1-06-2002), Executive Summary, p. 15.

<sup>10</sup> Press Release, 2695<sup>th</sup> Council Meeting, Transport, Telecommunications and Energy, Council of the European Union, Brussels, 1/5 December 2005, 14636/1/05/REV 1 (Presse 303), p. 9.

<sup>11</sup> C. Grant and K. Barysch, *The EU-Russia Energy Dialogue*, Centre for European Reform Briefing Note, p. 1, [http://www.cer.org.uk/pdf/briefing\\_eu\\_russia.pdf](http://www.cer.org.uk/pdf/briefing_eu_russia.pdf).

<sup>12</sup> Available on the EU-Russia Energy Dialogue website: [http://europa.eu.int/comm/energy/russia/overview/index\\_en.htm](http://europa.eu.int/comm/energy/russia/overview/index_en.htm).

<sup>13</sup> *The Treaty Establishing a Constitution for Europe*, Part III, Title III, Chapter III, Section 10, Article III-157, paragraph 1.

## The European Union and the Export of Security

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In post-1945 Western Europe, defence/military action was bound up in the Cold War context, and particularly the Atlantic Alliance. With the Americans absorbing the bulk of the military burden, it could be kept off the EU agenda and the member state governments could devote more expenditure to economic and social provision. In addition, EU governments were constrained by the Cold War bipolar stand-off in terms of their ability to forge and conduct an independent European foreign policy. At the heights of the confrontation, Roy Ginsberg observed that there was no common concept of just what the Union's global role should be.<sup>1</sup> For him, as global interdependence took hold, opportunities were created for 'giant middle powers' with non-military means at their disposal to play a much more significant role in world affairs. As a result, the Union was compelled to develop its own mechanisms for managing and responding to new external influences such as the Middle East set of issues.<sup>2</sup> This all served to exacerbate the impression of the Union as a civilian power. In this regard, Stanley Sloan observed, a couple of questions stand out: first, '[T]o what extent did US global military capabilities permit the West European allies to concentrate on non-military approaches?'; second, '[D]oes military strength generate an inclination to use force to further national objectives?'<sup>3</sup>

The end of the Cold War then clearly brought into question the future shape of Western Europe's institutional security architecture centred on NATO. There was no longer a straightforward answer to the question of what now constituted a security threat, particularly in the context of the widening of the security agenda set out above. For Julian Lindley-French, '[T]he neat dividing lines between hard and soft, civil and military security are rapidly dissolving, requiring far more flexibility and causing much confusion as allies and partners have disagreed significantly about how to manage such complexity'.<sup>4</sup> It would take Europe's security managers most of the ensuing decade to fully digest the implications of this vastly changed structural and ideological environment. The result would be the transformation of the EU from an experiment in economic integration into an organisation attempting to be an international actor bestowed with all the instruments utilised by states in the pursuit of their foreign policy interests, including a military capacity. The EU is

now central to any debate about European security management, but why? Michael E. Smith notes that although the Union has increasingly employed economic instruments for foreign policy he questions whether there are any or only minimal economic benefits to CFSP; adding 'no other regional economic organization has such overt pretensions'.<sup>5</sup> From another perspective, this question can be couched in terms of the civilian/military actor debate or the notion of soft and hard power. With the Cold War over and with the inauguration of the aforementioned new world order based on multilateralism and international law and with military power seemingly devalued as a foreign policy instrument, many pointed to the logic of a central, and even dominant, role for the EU, as a civilian power, in the future management of Europe's security.<sup>6</sup>

But for Brian White, among others, the way was now open for both security and defence to be included in the Union's integrationist agenda.<sup>7</sup> While for Ginsberg, the end of the Cold War 'catapulted the European Community into a European Union with enormous responsibilities for supporting the democratic transitions of the CEE (central and east European) states and for responding to the challenge from the United States to be a partner of scale, capable of working with Washington to solve global problems too big for any single partner to solve alone'.<sup>8</sup> However, the Union's ability to cope successfully with the new challenges of the post-Cold War would be severely tested as Yugoslavia accelerated towards political collapse and then a series of bloody conflicts. Its shortcomings were ultimately exposed by its inability to broker anything approaching a permanent peace on the ground. Beyond a certain point, it seemed as though no amount of economic incentives could have separated the various warring factions, especially as the crisis spread geographically and deepened in intensity. Had it been able to call upon military force, it may have been able to coerce the belligerents to cease their conflict and to negotiate a political settlement. But talk of bestowing the Union with military attributes, let alone allowing them to be used coercively, was clearly highly emotive and raised fundamental problems of principle.

As a result, NATO emerged with an apparent virtual monopoly of European crisis management. The subsequent response of European governments to the Kosovo crisis of 1998-9 would then confirm this interpretation. The European leaders quickly realised the futility of a solely diplomatic approach when dealing

with a regime of Milosevic's type and thus sidelined the EU while turning to NATO where coercive force could be discussed. The EU's role in the region became a combination of post-crisis reconstruction and stabilisation. But by now there was a discernible recognition that simply *reacting* to crises was no longer sufficient and that emphasis should now be placed on *pre-empting* crises. Added to this was a certain normative dimension that asked whether there is actually a distinctive European approach to conflict. Certainly, a significant part of the European body politic is deeply sceptical of using coercion to settle disputes. With the possible exception of the leaderships in Britain and France, the 'civilian' mentality is pronounced; more emphasis is placed on seeking to prevent conflicts through political engagement and constructive dialogue and confrontation and military action are seen as measures of last resort.

This perspective on conflict has become a growing priority for EU external policy; conflict prevention could even now be said to be the binding concept of CFSP, as providing the common thread, in terms of values, objectives, and instruments, which holds the system together and gives it purpose. In many respects, the Union is ideally placed to operate effectively in the field of conflict prevention: it has the world's biggest market and largest aid budget, and it has an unparalleled web of historic, cultural and diplomatic ties. Hence then, it has an impressive array of economic and political levers at its disposal in order to help dissipate the root causes of scenarios that can lead to violent conflict. It is recognised that the need is to target the underlying causes of crises, rather than just the short-term causes. Thus, the Union has been quietly active in promoting economic development, democracy, good governance, judicial reform, human rights and so on.

Perhaps it is somewhat ironic then that just as, through the 1990s and into the twenty-first century, the EU has simultaneously, if gradually, become a military actor it has increasingly been acknowledged that Petersberg-type missions will take on an ever-greater civilian dimension. This was certainly the case with the Union's involvement in former Yugoslavia in the early 1990s.<sup>9</sup> Hence important aspects of the Union's emerging security role can be obscured if the focus on actorness and presence is too narrowly defined in military terms. Helene Sjursen argued, for example, that the post-Cold War environment has further highlighted the limitations of traditional definitions of security and has bolstered the recognition of the limitations of

military power in the pursuit of desired outcomes.<sup>10</sup>

Moreover, there is the question of what becoming a military actor does for the Union's credibility as a civilian actor as it seeks to promote its values of democracy, liberalism, human rights, dialogue and international cooperation. EU representatives and missions cannot be seen to be *imposing* these values and backing that up with the threat of military force. Perhaps with the exception of Britain and France, there does appear to be a discernible European approach to conflict characterised by an instinctive aversion to the use of coercion in the resolution of crises and a prominence given to civilian approaches. The emphasis has been more on *preventing* conflict through political engagement and constructive dialogue. In contrast to more belligerent powers, confrontation and military action are perceived as measures of last resort. Now clearly this inhibition was overcome with regard to NATO's operation in Kosovo. But even here, the general European approach was to use military force incrementally and as a signal of intent, rather than an American-style deployment of overwhelming force. The Union's member states have committed themselves to ensuring a permanent break from the continent's fractious past. For Michael Brenner, they 'perceive that they have a stake in preventing and, if necessary, opposing behaviour in their vicinity that is an affront to the values and norms by which they define themselves'.<sup>11</sup>

But a concerted debate regarding a strategic culture for the Union, particularly related to the use of force and whether this can be coercive, has only taken off in the twenty-first century. At present, the Union can quite successfully, from its perspective at least, promote stability and 'pro-EU' policies in its immediate neighbours, notably when EU membership is or could be on the agenda; Sten Rynning refers to this as structural power and as norm-setting that can change the behaviour of states.<sup>12</sup> The Union now has a European security strategy (ESS) which refers to the Union as a 'global player' and states 'Europe should be ready to share in the responsibility for global security and in building a better world'; it also identifies five main threats: terrorism, proliferation of weapons of mass destruction (WMD), regional conflicts, state failure and organised crime.<sup>13</sup> Furthermore, as Sven Biscop noted, reference is made to a key objective of the Union, in addition to security in its neighbourhood, being 'effective multilateralism' at the global level.<sup>14</sup> For Rynning, among others, the key question was whether the Union was obtaining the necessary strategic coherence that would enable it to undertake a major joint military

action or whether 'EU ambitions represent an elusive image of purity based on continuing powerlessness'.<sup>15</sup> On this matter, Rynning distinguished between the optimists and pessimists with the former claiming the Union is, borrowing from Paul Cornish and Geoffrey Edwards, 'gaining the physical ability and political confidence to use military means while still maintaining its overall character as a civilian actor'.<sup>16</sup> From this perspective, Rynning noted, national differences across the Union's membership are narrowing and there is a growing acceptance of the use of military force. Some observers would even go as far as saying that autonomy for the Union in the field of defence is a real possibility.<sup>17</sup> For the pessimists, the Union loses all sense of commonality in the face of significant external threats and this can only continue unless major reforms are put in place. From this view, the member states are divided 'in the fundamental issues of threat analysis and the application of force'.<sup>18</sup>

There does certainly seem to be a discernible disparity between the NATO/US approach to the use of force and that largely espoused by the EU. For Emil Kirchner and James Sperling, policymakers in the US and Europe have embraced 'a clearly differentiated understanding of security' that centred on their interpretations of security, the target and agency of threat and 'a continued American preference for national solutions to common security challenges'.<sup>19</sup> For Rynning, '[O]nce action takes place outside the NATO framework, the European emphasis on diplomacy as well as explicit UN Security Council mandates emerge clearly' and he noted that the EU's concept of force 'is less robust than that of NATO', citing European inhibitions concerning the application of force to win campaigns like Kosovo in 1999.<sup>20</sup> European leaders regularly decry what they see as an American instinct which over-emphasises military responses to security challenges. Elsewhere, Sloan observed that 'Europe was the site of two devastating wars in the twentieth century and was the principal host to the Cold War as well. Most continental European countries, at one time or another in the past century, have been defeated and occupied by foreign forces. From a European perspective, the desire to avoid war remains an immediate and meaningful imperative'.<sup>21</sup> Extrapolating these ideas further, perhaps it is possible, as Michael Smith has done, to talk of a divergence of perspective on either side of the Atlantic with regard to notions of leadership, world order and the distribution of power; indeed, he defined the US as a 'warrior state' and the EU as a 'trading state'.<sup>22</sup> If this is transposed to notions of security, then Smith's line has the US embracing

the concept of 'hard' security and the EU that of 'soft' security.

The EU is still a long way from being a full security provider and exporter if that includes the ability to project coercive military force (it has no problem using coercion in the economic sphere however). Does this matter? Not if you believe that coercive military force is a redundant instrument in the contemporary security environment. Nor does it matter if you still favour an institutional division of labour with the US providing the firepower. There is though, of course, a price to pay for continuing with the latter scenario. In return for relying on American military muscle, Europeans have to follow American diplomacy and foreign policy. ♦

<sup>1</sup> Roy H. Ginsberg, *The European Union In International Politics: Baptism By Fire* (Lanham: Rowman & Littlefield, 2001), p. 24.

<sup>2</sup> *Ibid.*

<sup>3</sup> Stanley R. Sloan, *NATO, the European Union, and the Atlantic Community: the Transatlantic Bargain Reconsidered* (Lanham: Rowman & Littlefield, 2003), p. 82.

<sup>4</sup> Julian Lindley-French, 'The Revolution in Security Affairs: Hard and Soft Security Dynamics in the 21<sup>st</sup> Century', *European Security*, vol. 13, nos. 1-2, 2004, p. 1.

<sup>5</sup> Michael E. Smith, 'Institutionalization, Policy Adaptation and European Foreign Policy Cooperation', *European Journal of International Relations*, vol. 10, no. 1, 2004, p. 97.

<sup>6</sup> See, for example, Christopher Hill, 'Closing the Capabilities-Expectations Gap', in John Peterson and Helene Sjursen, eds, *A Common Foreign Policy for Europe* (London: Routledge, 1998), pp. 18-38.

<sup>7</sup> Brian White, *Understanding European Foreign Policy* (Basingstoke: Palgrave, 2001), p. 147.

<sup>8</sup> Ginsberg, *op cit*, p. 25.

<sup>9</sup> White, *op cit*, p. 111.

<sup>10</sup> Helene Sjursen, 'Missed Opportunity or Eternal Fantasy?: The Idea of a Common European Security and Defence Policy', in Peterson and Sjursen, *A Common Foreign Policy For Europe*, pp. 97-8.

<sup>11</sup> Michael Brenner, *Europe's New Security Vocation*, Institute for National Strategic Studies: McNair Paper 66, p. 63.

<sup>12</sup> Sten Rynning, 'The European Union: Towards a strategic culture?', *Security Dialogue*, vol. 34, no. 4, 2003, p. 487.

<sup>13</sup> *A Secure Europe in a Better World: European Security Strategy*, Brussels, 12 December 2003, p. 1, 3-4.

<sup>14</sup> Sven Biscop, 'Able and Willing? Assessing the EU's Capacity for Military Action', *European Foreign Affairs Review*, vol. 9, no. 4, 2004, p. 509.

<sup>15</sup> Rynning, *op cit*, p. 480.

<sup>16</sup> Paul Cornish and Geoffrey Edwards, 'Beyond the EU/NATO Dichotomy: The Beginnings of a European Strategic Culture', *International Affairs*, vol. 73, no. 3, 2001, pp. 587-603.

<sup>17</sup> Charles, G. Cogan, *The Third Option: The Emancipation of European Defense 1989-2000* (Westport: Praeger, 2001).

<sup>18</sup> Stine Heiselberg, *Pacifism or Activism: Towards a Common Strategic Culture Within the European Security and Defense Policy*, ISS Working Paper 2003/4, Copenhagen: Institute for International Studies.

<sup>19</sup> Emil Kirchner and James Sperling, 'The New Security Threats in Europe: Theory and Evidence', *European Foreign Affairs Review*, vol. 7, no. 4, 2002, p. 438.

<sup>20</sup> Rynning, *op cit*, p. 485.

<sup>21</sup> Sloan, *op cit*, p.76.

<sup>22</sup> Michael Smith, 'Between Two Worlds: The European Union, the United States and World Order', *International Politics*, vol. 41, no. 1, 2004, pp. 95-117.

## The Militarisation of the European Union: The Death Knell for Comprehensive Conflict Prevention?

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In the *European Security Strategy* adopted by the European Union (EU) in December 2003, 'preventive engagement' emerged as a strong theme, indicating the EU's intention to 'be ready to act before a crisis occurs'.<sup>1</sup> Indeed, the EU has been carving out a significant international role for itself in conflict prevention since the early 1990s, developing policy instruments to encourage political and economic stability in third countries (long-term or structural conflict prevention) as well as more reactive short-term instruments to address conflict when it breaks out (civilian and military crisis management).<sup>2</sup> The Union is now actively involved in promoting peace and preventing conflict in a number of regions, including South-eastern Europe, the Middle East and Sub-Saharan Africa, and has been developing formal relationships with other international organisations concerned with preventing conflict, notably the United Nations (UN), the Organisation for Security and Cooperation in Europe (OSCE) and the North Atlantic Treaty Organisation (NATO).<sup>3</sup>

The prevention of conflict has been established within EU institutions as a key EU external relations objective over the last decade. However, the EU faces difficulties in the planning and application of such a wide policy area, particularly when it comes to achieving coherence, and balancing resources for structural, civilian and military measures. Furthermore, evidence suggests that the EU is not getting the balance right: the rapid development of the military element of the European Security and Defence Policy (ESDP) may be at the expense of a more comprehensive conflict prevention policy. This article argues that the 'militarisation' of the EU, if not closely integrated with civilian measures and long-term security solutions, may see conflict prevention disappear from the agenda as a realistic policy option.

### From structural to operational conflict prevention

The prevention and settlement of conflict was stated as a likely objective of the EU's Common Foreign and Security Policy (CFSP) as early as



1992,<sup>4</sup> although it was in the development policy sphere that long-term conflict prevention progressed in the EU context, particularly as a strategy to manage change in conflict-prone African aid recipients.<sup>5</sup> By the end of the 1990s, conflict prevention was less visible in the development sphere and was being more and more linked to security and defence policy, particularly military crisis management. The militarisation of the EU is not necessarily an inherently negative development for conflict prevention. Conflict prevention has been increasingly defined as a policy inclusive of structural, civilian and military instruments, and the EU was widely seen to be lacking competences towards the military end of the spectrum after policy failures in Bosnia and Kosovo in particular.<sup>6</sup> It is widely accepted that force may be needed to prevent the escalation of violent conflict if diplomatic and civilian options fail.<sup>7</sup> While the EU's shift from civilian to military actor has provoked much debate in the post-Cold War period, the roles are not mutually incompatible. In fact, post-Cold War conflict response has been characterised by a cross-over of civilian and military operations and organisations, particularly in South-eastern Europe, where non-governmental organisations (NGOs), the OSCE, and the EU have worked alongside NATO. The EU is well-placed, with its civilian past and wide-ranging instruments, to integrate its military competences with existing and new structural and civilian competences.

### **Why institutions matter**

Institutional developments, however, indicate a lack of integration between structural, civilian and military aspects of conflict prevention, compounded by the EU's fragmented external relations institutions and procedures. Conflict prevention competences span a range of EU policy areas and are shared by the European Commission and the Council of the European Union. The Commission is responsible solely for development and humanitarian policy, but also gathers much early warning information and has expertise in civilian crisis management. The Council and the member states control military crisis management, and the Council's institutions also undertake early warning, and plan and manage civilian crisis management missions. Conflict prevention's increasingly operational tone goes hand in hand with the Council's institutional proliferation in support of the ESDP (the Political and Security Committee, the Policy Planning and Early Warning Unit/Situation Centre, the Military Committee and Staff, and the Committee for Civilian Aspects of Crisis

Management (CIVCOM)). The pursuit of policy coherence and coordination in conflict prevention is not helped by institutional rivalry and turf battles over the cross-pillar policy.

Moreover, a widening gap between the resources available for structural conflict prevention (designed to address the root causes of violent conflict such as poverty, inequality, political and economic instability) and those available for crisis management (short-term action in the face of conflict) can be identified. While conflict prevention as a long-term policy was first developed in the European Commission's Development Directorate-General (DG), the External Relations DG was better placed to give the policy a security twist, thereby increasing the Commission's influence in the CFSP. DG External Relations has been expanded, while many of DG Development's duties have been transferred to the new EuropeAid office and to EC delegations in developing countries. The Conflict Prevention and Crisis Management Unit in DG External Relations itself employs fewer than 20 staff, with only two working specifically on conflict prevention. The Commission's latest instruments in conflict prevention, the Rapid Reaction Mechanism (RRM) and the African Peace Facility (APF)<sup>8</sup> are reactive, last-minute mechanisms suggesting that EU conflict prevention has lost its base in long-term policy.

These developments do not bode well for the future of structural conflict prevention within the Commission, and may lead to a narrowing definition of the concept to civilian crisis management, especially since the Commission closely guards its role in this policy field. Indeed, the Commission has lost ground to the Council in recent years in the control, training and recruitment of civilian crisis management personnel, despite its considerable budget for non-military crisis management. The creation of a civilian mission support unit in the Council Secretariat rather than the Commission consolidated the Council's control of the civilian crisis management agenda.<sup>9</sup>

The operationalisation of conflict prevention is clearly evident in the Council of the EU. Structural conflict prevention expertise is lacking in Council institutions: the CIVCOM has no experts in conflict prevention, and the Council of Development Ministers has been scrapped, leaving development issues to be dealt with in the General Affairs and External Relations Committee (GAERC), overwhelmingly preoccupied by operational crisis management. While the Council has wrestled civilian crisis management from the Commission's grip, staffing levels for Council military structures

far outweigh both early warning and analysis staff and civilian experts.<sup>10</sup> Without strong Council institutions to push for early action, conflict prevention opportunities may be, (and arguably have been) lost. According to a Commission official, Commission experts informed the Political and Security Committee (PSC) of mass displacements and an impending humanitarian crisis in the Darfur region of Sudan in early 2003, but no action was taken.<sup>11</sup> Commentators noted the lack of EU action on the Darfur crisis, citing weak Council institutions and the sidelining of conflict prevention in favour of combating international terrorism and the spread of weapons of mass destruction (WMD) as reasons for the poor EU response.<sup>12</sup>

### A military rollercoaster?

The militarisation of the EU is progressing with neither internal consensus between institutions, nor between member states. The *European Security Strategy*, while outlining a broad consensus on the EU's strategic role, has been described as a document 'more about attitude than policies'.<sup>13</sup> It is debatable how successful it is in integrating 'soft' and 'hard' security concerns; certainly, the European Commission's civilian expertise had little input, and some regard it as a vague document, open to competing interpretations.<sup>14</sup> Member states have yet to agree on a clear doctrine on the need for and use of military force, and the ESDP has been disproportionately driven by the governments of France and the UK. The European Defence Agency (EDA) established in 2004 was fast-tracked from the defunct constitutional treaty. It has been created in part to better predict and prepare for future crisis management needs, but also to enhance the European arms industry, prompting critics to argue that an arms dynamic is taking hold of the Union and its member states.<sup>15</sup> The European Commission is also clambering for a role in defence procurement and is undertaking defence (or 'security' research). It is not even clear if the EDA and the Commission's research programme are working in synergy.<sup>16</sup> The apparent prioritisation of cooperation with NATO in military crisis management as opposed to support for the long-term conflict prevention goals of the OSCE further indicates the EU's lack of commitment to structural conflict prevention.<sup>17</sup>

With much of the commentary on the ESDP and European defence capabilities being caught up in transatlantic and intra-European politics and machinations, it is easy to lose sight of the end product and purpose of EU military crisis management. It is important that the militarisation of the EU does not become an end in

itself, but progresses cautiously in terms of clear goals and projected security needs. The recent emphasis on terrorism and WMD within the EU (assuming this focus remains *reactive*) takes attention and resources away from policies addressing the root causes of conflict. As Paul Rogers has argued, current trends suggest that the response to violent conflict will be to regain and maintain control rather than to address root causes.<sup>18</sup>

### Martial union or peace project?

The militarisation of the EU has fundamentally changed the traditional civilian identity of the Union as understood during the Cold War era. This was a pragmatic adaptation to post-Cold War crises and instability on the EU's borders, reflecting unprecedented progress in intergovernmental cooperation. Nevertheless, it has mixed blessings for EU conflict prevention. On the positive side, the EU is extending its instruments and equipping itself with appropriate means to intervene militarily and prevent the escalation of a conflict, or keep the peace. This could make the EU a more rounded and efficacious security actor. On the other hand, if the development of military means becomes an end in itself, then the purpose and utility of these competences must be questioned. Not only could the military dimension 'diminish the [EU's] civilian power image',<sup>19</sup> but the EU could face a serious legitimacy problem as a military actor. The EU has used the external relations objective of conflict prevention to justify its transformation from civilian to civilian *and* military actor. Conflict prevention therefore provides a normative framework for EU military activity. Yet if the trend identified here of a decoupling of long-term conflict prevention from military crisis management continues, the EU's legitimacy as an actor outside the civilian sphere will be questioned.

According to Robert Cooper, the Head of the Council's External Relations Directorate-General, 'in an age in which security will depend on taking early action against emerging threats abroad, legitimacy is more important than ever...[Europe will need] more power, both military power and multilateral legitimacy'.<sup>20</sup> Military power and multilateral legitimacy are not compatible goals if the EU loses its commitment to long-term security solutions. The continued marginalisation of long-term conflict prevention will undermine the EU's considerable progress in this area during the 1990s, as well as the security of the Union's own borders. One thing *is* certain: no amount of military hardware or rapid response forces can guarantee this. ♦

## Assessing the Impact of the Pillar Structure on the Development of the European Union as a Foreign Policy Actor

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At the Convention on the Future of Europe, debates in the Working Groups (on legal personality, external action and simplification) once again raised interesting questions regarding the complexity of the Union's architecture under the 'pillarisation' formula and its impact on the development of an effective European Union foreign policy to match expectations.<sup>1</sup> The argument that the pillar structure is a constraint upon the development of the EU as an effective foreign policy actor<sup>2</sup> which could be resolved through its abolition has long been proposed by the Commission and held sway among many members of the European Parliament.<sup>3</sup> In response to the EU's perceived lack of actorness in foreign affairs, proposals issued during the Convention process suggested abolishing the pillar structure, attributing a single legal personality to the EU and possibly merging the treaties.<sup>4</sup> Counter arguments regarded pillarisation in ideational terms as the structural representation of diversity within the wider integration process and practically as the only guarantee of sovereign control in foreign policy, thus requiring it to remain intact.<sup>5</sup> Others argued that any solution short of the total abolition of the pillar structure and wholesale communitarisation would still need to allow for the preservation of the current distinctions between the more supranational EC pillar and the more intergovernmental second and third pillars.<sup>6</sup> The compromise eventually accepted by the member states is rather anachronistic as it attempts to preserve the distinctiveness of the pillars within a single treaty. Therefore it neither merges the Common Foreign and Security Policy (CFSP) with External Relations (RELEX), nor brings CFSP under the Community method.<sup>7</sup> The result is that the EU will remain effectively 'pillarised' regardless of the draft constitution being ratified or not in future because the crucial tenets of pillarisation, namely differentiation and logic of diversity,<sup>8</sup> remain fundamental to the process of European integration. However, while the draft constitutional treaty makes no explicit reference to the removal of the pillar structure there is perhaps a general misperception within the media, the public and even practitioners that

<sup>1</sup> *A Secure Europe in a Better World: European Security Strategy*, 12 December 2003, p. 7.

<sup>2</sup> See the European Commission's *Communication on Conflict Prevention* (COM (2001) 211), and the annual *Conflict Prevention Reports* produced by the Presidency.

<sup>3</sup> See E.J. Stewart, *European Union Conflict Prevention: Policy Evolution and Outcome* (Hamburg: Schleswig-Holstein Institute for Peace Research/Lit verlag, 2006).

<sup>4</sup> June 1992 Lisbon European Council Presidency Conclusions: *Report to the European Council in Lisbon on the likely development of the CFSP*.

<sup>5</sup> Interview with European Commission official, Brussels, October 2004.

<sup>6</sup> See D. Carment and A. Schnabel, *Conflict Prevention: Path to Peace or Grand Illusion?* (Tokyo and New York: UN University Press, 2003), and Stewart, *op cit*.

<sup>7</sup> See, for example, C. Bildt, 'Force and Diplomacy' *Survival*, vol. 42, no. 1, 2000, pp. 141-8.

<sup>8</sup> The RRM was established in 2001 to allow for the fast release of funds for targeted assistance, fact-finding missions, mediation or the dispatch of observers. The APF came into effect in May 2004 as a mechanism designed to support peacekeeping missions undertaken by the African Union (AU). Worth 250 million euros, the fund has a lifetime of 3 years only, funded from the European Development Fund (EDF – resourced directly by member states).

<sup>9</sup> See the *ESDP Presidency Report*, Brussels European Council, June 2004.

<sup>10</sup> There are up to 150 military staff in the Council Secretariat, with recourse to national and NATO HQ for operational military planning. In 2003, there were only 15 staff in the Secretariat to carry out civilian planning and mission support functions. See M. Tappert, 'Developing Civilian Crisis Management Capabilities' *European Security Review* No. 20 (Brussels: ISIS Europe, 2003).

<sup>11</sup> Interview with European Commission official, Brussels, October 2004.

<sup>12</sup> See R. Keane, 'EU Response to Darfur – Paper Promises' *European Voice*, 29 July 2004.

<sup>13</sup> J.V. Haine, 'An Historical Perspective' in N. Gnesotto, ed., *EU Security and Defence Policy: The first five years (1999-2004)* (Paris: EU Institute for Security Studies, 2004), p. 46.

<sup>14</sup> Interview with European Commission official, Brussels, October 2004.

<sup>15</sup> See J. Mawdsley, 'The Arming of the European Union: Explaining the Armaments Dimension of European Security and Defence Policy' *Perspectives: The Central European Review of International Affairs* Issue 22, Summer 2004, pp. 7-21.

<sup>16</sup> See F. Cameron and G. Quille, 'ESDP: The State of Play' *EPC Working Paper* No. 11 (Brussels: European Policy Centre, 2004).

<sup>17</sup> See Stewart, *op cit*.

<sup>18</sup> P. Rogers, *Losing Control. Global Security in the Twenty-First Century* (London: Pluto Press, 2000).

<sup>19</sup> K.E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity, 2003), p. 170.

<sup>20</sup> R. Cooper, *The Breaking of Nations* (London: Atlantic Books, 2004), pp. 167 and 172.

with the attribution of a single legal personality it has been abolished in all but name resulting in a further federalisation of the EU.<sup>9</sup> In fact, it does not tip the delicate institutional balance towards greater communitarisation or increased supranationalism: the balance of the existing pillar structure is maintained under the draft constitutional treaty.<sup>10</sup> The consequences of such a misperception may have been a contributing factor in the rejection of the draft constitution in the French and Dutch referenda.

Clearly, both now and under the draft constitution we can still regard that pillarisation lives on and remains the central organising principle of the EU.<sup>11</sup> Therefore the development of an effective EU foreign policy actor remains subjected to many, if not all, of the constraints associated with pillarisation, particularly the issue of managing consistency. The formula by which the pillar structure is organised according to cleavages and subdivisions across policymaking areas and according to different policymaking methods, has rightly been criticised for producing inefficiency and inconsistency particularly in the field of foreign and security policy which straddles all three pillars.<sup>12</sup> Technically, the problem is one of coordination, duplication and an unclear separation of powers. It also leads to rather unproductive competition between member states and institutions wrestling for power or influence within the policymaking and integration processes. Specifically, this translates into competition and the necessity to coordinate, sometimes with difficulty, between the Council and the Commission, the Office of the High Representative, the member states and the External Relations Directorate General (DG RELEX) although both former Commissioner for RELEX Chris Patten and High Representative Javier Solana did not advocate the abolition of the pillar structure as a solution to these problems.<sup>13</sup>

In organisational terms the major problem identified with developing a foreign policy under a pillared EU is one of consistency. It is the issue that is most commonly raised as the justification for depillarisation but in actual fact consistency as a concept in EU foreign policy making has a long history which predates pillarisation and is likely to outlive it also if the draft constitution is ratified. Ironically the introduction of pillarisation was considered at the time of its introduction by intergovernmentalist member states at least as a viable solution to the inconsistencies of the old

European Political Cooperation with the European Community.<sup>14</sup> The management of consistency has rightly been highlighted as the crucial area where pillarisation, like its predecessors, succeeds or fails in operationalising the EU as an effective foreign policy actor. To complicate matters three categories of consistency have been identified – horizontal, institutional and vertical – and these reflect respectively the separation of the pillars between different policy areas of the EU, between two different bureaucratic apparatus (intergovernmental and Community) and between EU and national policies.<sup>15</sup> Pillarisation has not addressed but rather compounded these problems by formalising and entrenching the division, and the draft constitutional treaty does not overcome this. It aims to address horizontal consistency with the introduction of a Union Minister for Foreign Affairs but it remains to be seen how effectively this person can operate in light of his/her responsibility and necessity to address all three issues of consistency. Indeed managing consistency represents a considerable burden and perhaps an entirely consuming task but one that is unavoidable because as long as the Union organises its affairs in separate pillars the issue of consistency will also need to be managed.<sup>16</sup> The choice of depillarisation however is not a solution the Union is nearing because as long as any logic of diversity exists among the member states then pillarisation or some similar type of pillared or fragmented arrangement is necessary to contain the centrifugal forces of differentiation present within a Union of 25 or more member states.

Assessing the impact of pillarisation on the development of the Union as a foreign policy actor therefore is not just a debate of technical importance but requires due acknowledgment of the highly political basis of the pillar structure which seemingly fails to overcome the current impasse between sovereignty and integration. Indeed the pillarisation and sovereignty and foreign policy debates not only overlap but in the EU context are based on the same paradox – the need to consolidate diversity.<sup>17</sup> The crucial point here is that the pillar formula was acceptable to a diverse range of interests as it seemingly held the promise of a particular vision of European integration and a particular *finalité politique*, whether that be intergovernmental or federal. Therefore the structure formally established this ambiguity in the institutional blueprint for the European Union in the form of a compromise involving integration without communitarisation in the new areas of CFSP and JHA. From this author's perspective, pillarisation has proved rather more successful in restricting communitarisation than in



enabling the integration necessary for the development of an EU foreign policy capability that matches expectations and rhetoric.<sup>18</sup>

The biggest success of a pillared EU has been through achieving and maintaining what Ernst Haas once called a convergent coalition: a consensus in which different actors support the same agreement on the basis of assumptions that cannot all be true. When one considers that the basis of these assumptions lie on the fault line between the federalist and the intergovernmentalist visions of Europe, the extent of the success of the pillar structure in housing these disparate interests is revealed. The difficulty in measuring the extent to which the agreement reflects a truly balanced compromise between protecting sovereignty and promoting integration is the source of much dissatisfaction, particularly in the Commission which seemingly prefers technocratic rather than political solutions. In terms of its Pareto efficiency, it is a suboptimal solution which, it has been argued, represents a type of second best integration.<sup>19</sup> If the position of the Commission and its integrationist supporters are to be believed then only the wholesale application of the Community method amounts to the optimal solution for European integration. But this is roundly rejected by those who would point to this amounting to the implementation of a federalist vision of EU.<sup>20</sup> Hence pillarisation remains an ideationally-effective piece of institutional engineering in terms of facilitating compromise but one which has the potential to unravel, to unmake the compromise, if any of its fundamental assumptions prove to be wrong. Foreign policy, particularly in the wake of Iraq, and the pressures of globalisation are the most likely to raise serious questions about those assumptions.

What then are the assumptions the opposing camps hold regarding pillarisation and the development of the Union as a foreign policy actor? These can be explored in the teleological questions raised during the course of the European integration process. The question of the Union's *finalité politique* can be seen as a crucial factor around which the Maastricht decision to pillarise hinged and similarly the factor upon which the decision to depillarise also hinges. In terms of our pillarisation – actorness story, two distinct elements of a convergent coalition on either side of the intergovernmentalist – federalist dichotomy assumed pillarisation would serve their purposes in either the short or long term. The federalist vision envisages pillarisation as a temporary measure to facilitate incremental integration and communitarisation leading to a state-like foreign policy actor as part of a federal

EU; and intergovernmentalists had the goal of protecting sovereignty through the prevention of further supranationalisation as an immediate consequence of the wholesale application of the Community method. The latter represents a considerably short-term approach and the former a long-term vision of European Union. Certainly, whichever path is currently being followed, the consequence has been for the Union to (at least temporarily) develop into an entirely unique actor in international relations, variously described as a partially constructed actor or a hybrid entity and perhaps what Tony Blair called 'a super power, but not a super state'.<sup>21</sup> However this new intergovernmental vision seemingly designated for CFSP and JHA requires further understanding particularly if it constitutes a 'hybrid' or a redefinition of the crucial balance between supranational and intergovernmental institutions. In essence, it may just involve continuing the process of formalising aspects of the Community method that operate informally across all pillars and which intergovernmentalists find acceptable, for example that all three pillars are part of a single institutional framework and are subject to a set of common legal principles. In terms of the choice for reforming the pillar structure this seems to be path dependent and perhaps towards some kind of Pareto optimisation rather than radical or sweeping changes.<sup>22</sup> The new intergovernmentalism on offer seems to be a method of minor adjustments in search of the optimal consolidation of diversity rather than the spillover-driven gradualism synonymous with the neo-functionalist and federal approaches.

To conclude, the impact of the pillar structure on the EU's development as an effective foreign policy actor is significant because it provides a mix of constraints and opportunities, centred on the unresolved tension between the communautaire and intergovernmentalist approaches. The development of a Union foreign policy actor will remain constrained by pillarisation in some form and particularly by the institutionalised political divergence that it now represents. The unique ambition of developing the EU into a superpower that is not a superstate requires an equally unique and ambitious institutional architecture to enable capabilities to match expectations. Although the pillar structure in its present state has so far failed to do this, particularly with regard to the consistency issue, it still represents the basis for an acceptable solution to the problems of developing an effective foreign policy within a diverse EU. If balance between protecting sovereignty and promoting integration, and between intergovernmentalism and a communautaire approach, is the optimal state the EU can hope to

achieve, then pillarisation is as near to an optimal solution as can be expected despite its obvious flaws. Finally, pillarisation seems to be a problematic but long-term state for the EU rather than some kind of transitional period, surviving primarily because it provides more benefits to the relevant actors than alternate institutional forms.<sup>23</sup> The pillar structure will continue to enable and constrain the development of an effective EU foreign policy capability but this is seemingly characteristic of a Union based on integration whilst protecting the principles of diversity and sovereignty. The prospect for developing effective actorness can only realistically be achieved in the current context by managing the contradictions of pillarisation through innovations in the intergovernmental model such as the currently unused flexibility measures introduced by the Amsterdam and Nice Treaties and perhaps in future the far-from-drastic provisions of the draft constitutional treaty. ♦

<sup>1</sup> The Convention's mandate, provided for in the Laeken Declaration, included exploring how to improve the performance of the Union on the international scene, and make of it 'a power wanting to change the course of world affairs'.  
[http://europa.eu.int/constitution/futurum/documents/offtext/d oc151201\\_en.htm](http://europa.eu.int/constitution/futurum/documents/offtext/d oc151201_en.htm)

<sup>2</sup> Namely the limitations of intergovernmental cooperation in promoting strategic thinking, proactive decision-making and coherent action were denounced by a large majority of the Convention's members. A diagnosis of EU shortcomings in this domain was almost consensual, but the prognosis and certainly the prescription highlighted divergences between its members. See G. Grevi, D. Manca, G. Quille 'A Foreign Minister for the EU – Past, Present and Future', FORNET Working Paper No. 7, p. 4  
<http://www.fornet.info/documents/Working%20Paper%20no%207.pdf>.

<sup>3</sup> The Commission has called for the abolition of the pillar structure: 'Structural changes are needed if the Union is ever to become a credible and effective player at the global level'. Communiqué: Romano Prodi, Michel Barnier, Antonio Vitorino, 22 May 2002, Brussels.

<sup>4</sup> See Contribution by Mr. Panayiotis Ioakimidis, alternate member of the Convention: 'The development of the EU's Common Foreign and Security Policy and Defence Policy (CFSP/ESDP)' <http://register.consilium.eu.int/pdf/en/02/cv00/00389en2.pdf>; Working Group III stated that 'following a merger of the legal personalities and, if necessary, of the Treaties, it would be anachronistic to retain the current "pillar" structure. It therefore considered that to do away with this "pillar" structure would help to simplify the architecture of the Union considerably.'

<http://register.consilium.eu.int/pdf/en/02/cv00/00305en2.pdf>

<sup>5</sup> See speech by Timothy Kirkhope MEP, EPP, Conservative UK, 3/10/2002

[http://www.conservatives.com/tile.o?def=news.story.page&obj\\_id=40534&speeches=1](http://www.conservatives.com/tile.o?def=news.story.page&obj_id=40534&speeches=1)

<sup>6</sup> Intervention of Prof. Bruno de Witte at the meeting of Working Group III (Legal Personality), 11 September 2002 on the merger and reorganisation of the Treaties Working document 27, <http://european-convention.eu.int/docs/wd3/3035.pdf>

<sup>7</sup> 'The Community method is a decision-making procedure that

allows for a transparent, effective and democratic functioning of the European Union. It is based on the interplay between three autonomous institutions: the European Commission, the European Parliament, and the Council of Ministers (also called the 'institutional triangle'). Stefaan de Rynck 'Explanatory note on the 'Community Method', Brussels 2002

[http://europa.eu.int/constitution/futurum/documents/other/oth220502\\_2\\_en.pdf](http://europa.eu.int/constitution/futurum/documents/other/oth220502_2_en.pdf)

<sup>8</sup> This refers to the argument that the member states do not share extensive common interests and this logic of diversity tends to block agreement on creating more supranational foreign policy-making machinery, as well as the making of common foreign policies within the current framework. Stanley Hoffmann quoted in K.E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press, 2003), p. 4

<sup>9</sup> See <http://news.bbc.co.uk/1/hi/world/europe/2950276.stm> or from the European Parliament

[http://www.europarl.eu.int/meetdocs/2004\\_2009/documents/pa/542/542429/542429en.pdf](http://www.europarl.eu.int/meetdocs/2004_2009/documents/pa/542/542429/542429en.pdf)

<sup>10</sup> It is also argued that the aim of the overall agreement was to strengthen both intergovernmental and supranational institutions - Council and Commission - and to create a kind of two-pillar structure supporting the roof of the new constitution, making the EU institutions both more powerful and more efficient:

[http://www.europeanaffairs.org/archive/2003\\_fall/2003\\_fall\\_42\\_php4](http://www.europeanaffairs.org/archive/2003_fall/2003_fall_42_php4)

<sup>11</sup> See B. Crowe, 'Foreign Minister for Europe' (London: Foreign Policy Centre, February 2005).

<http://www.eugrondwet.nl/IMG/pdf/minofforeignaffairs.pdf>, and N. Winn and C. Lord, *EU Foreign Policy Beyond the Nation-State: Joint Actions and Institutional Analysis of the Common Foreign and Security Policy* (Basingstoke: Palgrave, 2001), p. 1.

<sup>12</sup> S. J. Nuttall, "Consistency" and the CFSP: a categorization and its consequences', EFPU Working Paper (London: LSE, 2001).

<sup>13</sup> The media has reported a contentious relationship between Javier Solana and (former Commissioner for RELEX) Chris Patten, one example is to be found at <http://www.news.telegraph.co.uk/news/main.jhtml?xml=/news/2002/02/20/weuus20.xml>, while others point not to conflicts between Solana and Patten that have been a serious problem (although competence arguments have sometimes been quite sharp at lower levels) but rather to a rivalry stemming from successive Presidencies unwilling to delegate their responsibility under the existing treaties for managing the CFSP and chairing the Council. See Crowe, *op cit*.

<sup>14</sup> S.J. Nuttall, *European Political Co-operation* (Oxford: Clarendon Press, 1992).

<sup>15</sup> Nuttall, "Consistency" and the CFSP', *op cit*.

<sup>16</sup> *Ibid*.

<sup>17</sup> The term 'consolidate' here can mean both to combine or fuse and to strengthen or confirm. This is a deliberate ambiguity to reflect the central ambiguity of the pillared EU framework to protect sovereignty whilst facilitating integration. This aspirational logic is further personified in the preamble of the draft constitutional treaty by the motto to be 'united in its diversity'.

<sup>18</sup> Christopher Hill, 'The Capability-Expectations Gap or Conceptualising Europe's International Role', *Journal of Common Market Studies*, vol. 31, no. 3, 1993.

<sup>19</sup> 'The current institutional arrangements, with responsibilities split between the Commission and the Council, Coreper and the PSC, and Patten and Solana, are suboptimal' in C. Grant, K. Schake, and D. Danilov, 'The EU's Rapid Reaction Capability', ESF Working Paper No. 4, October 2001. See also W. Wessels, 'Flexibility, Differentiation and Closer Cooperation', in M. Westlake, ed., *The European Union beyond Amsterdam* (London: Routledge, 1998).

<sup>20</sup> For example Jens-Peter Bonde MEP (Den IND/DEM) questioned whether the outline for the Convention which included the deletion of the pillar structure was in fact 'pressing the federalist card...'. See Notes of the Meeting of The European Convention, 28 and 29 October 2002, Ben Crum (CEPS), 29 October 2002.

<sup>21</sup> See Roy Ginsberg, *The European Union in International Politics: Baptism of Fire* (Boulder: Rowman & Littlefield, 2001); and Tony Blair's Speech to the Polish Stock Exchange, 6/10/200 <http://www.number-10.gov.uk/output/Page3384.asp>

<sup>22</sup> 'Although there were calls from some quarters for the abolition of the pillar structure, it was apparent that any changes in this regard would be incremental and would not lead to the rapid communitarisation of CFSP or, conversely, any appreciable increase in intergovernmentalism.' Simon Duke, 'The Convention, the Draft Constitution and External Relations: Effects and Implications for the EU and its International Role', European Institute of Public Administration, Working Paper No. 2003/W/2, <http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN013014.pdf>

<sup>23</sup> P.A. Hall and R. Taylor, 'Political Science and the Three New Institutionalisms', MPIFG Discussion Paper 96/6, June 1996, p. 13.

## Some Thoughts on the Constitution, the European Court of Justice and the CFSP

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The, at least theoretical,<sup>1</sup> fall of the pillars envisaged by the Treaty establishing a Constitution for Europe (CT) produces an important change in the nature of the measures adopted in the field of CFSP. Measures adopted under this pillar have, at present, the features of public international law. Should the draft constitutional treaty be ratified, the distinction between these measures and those adopted under the first pillar (EC law) will disappear. There will only be Union law, which will have the same characteristics EC law has at present. Thus in the current second pillar there is a shift from public international law to Union law, which has the effect of endowing CFSP measures with 'stronger' features (ie supremacy, possible direct effect) and, at the same time, of preventing them as a matter of EU law from being ruled invalid by national courts.<sup>2</sup>

Since CFSP measures become 'stronger' and national courts cannot rule them invalid, it would seem logical to expect the European Court of Justice (ECJ) to be able to subject them to a more effective control. Its jurisdiction is, nevertheless, very restricted under the draft constitution. Article III-376 CT excludes from the competence of the Court Arts I-40 and I-41, the provisions of Chapter II of Title V (CFSP), and Art III-293 (insofar as it concerns CFSP). We can thus assume for the purposes of this comment that the Court is still entrusted with the tasks of ensuring the primacy of Union law (Art I-6 CT) within the CFSP, as well as policing the borders between the CFSP and any other policies of the Union (Art III-308 CT).<sup>3</sup> I will not consider these 'residual competences' in this article.

For organisational reasons, and in order to gain a quick overview of the competence of the Court, we can distinguish between an 'abstract control of constitutionality' (that is, when the conformity of a measure to higher law—the Constitution, in this case—is examined in the abstract), and 'protection of individuals' (when the measure is challenged by an aggrieved plaintiff).

### Abstract Control

There is a mechanism of 'abstract control' whereby the ECJ can ensure that measures of secondary

law conform to the constitution. We refer to it as abstract because it is not brought by an aggrieved individual whose rights are ultimately protected. The action can be brought by several privileged applicants, and the control can entail checking accordance with a list of constitutionally-encoded rights (Part II CT) or with other constitutional requirements (eg lack of competence, any infringement of the constitution, etc). Whereas Art III-365 CT provides for this mechanism to be applied in all other fields, this cannot be the case within the CFSP, since the Court is generally bereft of jurisdiction in this area by means of Art III-376 CT. There is no reason to believe, however, that abstract control of international agreements adopted in this field is also precluded: such agreements are concluded under Art III-325(11) CT, which does not fall within the set of provisions referred to in Art III-376 CT.

Since international agreements are the only measures which the ECJ is allowed to control in the abstract, the question arises whether this very restricted control of constitutionality could upset the precarious equilibrium between the ECJ and the national constitutional courts. The latter can, at present, control the conformity of intergovernmental CFSP measures with their national constitutions. This includes ensuring accordance with a list of constitutionally encoded rights, but it also encompasses compliance with all other constitutional rules. Given that this control will become impossible once the shift towards Union law has taken place, these national constitutional courts may rise against supremacy and *Foto-Frost* if they are not assured that control of constitutionality will be exercised effectively by the ECJ.<sup>5</sup> Since the latter cannot exercise the required abstract control of constitutionality, it may be that protecting the rights of individuals very thoroughly in individual cases is an effective way for the ECJ to maintain the confidence of the national constitutional courts and avoid a 'rebellion', at least with regard to the aspect of abstract control which concerns ensuring compliance with a list of constitutionally-encoded rights. As regards other aspects of abstract control, eg controlling the correct exercise of competence, the ECJ does not seem to have a similar chance to make up for the deficiencies of its jurisdiction.<sup>6</sup>

### Protection of Individuals

The ECJ can protect the rights of individuals against restrictive CFSP measures in two different ways: it can review the validity of restrictive Union measures implementing a European

decision adopted under Art III-322 CT (since this provision is not excluded from the jurisdiction of the Court) or under the exception of Art III-376(2) CT (against a European decision itself, if it provides for restrictive measures against individuals).

Of these two channels, Art III-376(2) CT is the most interesting one because it seeks to put remedy to a potential judicial gap that loomed over the draft constitutional treaty and is a real exception to the exclusion of the Court from the CFSP. In the draft CT, an individual could only challenge restrictive measures which implemented a European decision, and not the European decision itself. Thus a European decision which contained restrictive measures against individuals, but which needed no implementation at Union level, lay outside any kind of judicial control. The exception contained under Art III-376(2) CT is thus novel because it allows for the challenge of European decisions themselves, rather than their implementing measures.

Contrary to what happens with restrictive implementing measures adopted under Art III-322 CT, the Court would not normally have jurisdiction to review CFSP European decisions; it can do so only because of the exception contained in Art III-376(2). It follows that the Court will have to decide each time whether the case falls within the limits of this exception. To what extent the above-mentioned potential judicial gap has been effectively avoided will crucially depend on the interpretation the Court makes of this exception: namely, of the boundaries of its own competence and of the conditions to have standing. Both points have to be decided on the basis of the same text within Art III-376(2) CT ('European decisions providing for restrictive measures against natural or legal persons'). In theory, it would be possible for the Court to restrict 'European decisions providing for restrictive measures against natural or legal persons' to measures formally addressed to the plaintiff. It can be argued, nevertheless, that this is not an acceptable interpretation of the competence of the Court: it would mean that a European decision with no formal addressee, but which affects the rights of an individual, escapes judicial control. If, on top of this, there are no implementing measures (which can be challenged under Art III-322 CT), the individual is left without remedy. Thus if the Court adopted such a restrictive approach, there would still remain, after all, a judicial gap.

In any case, we will have to wait and see how the



Court interprets Art III-376(2) CT. At this point we can only speculate on the unsuitability of a very restrictive approach.

There are further factors - arising out of the unique context in which the Court has shaped and continues to shape the legal order over which it presides - which could, in the future, push the Court towards a non-restrictive approach. On the one hand, it may wish to avoid external scrutiny by the European Court of Human Rights. On the other, it may also wish to avoid a rebellion of national constitutional courts, as pointed out above: a thorough case-by-case protection could be the only reason why national constitutional courts do not feel compelled to claim jurisdiction to check the conformity of CFSP measures with their national fundamental rights standards. These factors are of sufficient importance so as to influence the interpretation the Court makes in the future of its competence within this area, pushing it towards a more active role.

### Further remarks

In general, the jurisdiction of the Court is deficient in the field of CFSP. This is especially obvious when it comes to the abstract control of measures for their accordance with the constitution. With regard to the protection of specific individuals, the Court has been given some leeway, but the extent to which it chooses to use this margin - ie, the extent to which it will push the boundaries of its jurisdiction - remains to be seen.

On the whole, we can maintain that the judicial control of CFSP measures is less satisfactory than at national level, even when taking into account the wide scope of discretion generally left to national governments in this area. The German Federal Constitutional Court, for instance, has explicitly rejected the political questions doctrine.<sup>7</sup> Similarly, the French case shows that, even in a system which traditionally accepts the doctrine of *acte de gouvernement*, the courts are willing to reduce as much as possible the area which they are not allowed to enter.<sup>7</sup>

Furthermore, we should be aware of the fact that patterns of political (as opposed to judicial) oversight of executive action in the field of foreign policy differ widely between national legal systems, on the one hand, and the Union, on the other. In the first instance, judicial control is part of a system of checks and balances which includes political control, generally exercised by national parliaments (albeit that the dominance of the executive is a common feature of contemporary political practice). This is, however, not applicable

to the Union, given that, even in theory, there is no effective parliamentary control in matters of CFSP under the constitution (neither consent nor consultation is required, Art III-325(6) CT; the European Parliament must be merely informed, Art III-325(10) CT). What is a common thread in all systems is that the judicial role must be respectful of the political patterns of representation and accountability. The relative lack of these values in matters of CFSP could mean that a case could be made in favour of a more embracing role for the ECJ.◇

<sup>1</sup> Shaw rightly points out that the pillars do not disappear completely. J Shaw, 'Europe's Constitutional Future', *Public Law* 132, Spring 2005.

<sup>2</sup> As a consequence of the *Foto-Frost* principle. 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 04199.

<sup>3</sup> The competence to ensure primacy is disputed by some. Editorial, 'The CFSP under the EU Constitutional Treaty - Issues of Depillarization', *Common Market Law Review*, vol. 42, 2005, 325.

<sup>4</sup> Drawing on the position of several national constitutional courts with regard to the protection of fundamental rights enshrined in their constitutions. The common stance is that they have competence to check the validity of EC law measures against national constitutional standards, but will choose not to exercise such competence as long as the ECJ is protecting fundamental rights in a satisfactory manner. The clearest example is to be found in the case-law of the German Bundesverfassungsgericht: BVerfGE 37, 271, *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel (Solange I)* [1974] 2 Common Market Law Reports 540; BVerfGE 73, 339, *re the application of Wünsche Handelsgesellschaft (Solange II)* [1987] 3 Common Market Law Reports 225.

<sup>5</sup> Art III-308 CT only allows the ECJ to police the borders between the CFSP and other policies, and not the 'outer borders' of Union competence.

<sup>6</sup> *Inter alia*: *Saarstatut* case, BVerfGE 4, 157; *Grundlagenvertrag* case, BVerfGE 36, 1; *Rudolf Hess* case, BVerfGE 55, 349.

<sup>7</sup> The category of *actes détachables* has been constantly enlarged: for instance, military activities unconnected with warlike operations are considered reviewable. TC 9 June 1986, *Eucat*, AJDA 1986. 456. Other examples include CE 19 February 1988, *Société Robatel*, AJDA 1988. 354; CE 22 December 1978, *Vo Thanh Nghia*, AJDA 1978. 4. 36.

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