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Decision-making Void of Democratic Qualities? An Evaluation of the EU's Second Pillar Decision-making Procedure

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Abstract: The EU's foreign and security policy is often criticised for being undemocratic. In this article, this contention is addressed from the perspective of deliberative democracy. The focus is on the procedural qualities of the second pillar decision-making processes as it is not only the quality of the outcomes that determine the democratic legitimacy of policy-making, but also the way that decisions have come about. Against five criteria, the EU's second pillar procedure is assessed for its putative lack of democratic qualities. The analysis shows that not only does the second pillar lack parliamentary input, but the procedural set-up also violates basic democratic principles. There is no democratic deliberative forum to which citizens have access and where decision-makers must justify their positions. There is a serious absence of democratically elected participants to counter the vast number of bureaucrats, and the level of secrecy through which decisions are made is almost absolute. Furthermore, there is no separation of powers due to the fact that the same working groups prepare the second pillar items for both the Council and European Council, allowing the two bodies to lead an almost symbiotic coexistence. This impermeable unity controls agenda-setting, policy-formulation and execution, and hence also escapes both parliamentary and judicial scrutiny.

Keywords: deliberative democracy, European officials, legitimacy, political representation, judicial review, transparency, Common Foreign and Security Policy (CFSP), ESDP, accountability, political science

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1. Introduction: Democracy and bureaucracy in CFSP/ESDP

Over the past few years, the EU's foreign and security policy has gained momentum. Even if it still has an intergovernmental identity in the Treaties, studies have shown that there is now an increased concentration of activities, people and interaction mushrooming in Brussels (Smith, 2003; Duke and Vanhoonacker, 2006; Cameron, 2007). This so-called 'Brusselisation' means that "While the relevant competencies do remain ultimately at the disposal of the Member States, the formulation and implementation of policy will be increasingly Europeanized and Brusselized by functionaries and services housed permanently at Brussels" (Müller-Brandeck-Boucquet in Barbé, 2004: 48). This mushrooming indicates that the centre of gravity is gradually altered from national capitals towards Brussels and that the second pillar – despite its formal legal character – is arguably not so intergovernmental after all (Sjursen, 2007; Duke and Vanhoonacker, 2006; Mérand et al., 2010).

As in other EU policy areas, foreign and security policy also involves handling complex technical and procedural information at different levels. It is therefore heavily dependent on

expertise provided by bureaucrats, diplomats and/or scientists. While such expert-based policy-making is seen by some as a guarantee of rational decision-making, it is also often perceived as technocratic and opaque. The lack of transparency in the way in which expertise is selected and the extent to which it informs and sometimes dominates policy-making is often considered a problem that could undermine the legitimacy of the decision-making process.

In general, foreign and security policy is an issue area that is rarely subjected to democratic scrutiny. In this regard, the EU's foreign and security policy is no exception. For anyone with a minimum of knowledge of the EU's foreign and security policy, it will consequently come as no surprise that the second pillar framework does not 'deliver' well in democratic terms. Even so, this article argues that an assessment of the democratic shortcomings of the EU's foreign and security policy is important.

One obvious reason for subjecting the second pillar to a democratic evaluation is that there are few studies that have conducted this type of assessment. Whereas some look at the European Parliament (EP) and its influence in foreign and security policy (Peters et al., 2010; Wagner; 2006; Diedrichs, 2004; Crum, 2006; Barbé, 2004; Thym, 2006) and other studies look at national parliaments' role in the CFSP/ESPD (Bono, 2005; Peters et al., 2010), no studies have conducted a *systematic evaluation* of the EU second pillar decision-making system. In this article, I do not limit the assessment to parliamentary control alone, as this only amounts to a minimum common denominator shared by all democratic theories. Rather, the evaluative scheme applied here has a different focus in looking at the *policy-making procedure* as such and thus takes heed of how the second pillar as a decision-making framework performs *as a whole*. The focus on procedural qualities, then, tells us something about the *preconditions* under which the EU's second pillar policy comes about and whether these will at all increase the *likelihood* of *democratic* decision-making to take place.

Another reason is that while there may be certain special instances with regard to operational information that require confidentiality, there is no *principled* reason why foreign and security policy as such should not be subjected to the same type of democratic scrutiny as other policy areas. The democratic principle states that everyone should have a say in the making of decisions that have a direct effect on their actions. Foreign and security policy is in this sense not practically different from other policy areas.¹ In fact, its content is increasingly disputed and not something citizens and parliaments are willing to blindly put in the hands of the executive (Sjursen, 2007: 2). This challenge of executive dominance is indeed applicable in the EU where neither the EP nor national parliaments have proper control of decision-making in the foreign and security field (cf. Peters et al., 2010).

This brings us to the third reason why the question of democracy should be addressed in this policy field. Whereas it is commonplace to argue that foreign and security policy lacks democratic credentials, what is missing in the literature is an account of how we can understand the *nature of the democratic deficit* in EU foreign and security policy. What is at stake when second pillar decision-making is not subject to democratic control? As indicated

above, modern decision-making is complex, technical and knowledge-demanding. Elected representatives are not experts in all fields, but are politicians with general knowledge. In expert terms, then, democratically elected legislators are considered “...to be seriously deficient as lawmaking bodies. They often lack, among other things, the expertise, staffing resources, organisation, cohesion and flexibility needed for the making of quality legislation. Thus, in no European country does the elected body act as the exclusive legislator” (Van Schendelen and Scully, 2006: 2). In other words, experts in a variety of fields are needed to ensure that decisions meet certain scientific and cognitive demands.

However, from a democratic perspective the fear is that these experts become too powerful, thus out-manoeuvring the elected generalists. The fear of expert domination is not unique to the EU alone even if it is more critical to ensure democratic control at the European level due to weaker representative institutions. With an expanding supranational bureaucracy this is a challenge in second pillar decision-making. The problem is that when: “...officials act on the basis of normative knowledge that is not regulated by democratic procedures[, t]hey use their ‘own’ perceptions and values or ‘internal’ professional standard when they evaluate societal problems. The question is from where the experts yield authorisation to deploy particular values when doing their job. Who has given them the right to act in this way and how can we know that they have applied correct values and valid knowledge?” (Eriksen, 2001: 17-18, author’s translation).

What is more, since we cannot anticipate all of the consequences of a decision, we can never truly be sure what the best solution is. No one possesses complete information and knowledge – not even experts. Unintended consequences must always be factored in – sometimes they go in a positive direction, but very often also in a negative direction. In short, even if it may be argued that experts/bureaucrats may have more knowledge about certain aspects of foreign and security policy than ordinary citizens, the former never have complete information. *Relevant* knowledge in foreign and security policy does not only involve professional advice. It also involves making political and ethical choices about which policies the EU *should* pursue, hence knowledge about how policy choices will affect different groups will increase the quality and rationality of decisions. As experts and bureaucrats are not the only potentially affected parties, the viewpoints of ordinary citizens also represent valuable knowledge in policy-making processes.

On the basis of the above, it seems pertinent to start discussing the democratic shortcomings of second pillar decision-making. In this article, the second pillar decision-making system is assessed from a discourse-theoretical/deliberative perspective, which underlines the importance of testing policy proposals through inclusive and open discussions prior to actual decision-taking. This means that “...it is not the simple consent that contains the moment of legitimacy but rather a process of accountability in which citizens have objections answered and hear and evaluate the reasons. The approval or disapproval of other people’s deliberations reduces democracy to voting” (Chambers, 2004: 397). In other words, the emphasis is first and foremost on the democratic quality of the decision-making *process* itself – not on the

final outcome. In focusing the assessment first and foremost on the policy-making process, the important stages leading up to a decision become the main evaluative target and not merely the act of casting votes. Hence, deliberative democracy puts us in a position to also factor in the participation of bureaucrats/experts in the preparatory phases and not only the final decision-making moment in the Council.

Against this background, the purpose of this article is to assess the second pillar decision-making framework for its putative democratic shortcomings, hence the following research question: *To what extent is it correct to hold that decision-making processes in the second pillar lack democratic control?*

This article contains three sections. The first section presents the analytical framework containing five criteria (and accompanying indicators) for assessing democratic legitimacy from a deliberative perspective. Against these criteria, the second section is devoted to the evaluation of the second pillar. The third section holds the conclusion.

1.1 Analytical framework

The analytical framework that will be applied in order to shed light on the above-mentioned research question was developed in previous work (Stie, 2007, 2010) and is based on a deliberative approach to democracy (Habermas, 1998, 2001; Eriksen, 2009; Eriksen and Fossum, 2002; Eriksen and Skivenes, 2000).² This framework was worked out with the aim of facilitating an assessment of *institutionalised decision-making procedures*. The crux of the normative argument is the importance attached to the *procedural qualities* of the decision-making procedure for the overall democratic legitimacy of policy outcomes. The bottom line is that in order to be democratically legitimate, decisions must be validated through a *particular type of process*. This entails that they have been defended, tested and criticised argumentatively in a publicly accessible debate and that minority positions have been included, listened to and taken into consideration during the course of a collective and inclusive process.

Deliberative democracy underlines the obligation decision-makers have to *justify* the decisions they make on others' behalf and that decision-making settings and procedures should be regulated in order to maximise the possibility for this to happen. This does, however, not mean that democratic deliberation is required at every stage of decision-making processes. Rather, "Deliberative democracy makes room for many other forms of decision-making (including bargaining among groups, and secret operations ordered by executives), as long as these forms themselves are justified at some point in a deliberative process" (Gutmann and Thompson, 2004: 3).

From deliberative theory, five criteria have been derived: A democratic decision-making procedure must: (1) facilitate *democratic deliberative forums*; (2) *include* the viewpoints of *affected* and *competent parties*³; (3) take decisions in *openness* so that the relevant

information is accessible and the opportunity for public scrutiny is possible; (4) provide mechanisms for *neutralising* asymmetrical power relations; and, finally, (5) have *decision-making capacity* (see Stie, 2007, 2010).

Criterion 1: Forums conducive to democratic deliberation

To facilitate deliberation there must be places where actors can meet to discuss. Forums as such can have many purposes; some are merely for discussion and preparation of decision-making whereas others are joint discussion and decision-making forums. Others again may be allocated for bargaining or conciliation. From a *democratic* perspective, however, there must be forums organised and regulated in such a manner that they facilitate publicly accessible debates where decision-makers must meet and where the positions relevant for second pillar dossiers are presented, scrutinised and tested before a final decision is taken. This is important for two reasons. Firstly, positions need a quality check, that is, they must be scrutinised in order to be deemed publicly acceptable. Secondly, citizens must be assured that their concerns, interests and preferences have *in fact* been raised, considered and justified during the decision-making process (Lord, 2007a: 147-8). Hence, *democratic deliberative forums* are settings where the *views* of citizens/affected parties are voiced via popularly elected representatives.⁴ The indicator of a democratic deliberative forum is the following:

- There is at least one setting (i) that is dominated by a representative selection of elected representatives, (ii) where there is access to documents and debates, (iii) where there are rules ensuring and inducing equality among the participants and, finally, (iv) where there is time for debate prior to decision-making.

Criterion 2: Inclusion of affected and competent parties

From a discourse-theoretical perspective, democratically legitimate decisions have both a moral and a cognitive element, i.e. they should be informed both by the viewpoints of affected parties as well as by the knowledge provided by experts. Operationalised to present purposes this means that the views of affected parties can only be voiced by representatives who have a popular mandate and can be discharged by citizens in the next election. Competent parties are appointed officials/bureaucrats/experts possessing scientific or technical expertise. The indicators of inclusion are:

- The main institutional decision-making bodies are *popularly elected* and have collective *veto* power over the final outcome.
- *Hierarchy of actors*: The *elected representatives* are the *key actors* when *discussing and deciding* how consequences and burdens are distributed. It is required that elected representatives sit together and *collectively* mould an opinion and discuss a case prior to decision-taking. The involvement of *competent parties* is limited to preparing policy-making.

Criterion 3: Openness and transparency

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

- All the involved institutional actors and the public get access to the policy proposal before it is finally decided.

- *Access to documents:* There is a digitally accessible register of documents (or other ways of ensuring easy access to documents).
- *Transparency of debates:* There are either verbatim records, video streaming of debates through the internet or minutes available in all official languages.

Criterion 4: Neutralisation of asymmetrical power relations

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

- *Ex ante mechanism (1): Separation of powers:* The institutional actor presenting a policy proposal is not at the same time the decision-maker. There is a clear *legal division* between executive, legislative and judicial powers.
- *Ex post mechanism (1): Parliamentary control:* A parliamentary body has the right to scrutinise individual dossiers and to pass a vote of censure.
- *Ex post mechanism (2): Judicial review:* Affected Union citizens and other legal subjects can appeal to get their complaint reviewed on which basis the Court can scrutinise (and possibly sanction) not only adherence to procedural rules, but also the content of second pillar decision-making.

Criterion 5: Decision-making capacity

To make a difference, a procedure must produce outcomes. Decision-making capacity here refers to both formal and informal aspects. Hence the procedure and powers of the second pillar should both be *officially* described in the Treaties and decisions should also *actually* be taken within the formally assigned format in order to rule out that formal institutions are not merely rubber-stamping decisions taken in other forums and by other actors. This does not mean that informal meetings are automatically deemed ‘illegitimate’. Formal institutions prescribed and described in legal provisions are usually not ready-made recipes in no need for practical interpretation when applied to actual empirical circumstances. The point is that the actual practice of a procedure can be more or less in line with the *intention* of the formal legal provisions and that informal structures/meetings have not taken over and thus made the formal set-up redundant.

From a deliberative democratic perspective, the findings under this criterion can give us an indication of whether the potential for publicly accessible deliberative processes that we perhaps find under the first criterion can be connected to and thus be said to influence the decision-taking moment. The indicator of decision-making capacity is:

- There is *absence of informal networks* where powerful actors ‘pre-cook’ proposals that are not sanctioned by democratic organs and which consequently have taken over as the locus where actual decision-making takes place.

1.2 Methodological remarks

The focus of this article is on the second pillar (i.e. Title V TEU⁵). It deals with how the internal processes of second pillar decision-making is organised and regulated, that is, the legal instruments as listed in Article 13 TEU: *Common Strategies, Joint Actions, Common Positions*.

The evaluation is based on the Nice legal framework and includes decisions (until the end of 2007) that affect the procedural qualities of the second pillar. Such decisions can, for instance, be inter-institutional agreements altering the provisions for institutional interaction and decisions changing the institutions' rules of procedure. The assessment thus relies on an interpretation of official documents (the Treaties, the institutions' respective rules of procedure, inter-institutional agreements as well as material presented on the EU's websites such as activity reports etc.) and academic studies on the second pillar in particular and the EU legislative system in general.

With the Treaty of Lisbon, the rotating Presidency in second pillar issues has been replaced by permanent positions. In the European Council, a permanent President (elected for 2,5 years) now chairs the meetings whereas the High Representative (who is simultaneously a Vice President in the Commission) chairs the Foreign Affairs Council (FAC) meetings. Hence, where mention is made of the Presidency below, it refers to the pre-Lisbon rotating Presidency. How these changes will affect the internal organisation of the European Council and Council meetings remains to be seen. However, given that neither of the new positions have a popular mandate, it is unlikely that the democratic impact on the European Council and the Council will be decisive. In all other matters, the second pillar decision-making process is unaltered.

On the basis of the analytical framework presented above, the second pillar decision-making system will now be assessed against the five criteria.

2. Democratic deliberative forums?

The first criterion requires the existence of at least one open forum where decisions are tested and critically examined by popularly elected representatives in a manner that is publicly accessible. The selection of eligible second pillar forums for the assessment of the first criterion was decided on the basis of the minimum requirement for such forums, namely that they are composed of a representative selection of *popularly mandated* representatives. Only two second pillar settings meet this initial threshold: the *European Council* and the *Council of Ministers*⁶.

The European Parliament is not included because even if it conducts open debates on foreign and security policy, it lacks decisive competences in second pillar decision-making. Hence, even if the EP may influence second pillar decision-making indirectly through the arguments raised in parliamentary debate, the EP is not a setting where the actual decision-makers must face public scrutiny and justify their positions in open debate.⁷

2.1. The European Council

The formal policy initiation and agenda-setting phase starts in the European Council which formulates general guidelines for the Council. The European Council consists mainly of the heads of state and government with the Commission President also participating as a full member (but with no right to vote). The national foreign ministers⁸ as well as a Commission member assist their respective heads of state and government/Commission President (Article 4, TEU). In addition, the High Representative (HR), the Council Deputy Secretary-General, the Commission Secretary General, senior officials from the Presidency and the Council Secretariat as well as technical staff are present. The EP President addresses the European Council, but does not stay for discussions. In sum, the main actors are the national heads of state and government who all have a popular (even if indirect) anchoring.

The meetings are, however, conducted in confidentiality. An annotated (draft) agenda for the meeting is the only document available to the public before the meeting.⁹ After the meeting a press conference is held and the Presidency Conclusions become publicly available in all languages along with some background documents. According to Article 4 (TEU), the European Council shall submit a report to the EP after each meeting (in addition to an annual report on the achievements of the Union). Altogether, this is not enough to enable the public to follow the meetings.

The European Council is not a regular EU institution, but rather a “...locus of power...” (Hayes-Renshaw and Wallace, 2006: 165).¹⁰ Even if recognised in the Treaties¹¹, the internal life of the European Council is not covered and there are also no written rules of procedure.¹² Rather, the meetings are characterised by informal practices and ‘club-like’ atmosphere (ibid: 167). Under the Nice provisions, the member state holding the Presidency chaired the meetings and functioned as a co-ordinator and consensus-builder even if the Presidency role was more partisan than in the Council (ibid: 168). The Presidency was consequently an important position, but given that it was a rotating position, everyone got a chance at the wheel.

The meetings have both a formal and an informal side. To ensure equality, all the formal meetings are translated in all the official languages so everyone can understand what is being said. In-between the formal plenary meetings, the Presidency conducted bilateral (so-called ‘confessionals’) or group talks in order to reach agreement on difficult matters. Formally, the decision-making rule is unanimity hence prior consensus-building is important (Hayes-Renshaw and Wallace, 2006). These informal meetings have become increasingly important

after the 2004/2007 enlargements and it is now common that smaller groups of member states coordinate informally prior to the formal meetings in so-called ‘like-minded groups’. In sum, in lacking rules of procedure, European Council decisions are more likely to be vulnerable to power asymmetries. However, the voting rule is unanimity, the formal meetings are translated, there is a rather strong consensus norm and, under the Nice provisions, the Presidency position was still rotating among all the member states.

European Council meetings last for two days and are usually conducted around four times a year (and at least twice a year, according to Article 4 TEU) in Brussels. Hence the schedule is tight and time is a factor. Whereas a two-day meeting can be productive in terms of informal gatherings and final results, it seems rather difficult to ensure a *collective* setting where heads of state and government sit down and discuss particular CFSP policies in detail, also since European Council meetings never only have second pillar items on the agenda. Rather, the meetings are prepared by several Council bodies before it reaches the ministerial level and it is here the more thorough discussions take place.¹³

2.2. General Affairs and External Relations Council (GAERC)

It is the GAERC configuration that takes the decisions in CFSP matters and here the ministers of foreign affairs represent the member states.¹⁴ The defence ministers only “...meet at the fringes of the GAERC” (Wagner, 2006: 201). In addition, the HR and the Commission are present and PSC members can also assist their respective foreign ministers. In sum, the national ministers dominate the GAERC and these meetings are thus primarily occupied by representatives with a popular foundation.

The GAERC meetings are not open to the public.¹⁵ At the Council website, there is an access point for agendas/background notes/briefings for all Council configurations. Whereas the other Council configurations often offer publicly available minutes, this is not the case with the GAERC when dealing with CFSP matters – although some minutes have partial access. Hence it is possible to find out what documents are relevant, but access to the texts is unobtainable.

Unlike the European Council, the Council (2006) has rules of procedure regulating the interaction among member states. Attendance, convening and chairing of meetings (i.e. the rotating presidency) are regulated in Article 203 and 204 (TEC) and followed up in Article 1, 5 and Annex I in the Council’s rules of procedure. However, also the GAERC is characterised by informal sessions in-between the formal meetings. Due to the high number of people formally attending the GAERC meetings, the “...ministers find it difficult to enter into substantive discussion on more sensitive matters with such a large audience” (Westlake and Galloway, 2006: 54).¹⁶ The attendance of ministers in the formal setting has consequently decreased and they appear instead for informal lunches and leave the formal settings for their deputies (ibid). In an effort to rectify this tendency, there are now a ‘restricted’ setting within the formal format of GAERC meetings which usually only contain the minister and two

officials from each delegation (Reiderman, 2006: 67). Hence this could at least ensure a collective ministerial process that to some extent can counter the tendency after the 2004/2007 enlargements of more informal encounters.

As in the European Council, under the Nice provisions the Presidency represented a key position, but the office was rotating and thus to some extent levelled out the playing field among the member states. In addition, the second pillar requires unanimity which formally gives each member state a veto. However, disagreement can also be shown less drastically by filing a 'constructive abstention' which means that they abstain from voting without blocking a unanimous decision (Article 23 TEU). If a constructive abstention is followed by a formal declaration, the member state in question is not obliged to apply the decision, but must accept that it commits the others. The Member State must then refrain from any action that might conflict with Union action based on that decision. However, the consensus norm is also strong at the ministerial level and votes are rarely taken (Hayes-Renshaw and Wallace, 2006).

GAERC meets once every four to six weeks and the minister from the member state holding the Presidency chaired the meetings. In addition to already tight schedules, the latest two enlargements resulted in the fear of inefficiency and deadlock and led the Council to adjust its rules of procedure. Prior co-ordination in 'like-minded delegations' is also common in GAERC meetings. This practice obviously reduces the likelihood of a collective process of policy deliberation to take place in formal GAERC meetings as the incentives for discussion is canalised into the informal meetings which have a more frank atmosphere. However, given the almost complete absence of openness of GAERC meetings the potential deliberation going on cannot be compared to a proper process of democratic justification and scrutiny as it only takes place among elites with no possibility for public intervention. Whereas the duty to justify positions is firmly institutionalised for internal purposes towards fellow participants, the public is provided more or less with a 'fait accompli' in a press conference after the final decision is taken.

In sum, as none of the two settings meet the requirements for a democratic deliberative forum, the first criterion is not met. The main problem with the European Council and the GAERC is that they are conducted in secrecy. Whereas both meeting places consist of a representative selection of popularly mandated representatives, being elected is, however, not enough. The representatives lose their normatively superior status as the trustees who voice the views and speak on behalf of affected parties when the latter do not have any access to the meeting place and when there is no possibility for others to hold them accountable for their actions in this particular setting. This means that during second pillar decision-making there are no settings where decision-makers must justify their decisions in a publicly accessible manner.

3. Inclusion

The first indicator of inclusion demands that the main and most important decision-makers are popularly elected representatives situated in bodies that have veto power. According to the Treaties, the main second pillar decision-making bodies are the European Council and the Council which both consist of ministers and thus have an indirect popular link. Although the lower level Council actors dominate the preparatory process, the European Council and the GAERC still have final veto power. Only unanimously agreed items will pass.¹⁷ Hence, the second pillar framework complies with the first indicator.

However, when we consider the second indicator of inclusion concerning the overall involvement of *individual* actors and the relationship between elected and unelected participants, the picture is more complex. During the policy-making process it is not the ministers, but the officials in the many working groups and the PSC, who sit together and *mould* a dossier *collectively* throughout the procedure.¹⁸ The ministers are only partly involved in policy-formation (see Cameron, 2007: 41-2). Since this is not their main job they are not 'hands-on' on an everyday basis which results in the situation that apart from the Presidency minister, the number of elected participants involved in CFSP decision-making is close to zero.

The problem is that the low frequency of meetings makes the possibility for a *collective* will-forming process difficult at the ministerial level. Hence, the ministers become heavily dependent upon Council officials/advisers, especially officials in the senior bodies such as the PSC, the Council Secretariat and the HR. As in the first pillar, the agenda is divided into an 'A' and 'B' list which means that only highly contentious issues reach the GAERC as 'B' points and hence warrant the full attention of the ministers. According to Duke and Vanhoonacker (2006: 169), 90 per cent of the items are agreed at lower levels and appear as 'A' points on the ministerial agenda (see also Ambos (2004: 167)). Hence it is difficult to ignore the fact that the second pillar is heavily dominated by unelected actors. The domination of competent parties should also be seen in relation to the democratic problem of putting the entire decision-making process in the hands of the national executives without suitable involvement of parliamentarians to counter such executive dominance.

In sum, the vast majority of involved actors in the second pillar represent competent- and not affected parties. Hence, the normative hierarchy between elected and non-elected representatives is clearly violated.

4. Openness

One minimum criterion of openness is that the policy proposal is available to all the involved institutional actors prior to decision-taking. From the official Treaty perspective, this

requirement is met as the European Council, the Council and the Commission are all acquainted with the content before the process is concluded. If we, however, take into consideration the EP, the national parliaments and the public the situation is not satisfactory. True, the conclusions resulting from European Council meetings are available and give an indication of where the Union is headed in CFSP matters. However, unlike Commission proposals launched within the Community framework, the principles, general guidelines and common strategies resulting from European Council meetings are of a much more general character than the legislative proposals presented in the first pillar.

4.1. Access to documents

According to Article 255 (TEC) and further elaborated in Regulation 1049/2001, the Council¹⁹ is obliged to make documents connected to decision-making publicly available through a digital register.²⁰ As noted, however, access to relevant documents attached to individual CFSP-dossiers is almost impossible to obtain. According to the Council's rules of procedure (Article 17(3-4)), it is up to the Council/Coreper to decide (unanimously) on whether Common Strategies, Joint Actions or Common Positions should be published in the Official Journal. Though these legal documents are usually published after decisions officially have been reached, in principle, the fact that publication is voluntary is problematic from a democratic point of view. Apart from the general online summaries of adopted acts, some meeting agendas as well as the Council's annual CFSP report to the EP, the CFSP decision-making *process* is more or less conducted in secrecy. In foreign and security policy the above Regulation allows for significant exceptions to the openness rule (see especially Articles 4 and 9 of the Regulation).

Whereas the Regulation commits the institutions to list all the documents in the register so that it is possible to know that they exist, access to the content is rare. According to the 2008 Council's annual report on access to documents (p. 10²¹) "751 (...) sensitive documents were produced in the period concerned, 16 classified as "SECRET UE" and 735 as "CONFIDENTIEL UE". Of these, 2 "SECRET UE" document and 150 "CONFIDENTIEL UE" documents are mentioned in the register..." To get hold of documents not listed in the register, interested parties may apply to the Council Secretariat for disclosure.²² Only persons with the sufficient security clearance can evaluate and decide whether applications for such documents are accepted. Of all applications received by the Secretariat in 2008, 16,2% concerned CFSP matters and of these 13% were accepted (ibid: 14). Altogether, this is a rather limited result for affected parties to get acquainted with second pillar decision-making.

In addition to the categories of classified documents in the Regulation, the Council (and the Commission) also operates with a second system of classified documents referred to as 'restricted' documents.²³ Documents falling under this label are for internal circulation. They are not covered by the Regulation and are therefore not on the public register. This means that it is not possible to know that these documents exist unless one has inside sources. The 'restricted' category has a lower security level than the three others, but the fact that it is

excluded from the overall legal framework of the Regulation may make it tempting for the Commission and the Council to group documents they do not want the public to see in this category.

This policy provides the public, the EP and national parliaments with meagre conditions to form an opinion about CFSP/ESDP policy-making. Through an inter-institutional agreement, the EP has the right to send a special committee consisting of the EP President, the chair of the Foreign Affairs Committee and three additional MEPs to the Council to see classified documents.²⁴ They are, however, in many instances under the obligation not to reveal what they have read: “Information classified not as ‘top secret’, but merely as ‘secret’ or ‘confidential’ may, by agreement, be further distributed to members of the Foreign Affairs Committee meeting, if necessary, in camera” (Corbett et al., 2007: 147). In sum, most CFSP/ESDP documents are exempt from the public eye.

4.2. Transparency of debates

European Council meetings are conducted in confidentiality and no verbatim records, minutes or video transmissions are available for outside actors. However, the “...well-informed and interested observer can piece together a pretty complete picture from information gleaned from several national or institutional sources at a later stage” (Hayes-Renshaw and Wallace, 2006: 181).

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

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

5. Neutralisation mechanisms

5.1. Ex ante: Separation of powers

The second pillar has no clear divisions between policy-initiator/agenda-setter and legislator. All member states as well as the Commission (except in military matters) have the right of initiative (Article 22 and Article 14(4) TEU), but the Commission has no voting rights. Formally, policy initiatives originate at European Council meetings although the agendas of

these meetings are heavily dominated by lower level Council bodies (Westlake and Galloway, 2004: 223). Hence, the policy formulation phase is more or less exclusively situated in the Council and even though the Commission also plays an important role it is not the agenda-setter. The EP, the national parliaments and the ECJ have no formal powers according to Title V TEU. In sum, the second pillar framework seriously blurs the principle of separation of powers as the Council is both legislator and executive (the latter together with the Commission and the European Council). There is consequently no legal separation of powers in the second pillar (Bono, 2007: 435).

Although formally separated, there is also a problem of cross-pillarisation resulting from the fact that the legal boundaries between the three pillars are difficult to exercise in practice or that “...the legal form no longer captures the reality of decision-making” (Bono, 2006: 439). Hence, supranational first pillar issues of trade and development often affect the more intergovernmental second pillar (Ketvel, 2006: 84).²⁵ The institutional and legal dispersion of EU foreign policy into all three pillars adds to the deficiency of not properly distinguishing between executive and law-making competences within the second pillar.

5.2. Ex post: Parliamentary control²⁶

The EP’s involvement in the second pillar is regulated in Article 21 (TEU) which grants the Parliament a *general* right to be ‘regularly informed’ and ‘consulted’ on the ‘main aspects and basic choices’ of the CFSP and the Presidency is obligated to ‘ensure that the views of the EP are duly taken into account’. Further, the Parliament is entitled to ‘ask questions’ and ‘make recommendations’ and it shall hold ‘an annual debate on progress in implementing’ CFSP. Hence, the EP is deprived of formal rights to properly monitor ongoing policy-making as well as to scrutinise and possibly censure *individual* dossiers. However, through its Community budgetary powers, the EP has, according to Article 28 (TEU), formal power over CFSP administrative expenditure and non-military/defence operative expenditure (unless the Council unanimously decides to cover expenditure over the member states’ budgets).²⁷

However, even if limited, the EP has carved out a place for itself also in CFSP as although it lacks “...the formal power to censure, it is adept at exploiting the power to embarrass” (Reiderman, 2006: 64). The EP is not afraid to express its opinion and has usually a more principled stance than the more diplomatic approach of the Council (Crum, 2006: 390). When the EP is able to pair such statements with refusal to sign and thus preventing international agreements with third countries to come into force – a right it enjoys via the first pillar assent²⁸ procedure – the EP *may* acquire leverage towards the Council by undermining “...the unity of the stance of the EU vis-à-vis third countries” (ibid). Furthermore, through its rules of procedure²⁹ the Parliament seemingly tries to unilaterally change the current situation and make the HR and the Presidency more accountable to it (Diedrichs, 2004). Even if limited, many seem to agree that its powers exceed beyond what is formally set out in the Treaties due to its ability to exploit its budgetary and assent powers (Barbé, 2004: 55, 60). This is also confirmed by the aforementioned inter-institutional agreements on budgetary discipline and

access to sensitive documents respectively. However in sum, the EP does neither have the appropriate discretion to scrutinise nor to censure CFSP/ESDP decision-making.

Regarding national parliaments the situation is similar. Officially, there are only general Treaty-statements maintaining that it is up to national constitutional systems to decide the scrutiny powers the individual parliament will have in the second pillar and that the involvement of national parliaments is encouraged.³⁰ National parliaments have seemingly more power than the EP in CFSP/ESDP (Reiderman, 2006: 64), but the major problem is that they do not have a 'collective overview' (Bono, 2006: 440). Hence they may have some powers to hold their own government to account, but the secrecy of CFSP/ESDP decision-making renders it impossible for national parliaments to scrutinise the positions of the other member states (ibid). There is also significant variation when it comes to the depth and character of national parliamentary control in the member states (Wagner, 2006: 204-5; Bono, 2005, 2006). Moreover, none of the national parliaments seem to have the possibility to exercise democratic control, certainly not *ex ante*, but also not *ex post* (see Bono, 2005, 2006; Barbé, 2004).

5.3. Ex post: Judicial review

In contrast to the first pillar, CFSP/ESDP decisions are not under the jurisdiction of the ECJ and citizens and other affected parties can in general not appeal to the Court to consider decisions taken within this framework (Duke and Vanhoonacker, 2006: 177). This is the short story of Article 46 TEU. In the longer story, Article 47 nuances the picture in the sense that it requires CFSP-issues to be coherent and not violate provisions governing Community competence in TEC. This means that the Court has indirect influence on the CFSP in exercising the right to review whether a second pillar decision encroaches upon Community law-making (Ketvel, 2006: 91-2). Over the last few years, this has become more frequent as the policy areas in the three pillars overlap thus rendering the right legal basis under which decisions shall be taken a question for the ECJ. Whereas there have been quite a few cases of this kind regarding the third pillar (see Hillion and Wessels, 2008; Ketvel, 2006), there has only been one³¹ such case in the second pillar, namely the ECOWAS³² case. On the basis of Article 230 TEC, the Court ruled that the second pillar decision should be annulled as it should not have been adopted under the second, but the first pillar. For these competence questions, it is only member states and EU institutions that appeal to the ECJ. Hence despite having no jurisdiction in the second pillar, the Court has nevertheless considered the *procedural* aspects of second pillar decisions, but it has neither interpreted provisions nor evaluated the validity of these cases. In sum, the second pillar does not allow for proper judicial review of second pillar decisions and is thus "...inadequate to meet the basic demands of fundamental rights protection once action taken at Union level affects individuals" (Spaventa, 2008: 237).

6. Decision-making capacity

Given the nature of foreign and security policy, it is possible that there are secret settings that seldom appear in the literature, but where the ‘actual’ decisions are taken. For instance, small states worry that an informal group of the largest member states (variably called the ‘Directoire’/‘Quint’/EU-3 depending on the states involved) ‘actually’ decide the EU’s foreign and security policy. While the influence of the large states cannot be ruled out, Hill (2006) notes that although they obviously often take the lead, dividing interests hinder the formation of a permanent setting outside the second pillar. In this sense, we can argue that CFSP/ESDP decisions are taken within the European Council/Council framework.

However, cross-pillarisation is again an issue as there can be a tension between Community and second pillar competences. Decision-making capacity in the second pillar is therefore arguably dependent upon a good relationship between the Council and the Commission³³ as well as with the EP in budgetary issues. These points notwithstanding, there does not seem to be a competing institutional network where second pillar decisions are actually taken.

7. Concluding remarks

This study has contributed to the ongoing debate on the lack of democratic accountability in the EU’s foreign and security policy by extending the democratic test beyond the parliamentary field to a more comprehensive set of procedural qualities. This puts us in a position to better spell out what the implications of these democratic deficits entail for second pillar decision-making. The underlying assumption in this article has been that as long as the Union takes decisions that have consequences for those who are bound by them, there is no *principled* reason that can *normatively* trump the requirement that second pillar policy-making should be subject to democratic scrutiny. It was further argued that despite its formal intergovernmental character, the increasing ‘Brusselisation’ of the second pillar warrants subjecting the EU’s foreign and security policy to similar democratic standards as nation states. Based on an evaluative scheme developed from a deliberative perspective, the second pillar was consequently put to a democratic test.

The evaluation showed that the conditions for decision-making in the EU’s foreign and security field are not conducive to democracy. The main reason for this is the lack of popularly elected representatives who are involved in decision-making on a daily basis. The problem is not that unelected experts contribute to the preparation of the work of the Council. Every modern decision-making body is dependent upon a qualified staff to reduce complexities and provide expert advice. It is also impossible to draw exact boundaries between preparatory work and decision-making. The main problem, however, is the *extent* to which the Council officials act on behalf of the ministers. All second pillar forums are almost completely sealed off, making it impossible for the general public to follow the discussions

and to reach an informed opinion about CFSP/ESDP policy-making. Whereas the duty to justify arguments and positions towards fellow ministers and delegations inside the European Council and GAERC is carefully institutionalised (cf. the consensus-building norm), Union citizens are cut off with a press conference after decisions are taken. This is more or less a 'fait accompli' as there are only weak parliamentary and judicial accountability mechanisms to appeal to in order to annul a second pillar decision.

The democratic deficits of the internal organisation of the Council does not mean, however, that dossiers are not tested argumentatively. Studies show that the working groups and PSC are settings where decisions are reached in a more deliberative way (Juncos and Pomorska, 2006; Juncos and Reynolds, 2007). However, this type of deliberation does not amount to a democratic test of arguments as the ministers are not involved and the meetings are not publicly open. The working groups and the PSC indeed contribute to much needed (efficient) problem-solving, technical expertise and the ability to reach agreement among a heterogeneous set of member states positions. In this sense, they play a role in co-ordinating collective action and to enhance the epistemic dimension of second pillar policies, which are also valuable to democratic decision-making. But second pillar decisions are not merely apolitical and uncontroversial. Rather, they raise questions that are not only pragmatic, but also politically sensitive. Hence when almost the entire collective policy process takes place below the ministerial level, the extensive involvement of unelected officials becomes a serious democratic liability as there are no possibilities to hold these officials accountable through elections or in public debate. Hence the scope and extension of the Council officials' involvement should not be mistaken as a democratically legitimate way of relieving the ministers of their heavy workload, as the arrangement seriously violates the normative hierarchy between elected and non-elected actors.

Whereas these conclusions may not make much of an impression on those who find foreign and security policy irreconcilable with democracy, critics still need to answer the pertinent question that arises from the above analysis regarding who has the right to authorise the experts/bureaucrats to take decisions on behalf of Union citizens. On what basis can it be justified that unaccountable executives make better and more correct decisions: "Experts have knowledge about how we can reach given goals efficiently and can base their recommendations on scientifically verifiable data, but they do not have more competence than other citizens in questions regarding how things *should* be done" (Eriksen, 2001: 19, author's translation). As mentioned above, this does not mean that in a democracy there is no recognition of the need for confidentiality and efficiency for some operations. What is disputed, however, is that the whole second pillar process of agenda- and goal-setting, of deciding on what is acceptable and unacceptable in emergency procedures/situations, of formulating, discussing and executing policy proposals are not at any stage subjected to a proper democratic vindication. Uploading foreign, security and defence policy to the EU level means, by implication, that this policy field becomes even less democratically controlled as national parliaments are not empowered or equipped to hold the Council as a whole (and hardly their own government) accountable. Finally, the impermeable European

Council/Council policy-making system may backfire as it becomes less open to new ideas and thus risks the recycling of opinions and positions that in the longer run can affect the quality of, and subsequently jeopardise trust in, EU second pillar decisions.

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Endnotes

¹ Some may argue that the nature of foreign and security policy is 'structurally different' from other policy areas and as such not compatible with ordinary democratic procedures of decision-making (Thym, 2006) as there are special situations which require rapid reaction and a certain level of secrecy. Democratic theory is not irreconcilable with such a view. However, the claim here is that the goals, limits and certain (standing) procedures and rules for rapid reactions, secret operations etc. shall be established democratically *in advance* so that in the actual crisis situation, the executive can respond quickly without the involvement of a full parliamentary procedure. Democratic procedures evaluating such operations *ex post* may also be possible and necessary. The upshot is that the use of force shall at some point be democratically tested.

² The democratic yardstick is the Habermasian discourse principle: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses" (Habermas, 1998: 107). Whereas the wording 'all possibly affected persons' has ideally a normative reach beyond the EU, it will here be confined to persons within the borders of the Union.

³ The inclusion of '*affected parties*' is here operationalised as representatives with a popular mandate who voice the views of citizens. Hence they differ from '*competent parties*' which cover all unelected (expert) actors participating in the preparation of decision-making.

⁴ As mentioned above, there are also many other forums that are relevant during a decision-making process, see Stie (2007, 2010).

⁵ Reference is here made to pre-Lisbon provisions of the Treaty on European Union (TEU) as ratified in the Treaty of Nice.

⁶ In the second pillar the relevant Council configuration is the General Affairs and External Relations (GAERC).

⁷ For discussions on the EP's role in foreign and security policy, see Peters et al. (2010); Crum (2006, 2009); Steeg (2009).

⁸ Under the Lisbon provisions, the foreign ministers no longer meet in the European Council.

⁹ See Council rules of procedure (Article 2(3a)) (Council, 2006).

¹⁰ Under the Lisbon Treaty, the European Council has now become an official EU institution.

¹¹ Cf. Articles 4, 13, 17, 23, 40a TEU.

¹² Upon becoming the seventh official institution of the EU with the Lisbon Treaty entering into force, the European Council has now adopted its own rules of procedure, see European Council, 2009.

¹³ According to Article 2(3) of the Council's rules of procedure, it is GAERC that prepares European Council meetings. In reality, however, it is the lower level bodies that take care of these preparations. The most important ones are the PSC and the HR/Policy Unit which contribute to prepare Presidency Conclusions and have a strategic position in all phases of CFSP decision-making.

¹⁴ If a minister cannot attend s/he can be substituted by her/his deputy or Coreper ambassador.

¹⁵ Cf. Article 6, 8-9, Council's rules of procedure. According to Article 9(2a) in the Council's Rules of Procedure, the results and explanations of votes in CFSP matters are only available if the Council or Coreper decide unanimously to make them public. In the first pillar, explanations and results of votes in the Council are usually published on the website, but this is not the case for second pillar issues.

¹⁶ Cf. Council rules of procedure, Article 20, Annex V.

¹⁷ In cases where a Joint Action and a Common Position result from a Common Strategy, GAERC can use qualified majority voting. This is also the case when adopting a decision based on a Joint Action or Common Position and when appointing a Special Representative (cf. Article 23(2)).

¹⁸ There are 36 ordinary working groups dealing with CFSP issues in addition to the more specialised groups: EU Military Committee (EUMC), Committee for Civilian Crisis Management (CIVCOM), Nicolaidis Group, Antici Group, Relex/CFSP Counsellors working group, Politico-Military Group, Political-Military Affairs Committee (Polmil). The PSC is also daily supported by the network of European Correspondents.

¹⁹ The Regulation also covers the Presidency and the European Council.

²⁰ See Articles 11 and 12 of the Regulation. The provisions on access to documents are followed up in the Council's Rules of Procedure, mainly in Annex II.

²¹ See, http://www.consilium.europa.eu/uedocs/cmsUpload/EN_acces%20au%20doc%202008.pdf

²² If the applicant is denied access recourse to the ECJ and/or the Ombudsman is possible.

²³ See Council Decision (2001/264/EC, section II, § 4) and Commission Decision (2001/844/EC, ESCS, Euratom, Article 16(1)).

²⁴ See Inter-institutional agreement, (2002/C-298/01) and EP's Rules of Procedure, Annex VII.

²⁵ This is also visible in the fact that the resources (financial and personnel) used for the implementation of CFSP dossiers are mainly drawn from the first pillar (cf. the tension between the HR and Commissioner for External Relations).

²⁶ Cf. Peters et al. (2010).

²⁷ In 1997, the EP, the Commission and the Council concluded an inter-institutional agreement on budgetary issues with regard to CFSP. This agreement was extended to a general agreement covering all budgetary issues in 1999 (OJ, C-172, 18.06.1999) and revised in 2006 (OJ, C-139, 22.10.2006).

²⁸ After the entering into force of the Lisbon Treaty, the assent procedure is replaced by the new consent procedure.

²⁹ Cf. chapter 13 EP's rules of procedure.

³⁰ Protocol 9 annexed to the Treaties (OJ C-321 E/1).

³¹ It should be noted that also *Hautula* belongs to the second pillar framework (Case T-14/98, *Hautula v Council* [1999] ECR II-2489). Here the Court reviewed the legality of a Council decision rejecting

the plaintiff access to CFSP documents (Ketvel, 2006: 83). The Court ruled that the plaintiff be given partial access to documents.

³² Case C-91/05 *Commission v Council*, judgement of 20th May 2008.

³³ According to Cameron (2007: 57), 90% of the foreign policy toolbox originates from first pillar instruments, e.g. troop deployments or diplomatic demarches are dependent upon such resources.