

Chapter 2

The Latest Attempt at Institutional Engineering: The Treaty of Lisbon and Deliberative Intergovernmentalism in EU Foreign and Security Policy Coordination

Uwe Puetter

Abstract The Treaty of Lisbon is the latest in a series of attempts at institutional engineering seeking to enhance the EU's capability to act within a decentralised policy setting which is not governed through the classic Community method and in which Member States either cannot be at all formally sanctioned for non-compliance or only in very exceptional circumstances. More specifically, this chapter reviews the new role of the High Representative within the Common Foreign and Security Policy as well as the changed presidency regime of the European Council. It does so with a view to how these changes further consolidate a system of deliberative intergovernmentalism which is constituted by routinised and consensus-oriented policy dialogue and, thus, departs from previous notions of intergovernmentalism in EU policy-making. Similarly, the increased use of informal working methods as well as the repercussions of the creation of the

Uwe Puetter—Professor at the Department of Public Policy and Director of the Center for European Union Research at the Central European University in Budapest. Draft versions of this chapter have been presented at the UACES/Modern Law Review conference 'EU External Relations Law and Policy in the Post-Lisbon Era', University of Sheffield, 13–14 January 2011 and the UACES conference 'The Lisbon Treaty Evaluated', 31 January 2011. This chapter also has benefited from collaborative research carried out and directed by the author and Antje Wiener, University of Hamburg, in the context of the Commission sponsored FP6 RECON project, WP6. The author is grateful to Stiftung Wissenschaft und Politik in Berlin for hosting him as a visiting fellow in the second half of 2009 when he undertook research on the changing role of the European Council and the Council in European Union governance. Finally, the author wishes to thank Paul James Cardwell for his very helpful comments and suggestions.

U. Puetter (✉)

Department of Public Policy, Central European University,
Budapest, Hungary
e-mail: puetteru@ceu.hu

U. Puetter

Central European University, Budapest, Hungary

European External Action Service for enhanced administrative cooperation between national administrations are discussed.

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2.1 Introduction

This chapter analyses the changes brought about by the Lisbon Treaty to the governance dimension of the European Union's (EU) Common Foreign and Security Policy (CFSP). It does so by highlighting that these changes reflect a more substantial adjustment to the respective role of the European Council and the Council in the overall EU governance architecture. Most importantly, CFSP governance is interpreted as a system of deliberative intergovernmentalism which is based on consensus-oriented and intensive policy dialogue among independent actors. This is a feature shared with another nascent field of intensive EU activity—the area of economic governance under Economic and Monetary Union.¹ As CFSP implementation requires the sharing and pooling of highly decentralised resources and the adjustment of national policy-making towards common guidelines and rules, policy-makers constantly struggle with rallying consensus behind common EU positions. Ever since its inception in the Maastricht Treaty, CFSP has led to the development of a series of procedures and practices which seek to address the challenge to govern in a predominantly intergovernmental setting.

In particular, the leadership role assumed by the European Council and the Council as well as the development of an underlying committee system headed by the Political and Security Committee (PSC) reflect this challenge. The Lisbon Treaty is the latest in a series of attempts of institutional engineering which seek to enhance the EU's capability to act within a decentralised policy setting which is not governed through the classic Community method² and in which Member States either cannot be at all formally sanctioned for non-compliance or only in

¹ Puetter 2012.

² The term 'Community method' is used throughout this chapter in order to highlight the substantive meaning of what has become the key decision-making method in the process of European integration. Its centrality for EU decision-making is reflected in Articles 288–292 TFEU.

very exceptional circumstances. More specifically, this chapter reviews the new role of the High Representative within CFSP as well as the changed presidency regime of the European Council. It does so with a view to how these changes further consolidate a system of deliberative intergovernmentalism which is constituted by routinised and consensus-oriented policy dialogue and, thus, departs from previous notions of intergovernmentalism in EU policy-making. Similarly, the increased use of informal working methods in the Council context as well as the repercussions of the creation of the European External Action Service (EEAS) for enhanced administrative cooperation between national administrations are discussed. The following sections are organised as a commentary of the relevant Lisbon Treaty provisions against the background of findings from new empirical research including a series of expert interviews with CFSP policy-makers in Brussels and Member State capitals, which have been carried out between 2008 and 2010.

The Lisbon Treaty is reviewed mainly from a political science perspective while specific links between the political science and legal studies literatures in this field are highlighted. To this end this chapter is organised as follows. The second section provides a brief overview on potential research perspectives applicable to the analysis of the changes brought about by the Lisbon Treaty and discusses why deliberative intergovernmentalism is chosen as the conceptual framework for this commentary. The third section reflects on how the new Treaty defines CFSP as a decentralised governance set-up. Sections four and five review the changes introduced by the Treaty regarding the role of the High Representative and the European Council respectively. The final section interprets the findings within the framework of deliberative intergovernmentalism and considers the Treaty changes as attempts at institutional engineering which yet have to materialise in the form of changed CFSP governance practices.

2.2 The Treaty of Lisbon as an Attempt at Institutional Engineering: Conceptual Perspectives

There is no straightforward recipe as to how to set up a conceptual framework for interpreting Treaty changes and their relevance for EU policy-making. Most importantly, there are different disciplinary and theoretical perspectives which inform research on Treaty changes. For example, lawyers may ask about the implications of Treaty changes for the EU's legal order³ and engage in interpreting specific provisions and discuss their repercussions for the role of specific actors such as the Court, Member States or individual citizens. They may also reconsider

³ On the institutional-level questions see, for example, the contributions to this collection by Brkan, Sari and Schmidt.

the very notion of EU law as a core aspect of EU governance in the light of Treaty change.⁴

Similarly, political scientists may focus on different sets of questions when analysing Treaty changes. Classical integration theory, for example, will ask in how far a particular Treaty alters the character of the EU as a supranational polity.⁵ In short, does it lead to more or less integration? Others will discuss in how far a new Treaty empowers specific actors and deprives others from their influence. In addition, and partially related to this question, political scientists will also ask in how far a new Treaty changes the rules of the game⁶ or the modes of interaction and policy practice in EU policy-making. Finally, there is a larger scholarship out there dealing with the question of the process of Treaty change itself.⁷ This research is occupied with the questions of ‘How did we get here?’ and ‘Who got what?’. The latter perspective particularly gained ground in relation to the work of the Convention of the Future of Europe and the process of drafting the Constitutional Treaty.

This chapter concentrates on the question of what repercussions the Lisbon Treaty has for the overall *governance method* and the institutional set-up of CFSP. In doing so the chapter seeks to interpret both the formal legal framework constituted by the Treaty as well as established practices and routines in decision-making. Such a focus on both the *formal* and *informal* aspects of a given governance context is compatible with previous research in the legal studies and political science fields alike. In particular the large literature on the role of new modes of governance and soft law in EU policy-making has established such a dual perspective in contemporary EU studies.⁸

More specifically, CFSP is understood to constitute one of several new fields of EU activity which have been first introduced by the Maastricht Treaty and have evolved since then under the premise that they would not be governed through the traditional Community method for the foreseeable future. This means in particular that while Member States largely share the determination to develop common policies in these fields and to respond collectively to key policy challenges they remain reluctant to transfer ultimate decision-making competences to the EU level. Economic governance within EMU and CFSP are the most prominent examples for this institutional formula but they are by far not the only ones as the examples of employment and social inclusion policy coordination show.⁹ This does not, however, imply that these policy fields have been immune to changes with regard to the way they are governed. All Treaties following the Maastricht Treaty have reflected this.

⁴ Armstrong 2011.

⁵ See Majone 1997; Mancini 1998; Moravcsik 1998; Schmitter 2004.

⁶ See H  ritier 2007; Tallberg 2006.

⁷ Christiansen and Reh 2009.

⁸ See e.g. Armstrong 2010; Trubek and Mosher 2003.

⁹ Policy coordination in the latter two policy fields was introduced as the main governance method by the Treaties of Amsterdam and Nice, respectively.

Instead of uploading new ultimate decision-making competences to the EU level, Treaty changes have focused on regulating policy coordination procedures and reconfirmed the model of a decentralised decision-making system which is based on close intergovernmental policy coordination. In this context, Commission input is a crucial aspect of policy coordination but does not amount to the full right of legislative initiative, which the Commission enjoys under the Community method in other policy areas. Similarly, there are no sanctioning mechanisms for those Member States which do not comply with commonly defined policy objectives.

Given the decentralised nature of the decision-making process and the dispersed character of the resources for policy implementation, the generation of consensus over common policy action has become a constantly reoccurring challenge for CFSP decision-makers. As it is only through voluntary commitment that EU Member States can act collectively and (re-)orient their national policies towards commonly agreed objectives the emphasis is on refining working methods, coordination procedures and the administrative underpinnings of such a coordination process. This process is conceptualised here as *deliberative intergovernmentalism*. Instead of understanding intergovernmental relations in the EU primarily as a process of negotiation between Member States about the limited transfer of power to the EU level through the means of creating supranational competences in the tradition of the Community method,¹⁰ intergovernmental relations in the field of CFSP are interpreted here as driven by the paradoxical struggle for policy consensus in a decentralised policy framework. As policy-makers cannot retreat to the instrument of integration through law¹¹ in the sense of binding and enforceable provisions, which would institutionalise their policy consensus for a longer period of time, the only alternative is to adjust the instruments for policy coordination with a view to improving their potential to foster consensus orientation and close intergovernmental coordination at all levels of bureaucracy. It is only this way that Member States can formally reserve the right to ultimate decision-making while making progress on joint policies in response to foreign and security policy challenges.

In short, the argument is that the Lisbon Treaty has not changed the fundamental character of CFSP governance as an area of intergovernmental policy coordination in which decision-making ultimately rests with the Member States. However, the Treaty brings about a series of changes as to how decision-making in these two policy fields is organised and carried out. The Lisbon Treaty is therefore understood as an attempt of *institutional engineering* in the sense that the new provisions are aimed at addressing dysfunctional aspects of the previously existing institutional framework without however changing the general character of the allocation of formal decision-making competences in this policy field.¹²

¹⁰ Moravcsik 1993.

¹¹ Haltern 2003.

¹² The concept of institutional engineering is borrowed from and used by analogy with Giovanni Sartori's famous work on constitutional engineering and the context of comparative institutionalist scholarship on democratic institutions. See Sartori 1994.

The concept of deliberative intergovernmentalism can help to explain this particular institutional dynamic.¹³ It implies that intergovernmental relations in key EU policy areas such as economic governance and CFSP evolve around the permanent search for policy consensus. The output efficiency of these settings may be considered to be limited by default when they are compared to a top-down hierarchical decision-making structure and the classic Community method. Deliberative intergovernmentalism holds that they nevertheless can be studied in terms of their evolution over time. Institutional change in this regard is understood as the adjustment of a given context's potential to foster consensus seeking and policy dialogue among formally independent actors. As a result policy consistency and the effectiveness of the decision-making process may increase. Moreover, deliberative intergovernmentalism expects a concentration of policy dialogue at the most senior levels of bureaucracy as common policies in such important fields like foreign and security policy can only be implemented provided that there is clear endorsement by the most senior members of the Member State governments. The European Council and the Council are therefore at the centre of political gravity and it is in these settings that we should expect to witness the increasing importance of policy deliberation as a key method of decision-making. Moreover, CFSP is an evolving policy field in which core policy norms are relatively broadly defined and remain inherently contested.¹⁴ As long as these broad parameters apply, the evolution of CFSP governance mechanisms can be analysed in terms of their capacity to generate policy consensus among independent actors. Deliberative intergovernmentalism as an analytical framework provides a set of criteria for engaging in such a review of the CFSP governance framework and the changes brought to it by the Lisbon Treaty. Most importantly, deliberative intergovernmentalism distinguishes between the impact of the negotiation setting and the policy content.

The negotiation setting will be more conducive towards policy deliberation if informal settings which create room for frank and interactive policy dialogue complement formal decision-making procedures. The most prominent example for such an evolution so far has been the creation of the informal Eurogroup of finance ministers in the field of euro area economic governance.¹⁵ Moreover, the degree of routinisation of policy review procedures, which address diverse national policy responses, matters as much as the socialisation of actors into the practice of open and consensus-oriented debate does. Similarly, deliberative intergovernmentalism assumes that the combination of technical knowledge and the ability to exercise political leadership is crucial. Therefore, group membership and the closeness of senior policy experts and the most high-ranking political representatives of Member State governments and the relevant EU institutions matter. These factors need to be considered together with more technical aspects such as the duration

¹³ Puetter 2012.

¹⁴ Puetter and Wiener 2009.

¹⁵ Puetter 2006.

and frequency of negotiations. The content of policy debates will matter with regard to the question of whether and to what extent a specific policy challenge can be framed as a common problem by the involved actors. This essentially depends on individual actors and whether they can play a certain role under the above specified parameters of a given negotiation setting. However, some policy issues may be better suited than others for being framed in such way. For example, if Member States have experienced coordination failure regarding their responses to a particular problem or policy challenge in the past but were in agreement that it was necessary to avoid this in the future, the readiness to engage in coordination might be higher in a situation when a similar challenge reoccurs.

Thus, Treaty changes can only partially contribute to the creation of such an environment as it is essentially constituted through informal practices and routines which evolve over time. However, new or changed Treaty provisions may have significant repercussions for existing practices and routines as they may alter the conditions under which these have previously evolved. Treaty changes may also create new opportunities for further informal adjustments. This is particularly true for provisions defining certain decision-making procedures and assigning specific roles to individual actors therein. As it was the case with employment and social inclusion policy coordination in the Amsterdam and Nice Treaties, Treaty changes may also simply codify an informal or semi-formal practice which existed before.

2.3 How the Lisbon Treaty Defines CFSP as a Decentralised Governance Set-Up

Before actually looking at what changes the Lisbon Treaty introduced to the CFSP governance architecture it is worth recapturing in which context the Lisbon Treaty did emerge. As a slightly modified version of the original Constitutional Treaty the Lisbon Treaty can be considered as reflecting the outcome of the Convention process and the following Intergovernmental Conference. This is all the more important as the Convention was charged with reflecting on both the scope of EU policy competences and the appropriateness of governance mechanisms. Thus, the Lisbon Treaty can also be understood as a statement on where the EU stands and what institutional options do (or do not) exist in the foreseeable future.

The new Treaty essentially confirms the overall governance structure and policy orientation of CFSP as it was set out previously. This means that EU foreign and security policy is based on an underlying normative framework which highlights the fundamental norms of democracy, rule of law, human rights and international law as well as the principles of the United Nations Charter and is not limited to particular aspects of foreign and security policy.¹⁶ Moreover, this

¹⁶ Treaty on European Union, Article 21. For further exploration on the 'values' of EU foreign policy, see the chapter in this volume by Broberg.

normative framework is related to the EU's own history as a specific regional integration project among democratic states. In this sense the Lisbon Treaty does not change the fundamental policy orientation and thus the policy content dealt with under CFSP.¹⁷ The Lisbon Treaty—as the preceding Treaties—refrains from specifying further policy objectives beyond these fundamental foreign policy norms. Concrete steps in the development of CFSP therefore need to be taken on the basis of case-by-case agreement among the Member States and the actors involved. In other words, CFSP remains based on a rather thin policy framework as regards the Treaty provisions related to this policy field. The fundamental norms specified under Article 21 (TEU) can be considered as inherently contested. Research shows that while they receive wide recognition and appraisal among core elites in EU foreign and security policy, policy-makers derive diverging policy options from them when it comes to actually adopting common positions and joint actions.¹⁸ The observation that the Lisbon Treaty confirms the *status quo ante* is not trivial. The Treaty is the manifestation of a deliberate decision against a unified method of decision-making in EU governance. It confirms the deviation from the original Community method as far as it is understood as a mechanism to establish binding and enforceable provisions. This development path was first established with the Maastricht Treaty. This is all the more important as it comes at the expense of not having a unitary method of decision-making in all areas of EU activity. While on the one hand, the Lisbon Treaty advances the Community method more than any other Treaty before by firmly establishing co-decision and qualified majority voting (QMV) as the default decision-making mechanism for most areas of EU activity previously identified as first pillar policies it, on the other hand, consolidates notably CFSP and economic governance under EMU as policy areas governed through enhanced intergovernmental policy coordination.

For CFSP the Lisbon Treaty, thus, prescribes the concept of a decentralised policy framework in which independent actors agree on common policies based on a rather thin institutional framework. The real challenge for CFSP governance, therefore, continues to rest with foreign policy practice and the need to forge policy consensus in response to particular foreign policy scenarios. The reaffirmation of this particular governance method is reflected in smaller and mainly editorial changes to existing provisions which define the overall organisation of the CFSP governance set-up and the allocation of competences. In this context the new wording included in Article 24.1 (TEU) starting with the second sentence is noteworthy:

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded.

¹⁷ This does not mean that there are no changes to the policy content dealt with in the CFSP arena. As CFSP practice shows an expansion of the scope of foreign and security policy activity this is certainly the case. However, this development is currently not determined by Treaty changes.

¹⁸ Puetter and Wiener 2007.

The Lisbon Treaty confirms the principle of unanimity as well as the exclusion of legislative acts from the range of decision-making options. These are the key features of CFSP governance and correspond to the thin normative framework of CFSP as discussed above. As others in this volume have noted,¹⁹ without enjoying legislative competences in the field of CFSP the EU lacks a mechanism to further specify binding policy objectives and legislation beyond the broad CFSP principles provided by the Treaty. CFSP governance is clearly distinguished from the classic Community method and is not designed to evolve based on the concept of integration through law. The European Council and the Council are the key institutions in this governance set-up. They represent those actors in the CFSP setting who have ultimate decision-making power. Only the heads of state and government and the foreign ministers are in a position to agree on common policy options and to ensure implementation with the help of the dispersed and decentralised foreign and security policy resources of the Member States. In the absence of an instrument to introduce legally binding decisions the mobilisation of these resources can only come about through the voluntary commitment of the Member States. To the extent that the Commission commands relevant policy resources in this area it is equally involved in this process. Yet, it remains one among many actors sharing responsibility for policy execution and implementation. Compared to the previously applied wording the Lisbon Treaty is more pointed in summarising this key method of CFSP governance and its special character compared to other areas of EU activity. This in itself may be considered as an expression of the firm intention to govern CFSP in a particular way for the foreseeable future. Article 24.1 (TEU) continues:

The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions...

As previously discussed, the European Parliament is only assigned a limited role in CFSP governance.²⁰ The specific involvement of the Commission was outlined above. The special role of the two institutions is reflected in the above quote. In other words, the Treaty refrains from making a general statement on competence allocation—something one would expect in areas governed by the Community method. Crucially, the Court continues to be deprived of the role it plays in areas other than CFSP and economic governance under EMU.²¹

¹⁹ See, in particular, the chapters by Sari and Brkan who explore the limits of the legal enforceability of CFSP instruments, and that lack of jurisdiction of the European Court of Justice (ECJ).

²⁰ This is not to say that the EP cannot use competences it enjoys in other areas to exercise pressure on the Council and the European Council to recognise more explicitly the parliament's point of view. The example of the discussion about the establishment of the EEAS was instructive in this regard.

²¹ See, further, Brkan (in this volume) who analyses the reasons for the lack of jurisdiction and also identifies the ways in which the ECJ enjoys some competence over CFSP-related areas.

Again, with regard to these fundamental parameters the Lisbon Treaty does not change the previously existing institutional framework but is more pointed in distilling the essence of CFSP governance.

2.4 The New Role of the High Representative

After taking stock of how the Lisbon Treaty defines the overall CFSP governance framework this section turns to the more substantial changes—notably the increased role of the High Representative. Again, the last quote from Article 24.1 TEU in the previous section is instructive in the sense that it includes the High Representative alongside the Member States in being responsible for putting CFSP ‘into effect’. The fact that the High Representative is mentioned on equal footing with the Member States constitutes a departure from the changes brought about by the Amsterdam and Nice Treaties. Here the role of the High Representative had been introduced as one of assisting the Council and the presidency in running CFSP. It is therefore worth looking into the new provisions concerning the High Representative in greater detail.

The above formula ‘[t]he Council and the High Representative’ is now also used when describing the responsibility to ‘ensure compliance’ with the fundamental principles of CFSP.²² Previously, only the Council was mentioned as being responsible for this task.²³ This joint responsibility is also emphasised later when the Treaty provisions stipulate that the Council and the High Representative shall ensure the unity, consistency and effectiveness of action by the Union’.²⁴ This shared responsibility is also related to the executive dimension of CFSP when the Treaty stipulates that the ‘policy shall be put into effect by the High Representative and by the Member States, using national and Union resources’.²⁵

The Lisbon Treaty ends the central role of the rotating Council presidency in CFSP governance. Previously the rotating presidency was in charge of chairing the Council meetings and representing the EU in CFSP matters to the outside world.²⁶ It was also responsible for the implementation of policy decisions.²⁷ Prior to the Lisbon Treaty the High Representative only ‘assisted’ the presidency in relation to these tasks.²⁸ The same applied to the ‘formulation, preparation and implementation of policy decisions’ and the task of ‘conducting political dialogue with third

²² Treaty on European Union, Article 24.3.

²³ Treaty on European Union (pre-Lisbon) Article 11.2.

²⁴ Treaty on European Union, Article 26.2.

²⁵ Treaty on European Union, Article 26.3. See further, in this volume, Schmidt and her discussion of how this is likely to function insofar as crisis management operations are concerned.

²⁶ Treaty on European Union (pre-Lisbon), Article 18.1.

²⁷ Treaty on European Union (pre-Lisbon), Article 18.2.

²⁸ Treaty on European Union (pre-Lisbon), Article 18.3.

parties'.²⁹ Now the Treaty clearly assigns these functions to the High Representative.³⁰ Thus, the new provisions allow the High Representative to play a more pro-active role at all stages of the policy process.³¹

This means the entire field of CFSP governance is now removed from the immediate influence of the rotating Council presidency. The Treaty does not reserve any prerogatives for the rotating presidency of the Council which still exists as an institutional mechanism for organising the work of other Council formations. The High Representative can exercise all functions of an active chair of the Council including and has the right to table his/her own proposals as well as the responsibility to 'ensure implementation' of policy decisions taken by the European Council and the Council.³² The High Representative also has the right to call extraordinary Council meetings.³³ Moreover, the Lisbon Treaty assigns the role of a mediator to the High Representative in cases of severe disagreement with a CFSP decision on the part of a Member State.³⁴ Previously such a case could only be resolved through transferring the matter to the European Council. Yet, the latter option still remains available under the Lisbon Treaty.

Finally, the Lisbon Treaty equips the High Representative with a separate administrative infrastructure: the European External Action Service (EEAS).³⁵ The institutional set-up of the service reflects the decentralised nature of CFSP as it is composed of officials from both the Commission and the General Secretariat of the Council as well as seconded diplomats from the Member States.³⁶ The service is also not supposed to act independently but in 'cooperation with the diplomatic services of the Member States'.³⁷ It can be best described as an integrated intergovernmental bureaucracy which further institutionalises the functional integration of decentralised resources without fully transforming them into a supranational and fully independent bureaucratic resource.

2.5 The European Council and CFSP Governance

Research on the changing character of intergovernmental relations in the EU shows the evolution of the European Council as the virtual centre of political gravity in EU governance.³⁸ Over the last 15 years or so the European Council has

²⁹ Treaty on European Union (pre-Lisbon), Article 26.

³⁰ Treaty on European Union, Article 27.

³¹ See [Sect. 2.6](#).

³² Treaty on European Union, Article 27.1.

³³ Treaty on European Union, Article 30.

³⁴ Treaty on European Union, Article 31.2.

³⁵ See, further, the chapter in this volume by Blockmans and Laatsit.

³⁶ Treaty on European Union, Article 27.3.

³⁷ Treaty on European Union, Article 27.3.

³⁸ Puetter [2012](#).

become a major actor in day-to-day decision-making at the EU level as in particular the areas of CFSP and economic governance under EMU constantly require agreement at the highest political level. Otherwise policy decisions would lack the necessary political backing to be implemented at the national level- or risk not being reached at all. Foreign and security policy is an area which is considered to concern core aspects of national sovereignty. Member States have made clear that they are not ready to govern CFSP through the classic Community method for the foreseeable future. This means that in many instances only the most senior representatives of Member State governments can bring about final policy decisions and, thus, become involved in a routinised and intense policy dialogue about CFSP issues themselves. In many cases the foreign ministers cannot finalise decisions alone but only prepare them. It is often only after authorisation from the European Council that they can implement and operationalise major policy decisions. This is well reflected in the agenda, duration and frequency of European Council meetings which are not coincidentally overwhelmingly dominated by CFSP and economic governance issues—the two main areas governed through intergovernmental policy coordination. Thus, the European Council obtains a central role in the day-to-day decision-making process. The Lisbon Treaty acknowledges this central role by introducing new CFSP specific provisions related to the European Council as well as new general provisions regarding the functioning of the institution.

The Lisbon Treaty reconfirms the crucial role of the European Council in CFSP decision-making by reserving the institution the right to ‘identify the Union’s strategic interests, determine the objectives of and define general guidelines’ for policy-making.³⁹ It reproduces almost entirely the language of the pre-Lisbon Article 13 TEU. However, the Lisbon Treaty adds to it the term ‘the Union’s strategic interests’.⁴⁰ The new Treaty also reproduces the definition of the division of labour between the Council and the European Council in CFSP by making clear that the Council acts ‘on the basis’ of political guidance provided by the European Council. It is up to the Council to ‘frame’ policy—a new term—and to take decisions regarding its definition and implementation.⁴¹ As previously noted, the European Council appoints the High Representative but now does so in agreement with the Commission President.⁴² Similarly, the European Council also has the right to dismiss the High Representative.⁴³

The hierarchical relation between the European Council and the Council is also reflected in a catalogue of decisions the Council shall take by qualified majority. Although the field of CFSP in general is subject to the unanimity principle the Council decides (based on a qualified majority) whenever the European Council has established a clear framework for such decision-making in the first place.⁴⁴

³⁹ Treaty on European Union, Article 26.

⁴⁰ Treaty on European Union, Article 26.1.

⁴¹ Treaty on European Union, Article 26.2.

⁴² Treaty on European Union, Article 18.

⁴³ Treaty on European Union, Article 18.

⁴⁴ Treaty on European Union, Article 31.

What is new is that the European Council can charge the High Representative with proposing a particular decision on an EU action or position to the European Council. Under the new provisions the European Council can also specify other cases in which the Council will act based on qualified majority decision-making. Once such a proposal is adopted by the European Council, the Council again operates under QMV rules regarding any further decision-making following from this act.

The Lisbon Treaty also provides for new provisions on the European Council outside Title V which have repercussions for CFSP governance. Most of these provisions take stock and codify the *de facto* role the European Council has acquired in EU policy-making ever since the entering into force of the Maastricht Treaty. In addition, the European Council itself has been subject to institutional engineering. Most importantly, the European Council is now chaired by an elected permanent president and thus operates the same presidency regime as the Foreign Affairs Council.⁴⁵ Moreover, the High Representative ‘shall take part’⁴⁶ in the work of the European Council. In practice this arrangement implies that the High Representative plays a crucial role for linking the work of the European Council and the Council provided that the foreign ministers now no longer participate in European Council sessions unless they are explicitly required to do so. The participation of the High Representative in European Council meetings also shows the importance CFSP has gained with regard to the agenda of this forum.⁴⁷

Similar to the High Representative, the President of the European Council enjoys the role of an active chair. The President has the authority to call extraordinary meetings and is in charge of ensuring ‘the preparation and continuity of the work of the European Council’.⁴⁸ This may also imply an adjustment of the European Council’s working methods. Indeed, in one of his first major programmatic speeches, the newly elected president of the European Council Herman Van Rompuy made it clear that he intends to use this instrument and that the adjustment of European Council working methods is a top priority for him. He highlighted that this is particularly relevant for the work of the European Council in the areas of CFSP and economic governance.⁴⁹ The procedure was used on 1 March 2011⁵⁰ to convene an extraordinary meeting of the European Council on 11 March to discuss

⁴⁵ Treaty on European Union, Article 15.5.

⁴⁶ Treaty on European Union, Article 15.2.

⁴⁷ The Lisbon Treaty does not foresee a similar arrangement for the President of the Eurogroup. However, the current President of the Eurogroup is Luxembourg’s Prime Minister Jean-Claude Juncker who is a member of the European Council. He has been chairing the Eurogroup since 2005 when the office of an elected president was created for the first time. His appointment became possible because he also acted as Luxembourg’s finance minister at the time.

⁴⁸ Treaty on European Union, Article 15.6.

⁴⁹ See Van Rompuy H (2010) The Challenges for Europe in a Changing World, European Council Press Release PCE 34/10.

⁵⁰ European Council (2011) President of the European Council convenes an extraordinary European Council on Friday 11 March 2011. Press Release PCE 055/11.

‘developments in Libya and the Southern neighbourhood region and set the political direction and priorities for future EU policy and action’.⁵¹

The President of the European Council now formally represents the EU at the level of heads of state and government on CFSP matters⁵²—a function which, as other contributors to this volume have found,⁵³ may overlap with the competences of the High Representative. The President of the European Council also can ‘convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union’s policy’⁵⁴ in the light of specific foreign policy developments which may require so. Again, this prerogative will require close coordination with the High Representative. This procedure, however, also establishes a clear hierarchy between the President of the European Council and the High Representative as the former presides over the institution which defines the ‘strategic lines’ of CFSP.

2.6 What Next? The Lisbon Treaty as an Attempt at Institutional Engineering

The Lisbon Treaty did not alter the overall governance model which is applied in the field of CFSP. Nevertheless, the Lisbon Treaty adjusted individual features of the CFSP institutional set-up. Seen from the point of view of classical integration theory which would measure closer integration by the transfer of ultimate decision-making power to the supranational level, the Lisbon Treaty may appear as a total disappointment. In contrast to this the analytical concept of deliberative intergovernmentalism offers the opportunity to arrive at a more differentiated assessment of the modified CFSP governance architecture. Starting from the observation that governments are not ready to agree to a further substantial transfer of ultimate decision-making power to the EU-level within the area of foreign and security policy, CFSP is understood as a system of close intergovernmental policy coordination which is different from the traditional Community method. Its basis is the general desire on the part of the Member States to increase the ability to act collectively in this policy field while preserving ultimate decision-making authority at the national level. This increases the need to find mechanisms which actively encourage the constant generation of consensus and self-commitment. This is crucial for coherent collective policy action as Member States control most of the dispersed resources for CFSP implementation.

⁵¹ European Council (2011) Declaration adopted by the extraordinary European Council, 11 March 2011. EUCO 7/11.

⁵² Treaty on European Union, Article 15.6.

⁵³ See in particular Schmidt, who also notes the lack of clarity in dividing the tasks between the High Representative.

⁵⁴ Treaty on European Union, Article 26.1.

Thus, the strengthening of policy coordination is the key method through which CFSP is developed. In this context the notion of policy deliberation as the search for a reasoned consensus on common policy positions which is reached on the basis of initially diverging preferences is crucial. The evolution of the CFSP governance set-up can be conceptualised as increasing its potential to generate policy consensus under the condition that implementation cannot rely on the instruments of EU law. Consequently, deliberative intergovernmentalism expects that such a dependency on consensus generation translates into institutional adjustments which are aimed at enhancing the potential of core CFSP forums to generate consensus over policy. The review of the Lisbon Treaty in the previous sections was intended to demonstrate exactly this. In the following the main findings are briefly interpreted and summarised.

First, more clearly than any Treaty has done before, the Lisbon Treaty defines CFSP governance as being different from the Community method. Although the changes in the relevant Treaty provisions are essentially of an editorial nature these changes confirm the key premise of deliberative intergovernmentalism, i.e. that CFSP governance is confined to an inherently intergovernmental setting for the foreseeable future and shall continue to evolve within these parameters.

Second, the Treaty changes therefore concentrate on the adjustment of the working methods of key CFSP decision-making forums and do not focus on policy as such. Most importantly, they alter the way the Council and the European Council operate within CFSP. The key innovation in this regard is the transformation of the High Representative into a full-time chair of the Foreign Affairs Council. Given the competences assigned to the High Representative this means essentially the creation of the position of a pro-active chair who can structure the work of the Foreign Affairs Council internally and becomes the main spokesperson for CFSP externally. This constitutes an important change to the CFSP set-up. In a decentralised decision-making setting which relies on constant consensus formation and lacks legislative decision-making power a permanent and pro-active chair can make a difference. Such a chairperson can assume a crucial role in framing policy issues for debate and introducing them as common problems—a key precondition for successful policy deliberation. This also involves reminding Council members of previously reached agreements and discussion outcomes. It is noteworthy that the new Treaty provisions specify core tasks and responsibilities of the High Representative in relation to the concept of a pro-active chair. This includes in particular the responsibility to ensure compliance and consistency.

Indeed, expectations have been running high with regard to the new role envisaged for the High Representative under the Lisbon Treaty. Member States have emphasised this ever since the debates in the Convention and the negotiations leading to the Constitutional Treaty. The transformation of the position of High Representative the Lisbon Treaty provides for is, however, no guarantee that the above listed functions of a permanent chair will be actually performed in way that is conducive towards fostering consensus oriented policy dialogue among ministers. The example of the Eurogroup shows that such arrangements can give a mandate to a permanent president but they cannot engineer personal qualification and interaction dynamics among ministers. The recognition and general acceptance of the chair within the

relevant setting is something which cannot be taken for granted but evolves through practice. Most importantly, successful presidents need to command respect among their group members and be considered to be impartial and/or particularly competent. They also need to be willing to actually act as a pro-active chair. Here, not only the individual commitment and qualification matters but also the behaviour of other influential group members. Such group members may prevent the chair from structuring internal policy dialogue and from asserting him/herself as the central spokesperson in relation to the outside world. Although it is important to have a formal endorsement of this function in the first place it does not hinder others to publicly contest or compete with the permanent chair.

It is beyond the scope of this contribution to review in greater detail how Catherine Ashton—as the first High Representative working under the new rules—has performed this task so far and how she is likely to perform in the future.⁵⁵ However, it should be stressed that from the perspective of deliberative intergovernmentalism the potential of the High Representative to further the evolution of CFSP is not related to her ultimate decision-making competences but to her ability to act as a pro-active chair of CFSP coordination who reminds actors of their previously made commitments, shapes their focus on common policy challenges and acts as a single spokesperson for the EU. Moreover, key aspects of these functions involve behind-the-scenes-activity which is difficult to assess from an outside perspective. Most importantly, the role of a pro-active chair needs to evolve over-time and through practice. It cannot be engineered solely by a Treaty mandate. Such a mandate can only provide the conditions for a change in CFSP practice. However, it can be said that the Lisbon Treaty has done this.

The enhanced role of the High Representative as a pro-active chair of the CFSP policy process is further emphasised by the creation of the EEAS. The service will certainly increase the High Representative's potential to issue policy proposals and structure the agenda. The model of the EEAS can again be best explained by deliberative intergovernmentalism.⁵⁶ The service is set-up as a hybrid model. It is best described as an integrated intergovernmental bureaucracy with supranational elements. This hybrid nature reflects again the key assumption that CFSP shall not evolve in the framework of the classic Community method. Rather it is developed on the basis of a closer integration of intergovernmental resources. Notably, this includes the secondment of civil servants from the diplomatic services of the Member States to the EEAS and the construction and entertainment of a network of pooled resources. Thus, the development and operation of the EEAS in itself involves similar features as the process of creating policy consensus at the level of Council decision-making. The High Representative needs to chair and structure such processes and will need to rely on permanent consensus-building activity. If well developed, the EEAS structures may be the key instrument for further developing a

⁵⁵ On the working of the High Representative within the context of the Spanish EU Presidency in 2011, see the chapter in this volume by Pol Morillas.

⁵⁶ See also Blockmans and Laatsit (this volume).

much more closely integrated intergovernmental bureaucracy by involving further levels of national bureaucracies into the CFSP process more systematically.

The other major institutional adjustment in CFSP governance concerns the European Council. The institution is now dealt with by the Treaty as a regular EU institution and receives full attention in the text. Previous Treaties have avoided further specifying the role of the European Council in EU governance more generally. For CFSP this meant that the role of the institution was mainly defined through the CFSP-specific Treaty provisions. The new wording on the European Council introduced by the Lisbon Treaty can be considered as codification of what for many years has already shaped EU governance practice: the European Council's central role in CFSP and economic governance. This senior policy-making forum is indispensable for processing day-to-day decision-making—a role not envisaged for the European Council under the classic Community method. Thus, the relevant editorial changes introduced by the Lisbon Treaty acknowledge more clearly than ever before the changed reality of EU decision-making.

As in the case of the new competences of the High Representative the creation of the office of a permanent President of the European Council by the Lisbon Treaty can be seen as an attempt to enhance the deliberative potential of the European Council as a forum for policy dialogue at the highest political level. Again, it remains to be seen how the respective individual holding the office will perform the role of a pro-active chair. However, there is no doubt that the Lisbon Treaty provides the European Council president with such a mandate. Herman Van Rompuy has made clear from the beginning that this may involve far-reaching adjustments to the European Council's own working methods. He has already convened informal meetings and announced a further extension of this working method.

Finally, there is now a clear hierarchy between the European Council on the one hand, and the Council, on the other hand. The CFSP provisions make it quite clear how and when the European Council instructs the foreign ministers and the High Representative. Moreover, it is worth considering the role of the European Council in CFSP governance in relation to other policy fields—notably economic governance. The Lisbon Treaty has created a troika of permanent presidents involving the European Council, the Foreign Affairs Council and the Eurogroup. This may foster policy coherence and coordination between the three bodies. However, the three office holders may also compete with each other depending on how each of them is able to fulfil his/her role in the relevant context. It is far too early to assess the repercussions the Lisbon Treaty may have with regard to such institutional dynamics but they may well be quite significant.

References

- Armstrong K (2010) *Governing social inclusion. Europeanization through policy coordination*. Oxford University Press, Oxford
- Armstrong K (2011) *Law after Lisbon: legalization and delegalization of European governance*. Biennial Conference of the European Union Studies Association, Boston, 3–5 March

- Christiansen T, Reh C (2009) *Constitutionalizing the European Union*. Palgrave Macmillan, Houndmills, Basingstoke
- Halter U (2003) Integration through law. In: Diez T, Wiener A (eds) *European integration theory*. Oxford University Press, Oxford, pp 177–196
- Héritier A (2007) *Explaining institutional change in Europe*. Oxford University Press, Oxford
- Majone G (1997) From the positive to the regulatory state. *Journal of Public Policy* 17:139–167
- Mancini GF (1998) Europe: the case for statehood. *European Law Journal* 4:29–42
- Moravcsik A (1993) Preferences and power in the European Community: a liberal intergovernmentalist approach. *Journal of Common Market Studies* 31:473–524
- Moravcsik A (1998) *The choice for Europe. Social purpose and state power from Messina to Maastricht*. Cornell University Press, Ithaca
- Puetter U (2006) *The Eurogroup how a secretive circle of finance ministers shape European economic governance*. Manchester University Press, Manchester
- Puetter U (2012) Europe's deliberative intergovernmentalism—the role of the Council and European Council in EU economic governance. *Journal of European Public Policy* (forthcoming)
- Puetter U, Wiener A (2007) Accommodating normative divergence in European foreign policy co-ordination: the example of the Iraq crisis. *Journal of Common Market Studies* 45:1065–1088
- Puetter U, Wiener A (2009) EU foreign policy elites and fundamental norms. Implications for governance, RECON Online Working Paper. www.reconproject.eu/main.php/RECON_wp_0917.pdf?fileitem=5456591. Last accessed 18 Apr 2011
- Sartori G (1994) *Comparative constitutional engineering: an inquiry into structures, incentives, and outcomes*. New York University Press, New York
- Schmitter P (2004) Neo-neofunctionalism. In: Diez T, Wiener A (eds) *European integration theory*. Oxford University Press, Oxford, pp 45–74
- Tallberg J (2006) *Leadership and negotiation in the European Union*. Cambridge University Press, Cambridge
- Trubek DM, Mosher JS (2003) New governance, employment policy, and the European social model. In: Zeitlin T (ed) *Governing work and welfare in a new economy: European and American experiments*. Oxford University Press, Oxford, pp 33–58



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