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Mobilising the “F” in CFSP

1. Factors

The political intent behind the creation of the 2003 European Security Strategy (ESS) was to mend fences after the acrimonious division of EU member states over the question whether or not to join the US-led invasion of Iraq. This effort resulted in the adoption of the slogan of “effective multilateralism” in the ESS. Twelve years on, the post-Lisbon Treaty’s Common Foreign and Security Policy (CFSP) has been enriched with a few signature successes: the continuation of the EU facilitated dialogue aimed at the normalisation of relations between Serbia and Kosovo; the adoption and maintenance of sanctions against Russia over its annexation of Crimea and destabilisation of eastern Ukraine; and the conclusion of a final nuclear deal in the E3+3 talks on Iran. These successes could not have been achieved without effective multilateralism at EU level. Above that level, there is less proof of “stronger multilateral cooperation and good global governance” (Article 21 TEU) - a central point of the conference which the Netherlands will organise in December 2015 in the context of the consultation semester launched by High Representative/Vice-President (HR/VP) Federica Mogherini to move the EU’s strategic rethink process from the June 2015 strategic assessment of ‘The European Union in a changing global environment’ towards the submission of a European Global Strategy (EGS) to the European Council by June 2016.

The political factors driving the EGS process are internal too, but of a different nature than in 2003. A negative driver is the problem to mobilise enough of the right kind of resources to deal with an increasingly volatile neighbourhood and an ever-complex world. In the words of Winston Churchill: “Gentlemen, we have run out of money. Now we must think” (Tocci, 2015). A positive driver is the opportunity to use the new mechanisms provided by the Lisbon Treaty to forge a more “comprehensive approach” to EU external action, as prioritised by a new generation of officials at the helm of the institutions.

Essential in moving from description (the strategic assessment of June 2015) to prescription (the June 2016 EGS) is to tailor the existing mechanisms, instruments and capabilities to specific EU foreign policy goals. This written submission will focus on the former.

2. Fabric

The constitutional fabric is often overlooked by policy-makers. Helpfully, Article 21 TEU presents a full list of EU foreign policy objectives which were scattered across the treaties in the pre-Lisbon era. While this merger should in theory spur the inter-institutional cooperation in the development of a “comprehensive approach” to the different strands of EU foreign policy (humanitarian aid, development, enlargement, neighbourhood, trade, etc.), judicial practice shows that new institutional turf wars are being fought. In great part, this is due to the isolation of the CFSP, the only policy relegated to the TEU, largely beyond the control of the Commission, the European Parliament and the Court, and executed by way of “specific” procedures and instruments which are foreign to the toolbox of the institutions in the operationalisation of the other external relations policies under the TFEU.

Thus far, the Court has in its post-Lisbon case law not clarified how to determine which legal regime should take legal precedence when joining up the different strands of EU foreign policy. Yet, it has been given a new opportunity by the European Parliament in a “cross-pillar” dispute with the Council about the proper legal basis for an international agreement with Tanzania on the transfer for trial of pirates (a matter of criminal justice falling under the TFEU?) apprehended by CSDP operation Atalanta (launched in the framework of the CFSP enshrined in the TEU). It is hoped that the Court sheds light on the criteria applicable to the competence delimitation between the CFSP and TFEU-based policies of the Union, for “as long as EU institutions cannot sort out their internal differences, this will be to detriment of their consensually agreed external objectives and erode the EU’s global credibility” (Merket, 2015).

3. Flexibility

The strategic assessment of June 2015 applies the concept of flexibility almost exclusively to external funding: “As the largest global combined donor, the EU is a leader in development cooperation and humanitarian assistance. But insufficient flexibility

reduces the effectiveness of aid on the ground. Likewise, in counter-terrorism, implementation is hampered by heavy procedural requirements.”

When thinking about flexibility, most EU observers are instinctively drawn to the flexibility expressed in the variable geometric terms of the EU’s institutional architecture: the future of core groups in foreign policy. It is true that “under certain conditions, the specialisation and division of labour among EU member states [big and small] can strengthen both the effectiveness and legitimacy of the foreign policy of the EU”, especially in cases where there is a lack of interest or political will among all member states (Keukeleire, 2006). As long as such more or less structured coalitions of member states work towards the attainment of the EU’s commonly-held external action objectives, the extra efforts, money and other national resources devoted by core groups to specific foreign policy matters (regional or thematic) can help to:

- I. alleviate the stress on an understaffed and cash-strapped European External Action Service;
- II. assist in the operationalisation of EU foreign policy; and
- III. increase the visibility and credibility of the EU as an international actor.

In the context of diplomatic dispute settlement, the E3+3 model has been hailed as a way forward to more efficient and effective foreign policy-making by a contact group of big member states, coordinated by the HR/VP (Vimont, 2015). The latter is an important addition, as contact groups should not obstruct but rather buttress the EU’s structures in the foreign and security field. Respect by member states for the ‘constitutional’ duty of loyal cooperation with the EU institutions should prevent EU external policies and actions from being diluted, undermined, rendered less visible, and re-nationalised by core groups’ activities.

However valuable the exploration of such means to operationalise the CFSP, we should not lose sight of the fact that such actions by contact groups presuppose that member states have agreed to a common position or line of action. At the level of decision-making in CFSP, however, the general rule remains unanimity. In an EU of 28, differences in historical trajectories, socio-economic realities and (geo)strategic and political interests contribute to the cracks in the Union’s persona as an actor on the international stage. Differences in respect for the values on which the EU is built have also shown that these normative principles form an insufficient basis for policy consensus on foreign policy issues (cf. the 2015 refugee crisis). We should not be blind-sighted by the relative success of keeping member states together on, for instance, the issue of sanctions against Russia. The risk is real that they fizzle out before Russia ends its subversive actions in the Donbas region of Ukraine. Generally, on questions about the use of force or interference in the internal matters of third states, a “common” foreign and security policy is unlikely to emerge from the divisions that separate the member states (e.g. Iraq 2003, Syria 2013). Perceptions from “strategic” partners confirm the view that, more often than not, the EU fails to coordinate a common policy response to external crises, even when the instruments and means to address them are at hand.

During the consultation semester of the EGS, serious thought should be given to the situations in which the opportunities provided by the Lisbon Treaty can be seized to render the intergovernmental method of CFSP decision-making more efficient and effective. This plea concerns in particular the first of the four exceptions listed in Article 31(2) TEU where the Council can decide by qualified majority vote (QMV):

- I. when adopting a decision defining a Union action or position on the basis of a European Council decision relating to the EU’s strategic interests and objectives;
- II. when adopting any decision defining a Union action or position, on a proposal which the High Representative has presented following a specific request from the European Council, made on its own initiative or that of the High Representative;
- III. when adopting any decision implementing a decision defining a Union action or position; and
- IV. when appointing an EU Special Representative in accordance with Article 33 TEU.

Arguably, the second possibility for QMV would leave the High Representative plenty of room for initiative to operationalise the EGS if requested by the European Council in 2016.

The opportunity of opening up more avenues for QMV was also enshrined in a new passerelle clause: Article 31(3) TEU enables the European Council to extend the cases of QMV by unanimously adopting a decision stipulating that the Council shall act by qualified majority in other cases, with the exception of decisions having military or defence implications (Article 31(4) TEU). This new and generous licence for extending the QMV mechanism enables the European Council to adjust the CFSP decision-making order in response to future needs and considerations of member states. This passerelle clause might well be the “thin edge of the wedge” which leads to more efficiency and effectiveness in EU foreign policy-making (Törö,

2013). However, in some member states (e.g. Germany and the UK), the government will not be able to agree to use this passerelle without prior approval by its parliament (Piris, 2010). Moreover, the condition of full concurrence of national positions among the heads of state and government guarantees that the doors to the passage from unanimity to QMV will be firmly guarded and remain shut when contrary to the vital national interests or opposition of any member state.

To be sure, the above-mentioned constellations for QMV do not undermine the continued centrality of consensus for the adoption of CFSP decisions, because they represent clearly stated derogations from the general unanimity requirement laid down in Article 31(1) TEU. In each of these cases, any member state is entitled to pull the “emergency brake” and block a CFSP proposal “for vital and stated reasons of national policy” (Article 31(2) TEU). But as it is up to the High Representative to conduct the CFSP and to facilitate its decision-making to achieve the Union’s foreign policy objectives, she should use the ongoing process of strategic rethinking to determine which red lines member states would invoke to hold up any future use of QMV decision-making.

Finally, another derogation from the unanimity rule in CFSP decision-making deserves attention: the so-called “constructive abstention” mechanism, which allows for up to a third minus one of the member states to stand aside while the majority forges ahead. In case of an abstention, the member(s) in question “shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, [that/those] Member State[s] shall refrain from any action likely to conflict with or impede Union action based on that decision, and the other Member States shall respect [its/their] position” (Article 31(1) TEU). The Lisbon Treaty has therefore widened the legal space to accommodate member states’ interests in abstaining from CFSP decision-making by unanimity. So far, however, the mechanism has only been used once: in February 2008, when Cyprus abstained when the Council adopted the Decision establishing the EULEX Kosovo mission. It appears that this instrument for flexibility in CFSP decision-making still has to gain in popularity. The EGS process should clarify in which cases this mechanism too could carry more practical relevance.