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How does the Second Pillar of the TEU on the CFSP differ from the First Pillar on the European Community? What are the principal objections to the Pillar structure of the EU?

Do the failed Constitutional Treaty and the Lisbon 2008 version of the TEU and the Treaty on the Functioning of the European Union overcome these differences and what changes do they envisage in creating an EU without Pillars?

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Firstly, I will consider how the Second Pillar of the Treaty on European Union (hereinafter TEU) differs from the First Pillar regarding the role of the institutions and the decision making process within the Pillars. I will also consider the application of the principles of direct effect and supremacy and the jurisdiction of the European Court of Justice (hereinafter ECJ). Secondly, I will look at the principle objections to the Pillar structure of the European Union (hereinafter EU). From these two observations, I will evaluate whether the failed Constitutional Treaty (hereinafter CT) and the Lisbon 2008 version of the TEU (hereinafter Lisbon TEU) and the Treaty on the Functioning of the European Union (hereinafter TFEU) overcome these differences. Finally, I will consider the changes they envisage in creating an EU without Pillars.

It is suggested that the structure of the Second Pillar on Common Foreign and Security Policy (hereinafter CFSP) is one dimensional, in that it is simply an intergovernmental pillar. While the First Pillar on European Community (hereinafter EC) is two-dimensional, being a mix of supranational and intergovernmental elements.¹ But it is more accurate to describe both pillars as having supranational and intergovernmental elements, but striking a different balance.

¹ H Hauser and A Miller, 'Legitimacy: The Missing Link for Explaining EU-institution Building' (1995) 50 *Aussenwirtschaft* 17, 18.

Intergovernmental is the cooperation of Member States, in situations and conditions they can control. The governments of the Member States are able to decide the extent and nature of this cooperation, thus, they can retain national sovereignty.² Supranational, in contrast, is where Member States cooperate with power that transcends the national boundaries or governments of the Member States. There is independence from the governments. Hence, the governments do not have control over the extent and nature of the cooperation.³

The European Commission (hereinafter Commission) and the European Parliament (hereinafter EP), the more supranational EU institutions, have crucial roles within the EC. The Commission exclusively holds the right to submit proposals to the EP and the Council of the European Union (hereinafter Council). It is also responsible for implementation of EC law. The EP shares legislative power with the Council, particularly through co-decision.⁴

In addition, decisions within the EC are made by qualified majority voting (hereinafter

² N Nugent, *The Government and Politics of the European Union* (The European Union Series, 6th edn Palgrave Macmillan, Hampshire 2006) 558.

³ *ibid.*

⁴ EC Treaty (Treaty of Rome, as amended) art 251. (Hereinafter EC Treaty).

QMV).⁵ QMV minimises deadlocks in the decision procedure as Member States are unable to assert their national interests via a veto. Thus, it creates a strong supranational element within the EC.

However, under the CFSP the normal roles of the Commission and the EP are considerably reduced. Article 28(1) TEU takes away the Commission's function to police and enforce EC law and its individual power of decision.⁶ Article 22(1) TEU also removes the Commission's exclusive right to submit proposals to the Council. Under Article 21 TEU, the EP's role in the CFSP is reduced to a mere consultative body with no real power at all.⁷

It is the intergovernmental European Council and Council who have the crucial roles in the CFSP. The European Council defines the principles and guidelines for the CFSP and decides on common strategies; while the Council is the main decision making body in the CFSP.⁸ Moreover, decisions regarding the CFSP, particularly its objectives,⁹ are often

⁵ *ibid* art 205(2).

⁶ *ibid* art 211.

⁷ M Trybus, *European Union Law and Defence Integration* (Hart, Oxford, 2005) 127.

⁸ Treaty on European Union (Maastricht Treaty, as amended) art 13. (Hereinafter TEU).

⁹ *ibid* art 11(1).

made by unanimity. Consequently, this gives Member States a veto and reinforces intergovernmentalism.¹⁰

The principles of supremacy and direct effect do not extend to the CFSP. The ECJ affirmed that where national law and EC law conflict, EC law prevails.¹¹ However, the measures adopted in the field of CFSP are not automatically considered as supreme over national law. Most Member States locate the supremacy of EC law in their national legal orders.¹² But Member States do not extend supremacy to Title V of the TEU.¹³

In the ECJ held that the EC comprises a new legal order which confers rights and obligations on both Member States and their individuals.¹⁴ Individuals can enforce these rights before national courts. However, CFSP provisions generally do not confer rights

¹⁰ M Trybus, *European Union Law and Defence Integration* (Hart, Oxford, 2005) 603.

¹¹ Case 6/64 *Costa v ENEL* [1964] CMLR 425, 455.

¹² E.g. European Communities Act 1972 s 2 (UK).

¹³ E Denza, 'The Relationship between the European Court and National Courts' (Memorandum 2003) [6] < <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/47/47we06.htm> > accessed 2 April 2008.

¹⁴ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

and obligations on Member States or their individuals.¹⁵ Nevertheless, the possibility of CFSP measures having direct effect can not be excluded.¹⁶

The CFSP also differs from the EC in regards to the jurisdiction of the ECJ. The ECJ ensures that EC law is observed.¹⁷ EC law can be enforced against Members States.¹⁸ EC acts can be reviewed and annulled.¹⁹ Also, preliminary rulings concerning the interpretation of the EC Treaty (Treaty of Rome, as amended) and the validity and interpretation of EC acts can be given.²⁰

In contrast, the ECJ's jurisdiction in the CFSP is limited. According to Article 46 TEU, the ECJ's general jurisdiction does not even extend to actions taken by Member States within the CFSP. The ECJ is unable to directly review or interpret the provisions of Title

¹⁵ M Ketvel, 'The jurisdiction of the European Court of Justice in respect of the common foreign and security policy' [2006] ICLQR 77, 106.

¹⁶ D Curtin and I Dekker, 'The Constitutional structure of the European Union: Some Reflections on Unity in Diversity' in P Baumont, C Lyons, and N Walker (eds) *Convergence and Divergence in European Public Law* (Hart Publishing Oxford 2002) 59.

¹⁷ EC Treaty art 220.

¹⁸ *ibid* art 226 and art 227.

¹⁹ *ibid* art 230.

²⁰ *ibid* art 234.

V of the TEU.²¹ The ECJ's jurisdiction does not extend to the decision process. Thus, there is no effective 'judicial scrutiny over the legal basis or the procedure for CFSP decisions.'²² However, it is argued that Article 46 TEU does not prevent the ECJ from adjudicating on CFSP provisions indirectly.²³

Though the CFSP differs from the EC, the distinctions are not always clear. The CFSP is stated as 'covering all areas of foreign and security policy'.²⁴ But the EC has competence in some areas of foreign policy, e.g. economic external relations.²⁵

Principle objections

A principle objection to the Pillar structure is that it is causing fragmentation within the EU.²⁶ Member States have a strong position in the CFSP. The Council comprises the

²¹ M Ketvel, 'The jurisdiction of the European Court of Justice in respect of the common foreign and security policy' [2006] ICLQR 77, 83.

²² M Trybus, *European Union Law and Defence Integration* (Hart, Oxford, 2005) 133.

²³ M Ketvel, 'The jurisdiction of the European Court of Justice in respect of the common foreign and security policy' [2006] ICLQR 77, 83.

²⁴ TEU art 11(1).

²⁵ EC Treaty art 181a to art 188.

²⁶ M Trybus, *European Union Law and Defence Integration* (Hart, Oxford, 2005) 149.

Ministers of the Member States, while the European Council comprises the heads of State or government and the President of the Commission. Consequently, the CFSP is more susceptible to take a nationalistic outlook, than put the concerns of the EU at the forefront. This is inconsistent with the EC and undermines the EU's aim of 'an ever closer union'.²⁷

There is no coherent democracy across the three Pillars as the CFSP suffers from a democratic deficit. The EP, the only democratically elected EU institution, is unable to scrutinise the CFSP. Thus it appears that the EU's CFSP is failing to 'develop and consolidate democracy'.²⁸

The rule of law does is not consistently applied to the three Pillars of the EU. ECJ's jurisdiction to scrutinise the EC upholds the rule of law in the EC. Finland's EU Presidency statement at the United Nations stated that 'democracy, good governance and sustainable development are not possible without respect for the rule of law'.²⁹

²⁷ TEU art 1.

²⁸ *ibid* art 11(1).

²⁹ A Sotaniemi, 'The Rule of law at the national and international levels' (EU Presidency Statement to the United Nations, VI Committee, 2006) <http://www.europa-eu-un.org/articles/en/article_6367_en.htm> accessed 20 April 2008.

However, the rule of law appears to not apply to the CFSP since there is no effective judicial scrutiny.³⁰

Do the treaties overcome these differences?

Though the failed CT merges the three Pillars into one single framework, it is argued that ‘in some ways the pillars merely disappear “underground”’.³¹ The CT does not entirely suppress the intergovernmental features of the CFSP. The CT maintains the prominent role of the European Council. Unless the Treaty provides otherwise, decisions of the European Council are taken by consensus.³² This still involves unanimity amongst the Member States in the European Council.³³

Within CFSP, the European Council and the Council still have prominent roles.³⁴

Unanimity remains the general decision method. Also, the European Council and the Council act on initiatives from Member States.³⁵ This maintains the influential position

³⁰ M Trybus, *European Union Law and Defence Integration* (Hart, Oxford, 2005) 133.

³¹ J Shaw, ‘Europe’s Constitutional Future’ [2005] PL 132, 139.

³² Treaty Establishing a Constitution for Europe 2004 (Constitutional Treaty) art I-21(4). (Hereinafter CT).

³³ M Trybus, *European Union Law and Defence Integration* (Hart, Oxford, 2005) 605.

³⁴ CT art I-40(2)-(3),

³⁵ *ibid* art I-40(6).

that Member States have within the CFSP. Although the European Council may decide that the Council act by QMV, the decision to do so is still taken unanimously.³⁶ Also, according to Article I-40(8) CT the EP remains limited to a consultative role.

It is argued that the CT fails to clarify whether the application of supremacy will extend to CFSP measures.³⁷ Under Article I-6 CT, supremacy of EC law has been formalized as a principle of Union law. The concept of a single institutional framework is an important component of the principles of unity, consistency and coherence. Thus, Article I-6 CT appears to suggest that supremacy applies across all of EU law. But, there is no suggestion that the legislation adopted by the Union under the CFSP 'is to have a relationship with the national legal orders which is different from that of the rest of Union law.'³⁸ However it is for national courts to ensure the respect for, and determine the binding effect of, CFSP provisions. But it is unclear as to what the ECJ would do upon receiving a preliminary reference from a national court as to the effects of Article I-6 CT in CFSP matters.³⁹

³⁶ *ibid* art I-40(7).

³⁷ M Ketvel, 'The jurisdiction of the European Court of Justice in respect of the common foreign and security policy' [2006] ICLQR 77, 100.

³⁸ *ibid* 101.

³⁹ *ibid*.

The jurisdiction of the ECJ is still inconsistent across the EC and the CFSP. The CT does not extend the jurisdiction of the ECJ to CFSP matters. Article III-376(1) CT states that the ECJ shall not have jurisdiction with respect to the general provisions concerning the CFSP in Articles I-40 and I-41 CT nor with the provisions in Part III concerning the CSFP. However, the ECJ has the ‘competence in respect of all instances of interaction and overlap between CFSP and external policies of the Union.’⁴⁰ Article III-376 CT states that the ECJ has the jurisdiction to monitor the CFSP’s compliance with Article III-308. This means that ‘the Court is explicitly charged with the task of protecting Union competence from encroachment by the CFSP.’⁴¹ However, Article III-308 CT is quite similar to the current Article 47 TEU.

Under the Lisbon TEU the CFSP appears to be more intergovernmental in its nature. The European Council and the Council still dominate the CFSP. Their roles of defining and implementing the rules and procedures of the CFSP are left intact, with the European Council and the Council acting unanimously.⁴²

⁴⁰ *ibid* 103.

⁴¹ *ibid*.

⁴² Lisbon version of the TEU art 23(1) and art 26(1). (Hereinafter Lisbon TEU)

The High Representative of the Union for Foreign Affairs and Security Policy does bring a new supranational element to the CFSP.⁴³ He is the Vice-President of the Commission and also heads the Foreign Affairs Council (replacing the intergovernmental rotating presidency). The High Representative is in a power position as he will speak on behalf of the 27 Member States.⁴⁴ But this is unlikely to decrease the influence of Member States. CFSP decisions will continue to be made predominantly by unanimity with QMV being an exception.⁴⁵ Member States can still veto any resort to QMV for vital and stated reasons of national policy.⁴⁶

There is a general clause under which the European Council can decide to transfer decisions from unanimity to QMV in any area of the CFSP, except military and defence aspects.⁴⁷ But, it is a unanimous decision. It is unlikely that all the Members States will agree to extend QMV to decisions that are tied to national sovereignty.

⁴³ Different name under the CT.

⁴⁴ Lisbon TEU art 27(2).

⁴⁵ National Forum on Europe, 'A Summary Guide to the Treaty of Lisbon' (Stationary Office, Dublin 2008) 28.

⁴⁶ Lisbon TEU art 31.

⁴⁷ National Forum on Europe, 'A Summary Guide to the Treaty of Lisbon' (Stationary Office, Dublin 2008) 28.

The ECJ's jurisdiction within the CFSP remains rather unchanged under the Lisbon TEU. However, the ECJ is able to review the illegality of certain decisions.⁴⁸ But some Member States hold the view that national security is a matter for Member States. With this view they wish to maintain an independent foreign and defence policy.⁴⁹

Changes the treaties envisage in creating an EU without Pillars

In creating an EU without Pillars the CT, the Lisbon TEU and the TFEU establish an EU that replaces the current European Community and European Union. In doing so, these Treaties envisage consolidating the previous treaties into a simplified single text. They envisage that the disparity in the applicability and enforcement of EU law between the current Pillars will be removed. This is by replacing the three-Pillar Structure 'with a single legal personality which has treaty making power.'⁵⁰ This allows the EU to enter into international agreements, which the EC has been doing.⁵¹

⁴⁸ Lisbon TEU art 23(1).

⁴⁹ The Law Society, 'A guide to the Treaty of Lisbon – European Union insight' (2008) <www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf> accessed 22 April 2008, 8.

⁵⁰ National Forum on Europe, 'A Summary Guide to the Treaty of Lisbon' (Stationary Office, Dublin 2008) 10.

⁵¹ The Law Society, 'A guide to the Treaty of Lisbon – European Union insight' (2008) <www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf> accessed 22 April 2008, 7.

The Lisbon Treaty was drawn up with a view to enhancing the efficiency and democratic legitimacy, and the coherence of the external action of the enlarged EU.⁵² It is also thought that the Lisbon Treaty will bring more transparency within the EU.

⁵² National Forum on Europe, 'A Summary Guide to the Treaty of Lisbon' (Stationary Office, Dublin 2008)

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