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Mixed Blessing? EP Oversight of the ESDP and the Constitutional Treaty

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Abstract

As commonly held, the European Security and Defence Policy (ESDP) suffers from a "double democratic deficit": the EP has a marginal role in the ESDP-making process and the national parliaments remain unable to account for their own government. Therefore pressure coming from these two institutions had been exercised during the Convention on the Future of Europe to improve the democratic oversight on this rapidly evolving policy. This paper investigates the innovations included in the Constitutional Treaty, focusing specifically on the new role granted to the EP. It shows that even though this text does not substantially modify the inter-institutional balance of powers in the ESDP area, the EP may take advantage of some of its articles to become an actor in the ESDP-control process in the 'living constitution'.

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INTRODUCTION

Under the third Republic, French Prime Minister Georges Clemenceau ironically said that “war was a much too serious matter to be entrusted to the military”. Declared in the context of the First World War, this maxim illustrates the need to involve civilian oversight in the war-making process. Still, because their very nature is based on secrecy and reactivity, security and military issues seem incompatible with the features of the parliamentary system. The partisanship, the length of the debate, and the lack of expertise that national parliaments often displayed discourage the creation of an *a priori* parliamentary control¹.

In the field of the European Security and Defence Policy (ESDP), parliamentary oversight is even more absent². Two reasons related to the specific nature of the ESDP can explain this phenomenon. First, it is a recent policy. Initiated with the Amsterdam Treaty and the inclusion in the treaties of the “Petersberg tasks” previously developed by the Western European Union (WEU) (art. 17 TEU.)³, the policy was officially launched in Saint-Malo in 1998 following an agreement between France and the United Kingdom. A decisional framework was later added by the Nice Treaty⁴. That these have been so recently created implies that the ESDP is still a policy in the making, for which the underlying political logic has not been established. Second, and more fundamentally, the ESDP remains essentially an intergovernmental process. As part of the second pillar, the Common Foreign and Security Policy (CFSP), the ESDP is ruled exclusively by the procedures set by the ‘master of the Treaties’⁵. This represents a major obstacle for the existence of both national and supranational democratic oversight.

The draft of the Treaty establishing a Constitution for Europe⁶ could have been the ideal occasion to modify this pattern. Indeed, following a strong political pressure exercised by the European Parliament (EP) and by the national parliaments (through the inter-parliamentary Assembly of the WEU), two working groups, one on “defence” and another on “external action”, were established within the Convention with the explicit mission to rethink the democratic control of the ESDP⁷. Even though the Constitutional Treaty that was presented by V. Giscard d’Estaing in June 2003 and signed on October 29th 2004 would not enter into force in the best case scenario before November 1st 2006 (article IV-447), it seems useful to ponder the modifications imagined. Did the Constitutional Treaty tackle the issue of ESDP democratic accountability by increasing the controlling function of the EP or did it maintain the current unsatisfactory *status quo*?

¹ Born H., Fluri H. and Lunn S. (eds.), “Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security Sector and Its Reform”, DCAF, Brussels/Geneva, 2003, p.29

² Bono G., “Democratic accountability of international military and police cooperation in the EU (ESDP)”, DCAF, Conference paper, 4th Workshop on “Strengthening Parliamentary oversight of international military cooperation and institutions”, Brussels, 12-14 July 2002; see also during the same conference the paper of Catriona Gourlay, “Parliamentary oversight of ESDP: the role of the parliaments and of the EP”

³ The Petersberg tasks were established in June 1992 at the Ministerial Council of the Western European Union (WEU). It embraces: humanitarian and rescue tasks, peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking.

⁴ Its main political components is the Political and Security Committee-COPS (article 25 TEU) and its military elements are the Military Committee (EUMC) and the Military Staff (EUMS)

⁵ Ruling of the German Federal Constitutional Court on the cases brought against the Treaty of Maastricht of 12. October 1993, printed in: Entscheidungen des Bundesverfassungsgerichts, 89. volume, published by the Members of the Federal Constitutional Court, Tübingen 1994, S. 155-213, S. 190

⁶ Subsequently called ‘Constitutional Treaty’

⁷ WEU Assembly, press release, “ESDP: The parliamentary dimension”, Inter-parliamentary seminar in the Hague, 15 May 2001; see also the European parliament resolution 13/4/2000, containing EP proposals for the 2000 Intergovernmental Conference, that states that, “with a view to full integration of the CFSP into the normal EC decision-making procedures, further measures should be taken to ensure that Parliament is associated with the most important decisions and is in a position to contribute to the definition of the general guidelines of the CFSP”, European Parliament, A5- 0086/2000, Point 41.8; Interestingly enough, the same resolution called for a merge of “the positions of High Representative for the CFSP and Commissioner responsible for External Relations” and the creation of an “appointed Vice-President of the Commission”, which is one of the most creative clauses of the Constitutional Treaty in the field of CFSP.

This question will be discussed in the course of this paper. It aims to show that even though the Constitutional Treaty does not substantially modify the inter-institutional balance of powers in the ESDP area, the EP may take advantage of some of its articles to become an actor in the ESDP-control process. Special emphasis will be put on the EP's classical "tribunitian" function (a)⁸, which refers to its function of information and democratic forum, on the EP's budgetary competences in ESDP-related matters (b) as well as on EP's involvement in the field of civil crisis management (c).

I. THE EP'S 'TRIBUNITIAN' FUNCTION IN THE FIELD OF ESDP

Before the Constitutional Treaty, no explicit clause referred to the EP's capacity to oversight the ESDP. The article 21 TEU simply stated that the Presidency of the Union and the European Commission had to "consult the EP on the main aspects and the basic choices of the CFSP" and to "ensure that the views of the EP are duly taken into consideration", without making any specific reference to the ESDP. Hence, legally, the possibility to be consulted, to "hold an annual debate" and to "make recommendations to the Council" was limited to the CFSP⁹.

To increase its information on ESDP-related issues, the EP has also developed informal powers. First, the High Representative for the CFSP has taken the habit to regularly attend the hearings in the EP's Foreign Affairs, Human Rights, Common Security and Defence Policy Committee (AFET)¹⁰. After each European Council and the meetings of the General Affairs Council, he comes in the AFET to explain the decisions taken. In addition, J. Solana is used to consult the EP before a common strategy is adopted¹¹. Second, in 2001, the EP launched a successful initiative to have access to classified and top-secret documents in the field of ESDP. After challenging in the ECJ the EU Ambassadors' decision to classify sensitive military documents¹², the EP and the Council reached a compromise on November 25th 2002. According to the terms of this agreement, a committee of 5 MEPs, chaired by the Chairman of AFET, will have access to sensitive documents. Although the conditions foreseen by the agreement were criticised by a few MEPs, it allowed the EP to be better informed¹³. Third, the EP led an intense activity of parliamentary diplomacy. This was realised through the envoy of observers to the assembly of the WEU, through the establishment of an official delegation to the NATO's inter-parliamentary assembly and through the existence of bi-annual meetings between the AFET and the chairpersons of the national foreign and defence committees¹⁴.

The Constitutional Treaty formally extends to the ESDP the EP's existing 'tribunitian' functions of the second pillar without modifying in depth the inter-institutional framework. Firstly, it

⁸ As described by Georges Lavau, the "tribunitian" function refers to the competence to publicise opinions that are otherwise not express. According to Lavau, this political function was carried out by the French communist party (PCF) at the beginning of the French fifth Republic. In the context of this paper, it would refer to the capacity of the Assembly to create a democratic forum on ESDP issues; Lavau G., *A quoi sert le PCF?*, Paris, Fayard, 1981

⁹ Cf chapter 7 "The association of the EP: no longer the underdog in EPC?" in, Regelsberger E., de Schoutheete Ph, Wessels W, *Foreign policy of the European Union : from EPC to CFSP and beyond*, Boulder, London, 1997

¹⁰ Michael Hilger, « Défense européenne et contrôle démocratique: une tâche pour la Convention sur l'avenir de l'Europe », *Politique étrangère*, 2/2002 (printemps 2002). See for instance the intervention of Javier Solana on 10 September 2003 in a meeting organised jointly by the EP's Committee on Foreign Affairs and the chairmen of the foreign affairs and defence committees of the national parliaments of the member states. The Foreign Affairs, Human Rights, Common Security and Defence Policy Committee will since now on be called AFET (referring to its French acronym "Comités des Affaires Etrangères")

¹¹ Mittag, Jürgen, "the parliamentary dimension of CFSP/ESDP", report submitted for the EP, 2001, p.81

¹² ECJ, "Hautala vs. Council", T-14/98, July 19th 1999

¹³ Tappert M., "European Parliament resigned to limited oversight of the ESDP?", *European Security Review*, number 16, February 2003, p.9. Nevertheless, this competence is remarkable since not all the national parliaments dispose of such a favourable treatment. To have an overview of national competences in this field, refer to: WEU Assembly, "Parliamentary oversight on the intelligence services in the WEU countries- current situation and prospects for the future", Document A/1801, December 4th 2002

¹⁴ Mittag, Jürgen, "the parliamentary dimension of CFSP/ESDP", report submitted for the EP, 2001, pp.98-99

institutionalises the existence of inter-parliamentary meetings between the EP and the national parliaments in the field of ESDP. According to the protocol “on the role of national parliaments in the EU” (part IV), the Conference of European Affairs Committee “may organise inter-parliamentary conferences on specific topics, in particular to debate matters of CFSP and CSDP”¹⁵. Inspired by the inter-parliamentary cooperation run in the first pillar within the COSAC¹⁶, this procedure could constitute a useful information-sharing system for the EP¹⁷. Secondly, the procedures set at the article 21 TEU were extended to the CSDP. According to the article I-41 and III-304, the EP is regularly consulted “on the main aspects and the basic choices of the common security and defence policy” and must be kept informed of its evolutions by the the newly created Union Ministry for Foreign Affairs (UMFA). The UMFA must also check that EP’s views on these matters are duly taken into consideration. Finally, the EP can be briefed by the EU ‘special representatives’¹⁸ and can hold a “debate on progress in implementing the CFSP, *including the common security and defence policy*” twice a year instead of once (article III-304). Nevertheless, the effect of such clauses is limited since, as a report of March 2003 of MEP Morillon emphasised, the procedures of the article 21 TEU were already implemented in the area of ESDP¹⁹. Moreover, the Constitutional Treaty did not address the fundamental issue raised by the implementation of this article, which was the scope of the term ‘main aspects’ as well as the need for an *ex-ante* consultative procedure²⁰.

In reality, the main improvement brought by the Constitutional Treaty may reside in the fact that, unlike the High Representative, the UMFA will be politically responsible to the EP. As a member of the European Commission, he or she has to be approved by the EP (art I-27 (2)). Likewise, the EP keeps its rights to censure the Commission to which the UMFA belongs (art. I-26 (8) and art.III-340). Nevertheless, taking national instances into consideration²¹, it is doubtful that the EP would engage the responsibility of the whole Commission on a foreign policy issue. Moreover, since the Commission is not directly responsible for the CFSP (as implied by art-I-26 (1)), it is improbable that the EP would take the risk to censure the executive for CSDP-related matters. As a result, the most likely outcome of this new institutional framework would be an improved inter-institutional communication. Such dialogue would in return improve the EP’s existing capacity to oversight ESDP financing.

II. BUDGETARY POWERS

The budgetary powers of the EP are generally underlined to show EP’s involvement in the CFSP²²: “sie ist die stärkste Waffe des Europäischen Parlaments in der Außen- und Sicherheitspolitik”²³. Indeed, according to the regular budgetary procedure (art.272 TEU), the

¹⁵ Interestingly enough, the ESDP is named Common Security and Defence Policy (CSDP). This adjunction of the adjective “common” is however more symbolic than relevant. Nevertheless, as soon as this paper will refer to the Constitutional Treaty’s ESDP, the acronym CSDP will be used.

¹⁶ It stems for „Conférence des Organes spécialisées en Affaires Communautaires”

¹⁷ The idea of regular meetings between the national Parliaments and the EP was not new. It was present in a WEU Assembly’s report on 4 December 2001. It also appears in the Morillon report of 2003 at the point 58. To see the challenges of such system: Michael Hilger, « Défense européenne et contrôle démocratique: une tâche pour la Convention sur l’avenir de l’Europe », *Politique étrangère*, 2/2002 (printemps 2002) ; Mittag, Jürgen, “the parliamentary dimension of CFSP/ESDP”, report submitted for the EP, 2001, p.40

¹⁸ Article III-302 defines the “special representatives” as appointees with “a mandate in relation to particular policy issues” that carry out “his or her mandate under the authority of the Union Minister for Foreign Affairs”

¹⁹ EP, Report on the “European Security architecture- priorities and deficiencies-“, Ph. Morillon, A5-0111/2003, 27 March 2003, point 61

²⁰ Mittag, Jürgen, “the parliamentary dimension of CFSP/ESDP”, report submitted for the EP, 2001, p.68

²¹ In the recent parliamentary history of France (after 1958), Germany (since 1949) and UK, there is no instance of a government being censured uniquely because of a foreign policy issue (not even Thatcher’s government after the Falklands in 1982).

²² European Parliament, Working document on “the financial aspects of the CFSP and of the ESDP”, Armin Laschet, PE 325.486, march 18th 2003

²³ Mittag J., „Die parlamentarische Dimension der ESVP: Optionen für eine europäische Verfassung“, quoted by Hölscheidt S., „Die Finanzierung der Gemeinsamen Außen-und Sicherheitspolitik“,

EP votes the discharge of the budget²⁴ and, with the Council of the EU, is co-legislator for the non-compulsory expenditures of the EU. Hence, the whole debate is to determine which ESDP expenditures can fall under this category. According to article 28 TEU, all the operational expenditures of the CFSP are included in the EU budget, except the military and defence operational expenditures and the expenditures for which the Council decide otherwise unanimously. This would mean that all the ESDP expenditures remain beyond the control of the EP. In fact, this is only partially the case.

First, the EP is a co-legislator to appropriate the section III, subsection 8 of the EU budget which assesses the budgetary lines of the EU's CFSP. This heading appropriates funds for the "conflict prevention and crisis management" (B8-010), for the "non-proliferation and disarmament" (B8-011) and for the "conflict resolution, verification, support for the peace process and stabilisation" (B8-012)²⁵. When deciding a civilian crisis management action the Council can use these budgetary lines. Indeed, this was employed for the establishment of the EU Police Mission (EUPM) in Bosnia, which explained an increased appropriation of 10 millions in the 2003 budget²⁶. Second, other budgetary lines may be considered as useful for the civilian dimension of the ESDP. This is for instance the case for the line B7-21 that refers to "humanitarian aid", for the B7-7 ("European Initiative for democracy and human rights"), for the B7-671 (Rapid Reaction Mechanism²⁷) as well as for the B7-91 also called the "emergency aid reserve". For all these lines, the EP is a co-legislator. Last but not least, the EP has a right of oversight on the Council's 'administrative expenditures'(section II, title 3). Despite the 'gentlemen agreement' of 1970 whereby each institution refrains from amending each other's budget, the EP scrutinises the appropriation of section II (Council) and publicly expresses its views. This capacity to exercise pressure on the Council was demonstrated by the long-standing struggle to incorporate within section III the costs of the 'special envoys' that were traditionally charged under section II as an administrative expenditure (title I, line 1113). This was finally changed in the 2004 budget and expenditures of the 'special envoys' now lie in the section III²⁸. Hence, thanks to its budgetary power, the EP can exercise a control over ESDP civilian operations.

This control is however very limited for ESDP military operations. Since these expenditures are covered by national contributions, the EP has no legislative power. Nevertheless, it has struggled to obtain a right to be informed. According to the IIAA of May 1999 that entered in force on January 1st 2000, the Council must inform the EP immediately of the estimated cost of any operational expenditure (point 40)²⁹. In addition, the Presidency of the Council must keep the EP regularly informed of the on-going CFSP actions and, every three months, the Commission must transmit a report describing the execution of the CFSP actions. Since these mechanisms proved to be insufficient, the EP negotiated with the Council a new accord that reinforced the clauses of the IIA. Issued on November 25th 2002, the declaration obliges the Council to submit to the EP in a delay of 15 days "a document setting out the main aspects and basic choices of the CFSP, including financial implications for the EU budget"³⁰. Restating the

Finanztransferrecht, Beitrag 02-2004, consultable on: <http://www.finanzreform.de/cms/frontcontent.php?idcat=9>

²⁴ Corbett R. (ed.), Jacobs F., Shackleton M., *The European Parliament*, London, John Harper, 4th Edition, 2000, p.252

²⁵ For the 2004 Budget, the EU adopted a new nomenclature: ABB. The subsection B8 is now included in the title 19 and is detailed as follow: Conflict prevention and crisis management (19 03 01), Non-proliferation and disarmament (19 03 02), Conflict resolution, verification, support for the peace process and stabilisation (19 03 03), Emergency measures (19 03 04), preparatory and follow-up measures (19 03 05), European Special envoys (19 03 06)

²⁶ EP, working paper on "the financial aspects of the CFSP", Armin Laschet, PE 325.486, p.6

²⁷ The RRM was created by the regulation of 26 February 2001 "to respond to situations of crisis or the emergence of crisis and to provide immediate financing for non-combat activities related to urgent operations of crisis management and conflict prevention"; Council of the EU, Council Regulation "creating a rapid-reaction mechanism", (EC) No 381/200, 26 February 2001

²⁸ EP, working paper on "Budget 2004: other sections", Gill Neena, A5-0350/2003

²⁹ EP, Working document on "the financial aspects of the CFSP and of the ESDP", Armin Laschet, PE 325.486, point 12, march 18th 2003

³⁰ Declaration of the EP, Council and Commission on the financing of the CFSP in accordance with the inter-institutional agreement of May 6 1999, consultable on: <http://www.europarl.eu.int/meetdocs/committees/budg/20030324/486596en.pdf>

clause 40 of the IIA, the Declaration also imposes that, “whenever the Council adopts a decision in the field of CFSP entailing expenditure”, it informs the EP “immediately and in each case of the ‘estimate of the cost envisaged’” (the delay of five days is maintained). This means that the EP shall be informed of *all* CFSP expenditures, and not only those falling under the EU budget. Despite this formal obligation, the Council has had a bad record for forwarding the ESDP-related expenditures to the EP. One instance of this may be found in the latest EU intervention in Macedonia “Concordia”. After adopting a common action on January 27th 2003 to take over NATO’s operation in the former Republic Yugoslav of Macedonia, the Council did not comply with both the Agreement of 1999 and with the Declaration of November 2002. It did not inform the EP of its common action within five days (paragraph 3 of the Declaration), nor did it consult the EP *a priori*. Contrary to all logic, the Greek Presidency defended this position by claiming that the obligations of prior consultation and notification within five days only apply to those operations whose expenditures fall under the EU budget³¹.

To improve its capacity to oversight the ESDP expenditures, the EP hoped that the new Constitutional Treaty would incorporate the ‘common costs’ resulting from EU military interventions in the EU budget³². As agreed in a General Affairs Council’s meeting on the 17th May 2002, the ‘common costs’ are those which cannot be allotted to individual States; they include for instance the headquarters costs, such as transport, accommodation and communication facilities, and the armed forces back-up costs, such as infrastructure and medical care³³. This wish was not fulfilled: financing the CSDP continues to be mainly a Member States’ task³⁴. Article III-313 simply restated the two first paragraphs of article 28 TEU, maintaining the dichotomy between military related operations and non-military operations. The only new element appeared in the third paragraph. Considering the success of the “rapid reaction mechanism” in the area of civilian crisis management, the Constitutional Treaty introduced flexible emergency procedures to finance the preparatory costs of CSDP operations. It instituted two mechanisms. First, according to Art III-313 (3), the Council will have to establish a “specific procedure for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives of the CFSP, and in particular for preparatory activities for the tasks referred to in Article I-41 (1)”³⁵. This would mean that preparatory activities for CSDP military operations could be financed by the EU budget. The effect of this clause on the democratic oversight of the CSDP would depend on two elements: first, the level of appropriation of this fund (a too low level would decrease its utility), and second the balance imagined by the Council between rapidity and democratic scrutiny to set up the procedure. Second, the Constitutional Treaty refers to the Council to create a “start-up fund” that should finance “the preparatory activities for tasks which are not charged to the EU budget”³⁶. Unlike what the Morillon’s report advocated, this fund would not be part of the EU budget³⁷; it would complement the first procedure and would be managed by the UMFA, who would only be responsible for the use of the funds to the Council. Such financial framework represents a clear setback for parliamentary oversight; as MEP A. Laschet had written before the Convention: “parallel ad hoc funds outside existing structures would be contrary to the principle of

³¹ EP, Working document on “the financial aspects of the CFSP and of the ESDP”, Armin Laschet, PE 325.486, point 24, march 18th 2003

³² EP, working paper on “the financial aspects of the CFSP”, Armin Laschet, PE 325.486, p.10

³³ EP, working paper on “the financial aspects of the CFSP”, Armin Laschet, PE 325.486, p.10

³⁴ The article III-419 foresees the possibility to create an “enhanced cooperation” for CFSP matters but it is conditioned by an a priori authorisation of Council of Ministers. The article III-421 foresees that “the expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the Institutions, shall be borne by the participating MS, unless all members of the Council of Ministers, acting unanimously after consulting the EP, decide otherwise”. In this case, the EP is only consulted. In addition, the article I-41 (6) and III-312 pave the way to the creation of permanent structured cooperation in ESDP matters, which would allow the countries with higher military capabilities to set common commitments. In this framework, the role of the EP would be very limited.

³⁵ The tasks referred to are: „peace-keeping, conflict prevention and strengthening international security“

³⁶ It is relevant to note that there is already a budgetary line in the EU budget (B8-015) specially set up for “preparatory and follow-up measures”. The notice explains that this line may be used “to fund preparatory and evaluation measures with a view to the definition of any joint actions or common positions under the common foreign and security policy”. It was set in 1998 after the Council included in its budget as “administrative expenditures” the preparatory costs of the EUAM (the Administration of Mostar).

³⁷ EP, resolution on “the new European security and defence architecture - priorities and deficiencies “, Gen. Morillon, (2002/2165(INI)), April 10th 2003

parliamentary accountability and democratic control (...) and might lead to duplication, reduced management efficiency and inconsistency in overall management of the EU³⁸. Moreover, maintaining the dichotomy would increase the EU's inability to lead an integrated ESDP operations based on both military and non-military tools.

III. A POTENTIALLY INCREASING ROLE IN THE AREA OF CIVILIAN CRISIS MANAGEMENT

The end of the Cold War resulted in the appearance of new types of crisis. Instead of requiring military needs, the resolution of these crises implies the implementation of a large scope of non-military tools. In this context, prior the creation of the ESDP, the EU developed within the first pillar important financial and material resources, which implied an increasing involvement of the EP in the area of civilian crisis management and post-conflict stabilization. Therefore, the EP disposes of three legal bases. First, as it was seen previously, the EP's approval is necessary to finance most of these operations. In addition, the vote of the annual discharge gives the EP the opportunity to monitor the implementation of most of the actions led in this area. Second, the EP is consulted when the article 308 TCE serves as legal basis. This article can "cover any Community intervention related to security crisis, flanking or supporting EU activities in the areas of ESDP"³⁹. It was, for instance, used to found macro-financial assistance (TACIS, PHARE), to contribute to international funds and projects, and to foster democracy and the rule of law in third countries. The third legal basis is the article 179 TCE. Initially related to the development policy, this article is increasingly employed in the area of human rights because of the development of conditionality clauses in the EU development policies⁴⁰. It was also used for ECHO, the European Union agency for Humanitarian aid (Regulation 1257/96). Its advantage is that it requires a co-decision procedure instead of a simple consultation. For this reason, the EP is strongly advocating a more frequent use of this article. The addition of these three legal bases provided the EP an opportunity to become an important co-responsible in various areas of civilian crisis management such as: framing of humanitarian aid, securing the livelihoods and safety of refugees, de-mining, consolidating democracy and the rule of law, institution-building, and local capacity building (etc.)⁴¹.

Nevertheless, a risk of inter-pillar overlaps appeared when the EU decided to launch within the ESDP a civilian pillar. Indeed, to address the 'Petersberg tasks', which cover humanitarian and rescue tasks, peace-keeping tasks, tasks of combat forces in crisis management, including peacemaking, the European Council emphasised the need for EU's civilian crisis management instruments. At the Cologne Summit the 3rd and 4th June 1999, the European Council invited the General Affairs Council to deal with all discussions on aspects of security, with a view "to enhancing and better co-ordinating the Union's and Member States' non-military crisis response tools"⁴². At the next Council, in Helsinki (10 and 11 December 1999), the European Council adopted another "Presidency progress report on developing the Union's non-military crisis management capability" as part of a strengthened common European policy on security and defence (annex 2 of the document). Finally, the European Council in Feira on the 19th and 20th June 2000 explicitly reaffirmed its commitment to building an ESDP "capable of reinforcing the Union's external action through the development of a military crisis management capability as well as a civilian one"⁴³. Such commitment resulted in the creation of a pool of 5 000 police officers and of a few hundreds legal advisers. However, as part of the second pillar, these

³⁸ EP, working paper on "the financial aspects of the CFSP", Armin Laschet, PE 325.486, p.10

³⁹ European Commission, Proposal for a "Council Regulation creating the Rapid Reaction Facility", COM (2000) 119 final, 11.04.2000

⁴⁰ The idea of conditionality is that development aid policies will only be granted in the case the country respects human rights and "good governance" criteria. As such, it integrates within the first pillar CFSP considerations.

⁴¹ European Commission, Communication of the Commission on "financing the of civilian crisis management operations", 28.11.01

⁴² Presidency conclusions, Cologne European Council, 3rd and 4th June 1999, point 54; consultable on: http://europa.eu.int/council/off/conclu/june99/june99_en.htm

⁴³ Presidency conclusions, Santa Maria da Feira, 19 and 20 June 2000, annex I; consultable on: <http://ue.eu.int/Newsroom/LoadDoc.asp?BID=76&DID=62050&from=&LANG=1>

capabilities escape the scope of oversight of the EP. Hence, to dismantle this illogical situation resulting uniquely from the pillar structure, the Convention had been asked by some authors to include the EP in the decision-making process of the ESDP civilian pillar⁴⁴.

Once again, the European Convention circumvented the question. Article I-41 of the Constitutional Treaty, which emphasises the need within the CSDP for an “operational capacity drawing on assets civil and military”, only foresees a consultative role of the EP (article I-41 (8)). It did not differentiate between military and non-military operations. Likewise, the CSDP section does not even refer once to the EP. This could prove to be problematic since this text reinforces the duality of the CSDP and broadens it. The CSDP missions described at the article III-309 refer in great part to civil operations such as humanitarian tasks, assistance tasks, conflict prevention and post-conflict stabilisation. Moreover, the strong emphasis placed on “the fight against terrorism”, an area that was also present in the specific provisions “for implementing the area of freedom, security and Justice” (article I-42), indicated that the CSDP could be increasingly proteiform and could encompass a large range of activities. On the long run, such an extension seems unlikely to be achieved if the EP is left aside. How could it be possible to involve the EP in the financing process of such operations without granting it more legally binding powers in the decision-making process?⁴⁵ How could the EP accept to give its assent for the conclusion of international agreements (article III-227) dealing with humanitarian aid (article III-223) and development policies (article III-219) without reviewing the civilian CSDP operations led by the EU in the countries concerned?

CONCLUSION: ADDITIONAL POWERS IN THE LIVING CONSTITUTION

As illustrated by the previous examples, the question of the EP’s oversight of the CSDP was not entirely tackled in the Constitutional Treaty. Although it allows formally a consultative, budgetary and debating role for the EP, which in a way only made official an existing situation, it does not address the fundamental questions. The financial framework of the CSDP remains obscure whereas a clear separation between EU funded civil operations and contribution of Member States for military operations could have facilitated the overall mechanism. Even if such a division might have been practically difficult to implement, it would at least have drawn a clear boundary for the EP’s involvement in the CSDP-making process. Likewise, the association of the EP with national parliaments in the area of CSDP stayed unclear. Regular meetings do not seem adequate to compensate the disappearance of the WEU Assembly and to guarantee a real diffused democratic control of the CSDP. In fact, the vagueness of most of the clauses of the Constitutional Treaty, e.g. the political accountability of the UMFA and its ‘European external action service’ towards the EP, leaves much room for an evolving living constitution.

In this extent, it would be of particular interest to observe how the EP could take advantage of the creation of the EU armament agency to increase its influence on the CSDP (III-311 (2)). Since the agency’s powers would partially overlap with some of the policies of the former first pillar (article 157 TCE: industrial policy, article 163 TCE: Research and Innovation policy), it is likely that the communitarian institutions would be associated in the oversight of the agency. Indeed, in March 2003, the Morillon’s report already called for an armament agency whose statutes would be “drawn up in consultation with the EP, or even by co-decision”⁴⁶. Since armament policies have a strategic importance for the CSDP, the hypothesis of EP’s oversight on the agency would greatly increase its real power in CSDP-related matters: the dynamics of the widening of the CSDP could in the long term result in an indirect but real oversight of the EP.

⁴⁴ Mittag, Jürgen, “the parliamentary dimension of CFSP/ESDP”, report submitted for the EP, 2001, p.27 and 55

⁴⁵ A. Missiroli, “Euros for ESDP”, ISS, occasional paper 45, June 2003

⁴⁶ EP, Report “on the new European security and defence architecture - priorities and deficiencies-“, point 25, March 27th 2003

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