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## Beyond Intergovernmentalism: The Europeanization of Restrictive Measures?

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## Abstract

The functioning of the European Union (EU) has been explored extensively in recent years. The dominant prism through which to look at the EU is still one of locus: i.e. whether decisions are made in the capitals of its member states or in Brussels. This debate is contained in the dualism between intergovernmentalism and supranationalism, but drawing the boundaries between the two concepts is still undone. This article attempts to contribute to solving this problem by investigating the restrictive measures policy of the EU in order to identify three conditions under which intergovernmentalism should be used. First, when EU institutions are dependent on EU member states for information and expertise; second, when decision-making powers rest mainly in EU capitals; and three, when there are no exclusive *fora* for decision-making in Brussels. The study of the restrictive measures of the European Union does not meet any of these three conditions; therefore the article argues that the concept of supranational intergovernmentalism offers useful insights to understand the EU security governance of CFSP sanctions. The article is divided into four parts. The first introduces the debate on security governance and justifies the selection of this specific approach to the study of sanctions. The second part presents the restrictive measures policy of the European Union and justifies its pertinence to the field of security. The third part of the article investigates the emerging patterns in security governance by testing the three conditions on the decision-making process for EU restrictive measures. Finally, the conclusion summarises the main argument and indicates ways forward in the study of EU sanctions from a governance perspective.

## Keywords

European security governance; restrictive measures; intergovernmentalism; supranationalism; supranational intergovernmentalism

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The governance of security at the European level has been the subject of extensive and thorough discussion (Mérand et al. 2011; Kirchner and Sperling 2007; Webber et al. 2004), with an enduring division between supranationalists and intergovernmentalists (Gegout 2010; Pollack 2003; Majone 2001; Moravcsik 1998). Another development, however, has occurred with work that focuses on questions relating to the Europeanization (or not) of foreign policy (Alecú de Flers and Muller 2012; Gross 2009; Featherstone and Radaelli 2003). At least in part because of this latter development, a number of scholars (Juncos and Pomorska 2011; Howorth 2010) have pointed out that the dualism of the supranational versus intergovernmental debate may have been surpassed by the emergence of a supranational intergovernmentalism. One question arises: 'How much integration can intergovernmentalism take before it stops being intergovernmental?' (Sjursen 2011: 1081). The evolutionary process is captured in the literature on security governance and on the *brusellization* of European policy (Juncos and Pomorska 2011; Tonra 2000; Allen 1998) with its focus on different institutions and institutional dynamics (Bátora 2010; Lewis 2007; Duke 2005). These efforts have been justified as the search for understanding how integration in foreign policy proceeds since the intergovernmental approach seems to be outdated, but further investigation is needed to identify the conditions under which intergovernmentalism is not intergovernmental anymore.

This article attempts to identify some of these conditions by investigating the restrictive measures policy of the European Union (EU) and identifies three conditions to establish whether intergovernmentalism should be used. First, EU institutions are dependent on EU member states for information and expertise; second, decision-making powers rest mainly in EU capitals; and three, there are no exclusive *fora* for decision-making in Brussels.<sup>1</sup> I argue that none of these three conditions is met in the case study of EU restrictive measures and it would be most appropriate to use the term supranational intergovernmentalism when describing the sanctioning policy of the EU and understanding trends in the decision-making process of the Common Foreign and

Security Policy (CFSP). A 'supra-national intergovernmental' approach should be used when: i) EU institutions have competence and expertise that member states do not have; ii) Brussels-based actors acquire decision-making powers and iii) certain policies cannot be discussed and decided anywhere but in Brussels.

The formalisation of these three conditions contributes to defining the concept of 'supra-national intergovernmentalism' insofar as it highlights three patterns showing how Brussels-based institutions are acquiring more importance in the decision-making process and in EU security governance. The EU appears to be a post-Westphalian actor in a post-Westphalian world (Wagnasson et al. 2009; Kirchner and Sperling 2007), dealing with challenges that are peculiar to this new setting of the international system. The governance approach allows us to capture the nuances and the changing dynamics that characterise decision-making processes in the field of security as attempted by the authors of this special issue. This analysis is based on interviews conducted with EU and national officials from February 2009 to February 2013 as well as other primary sources such as EU legal documents and Court rulings.

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## **EU SECURITY GOVERNANCE AND SUPRA-NATIONAL INTERGOVERNMENTALISM**

The EU as an instance of regional integration was traditionally studied through the lenses of intergovernmentalism and neo-functionalism (Rosamond 2000). Intergovernmentalism gives special attention to the role of nation-states and understands the formation of EU policies as a bargaining process among independent states (Pollack 2003; Moravcsik 1998; Hoffmann 1966). However, the tenets of this approach have been increasingly questioned, with arguments that increasingly decisions are made more frequently in Brussels and that procedures have contributed to taking away sovereignty from EU member states. This phenomenon has been referred to through concepts such as 'supranational intergovernmentalism', 'Brussels-based intergovernmentalism', 'deliberative intergovernmentalism' (Juncos and Pomorska 2011; Sjørusen 2011; Howorth 2010; Juncos and Reynolds 2007; Howorth 2001). Therefore, the challenge is to identify the conditions under which the different terms could/should be used, namely the operationalisation of supranationalism and intergovernmentalism.

The security governance literature can provide the conceptual framework for understanding the ways in which EU actors make decisions in the absence of a clear dominant role for state actors (Mérand et al. 2011; Kirchner and Sperling 2007; Webber et al. 2004). To elucidate, the concept of governance is 'premised on the fragmentation of state authority. Public and private actors work together in policy networks that are based on shared interests and/or norms and contribute to the formulation of public policy' (Merlingen 2011: 20). Thus security governance has to be seen as involving a range – a network – of actors – whose interactions depend on a sense of shared concerns and principles.

There are three bodies of literature that can be used to develop a conceptual framework that facilitates the solution of the problem of 'who decides' in the EU. The first is that literature relating to the principal-agent model (Rosamond 2007; Pollack 2003; Moravcsik 1998). In the EU system, the principals would be the member states and the

agents the EU institutions in Brussels. This understanding of governance that combines assumptions from classical theories of International Relations has demonstrated a certain degree of utility as seen by the growing number of contributions employing it over the years (Hix 1998). However, matters are not always so clear-cut and in reality the agents themselves can behave more like principals. Historical and sociological institutionalism particularly, can now provide added value to the understanding of the evolution of the sanctioning process in the European Union and how agents, EU officials and institutions, have gained greater autonomy from their principal, EU member states (Klein 2011; Pollack 2009; Hall and Taylor 1996). As Liberals have convincingly argued, due to limited resources, national governments cannot check on everything that is done in Brussels, which assigns some freedom of manoeuvre for the actors in Brussels. Constructivists have gone further, arguing that Brussels-based actors are able to exercise independent power and to grow apart from their principals.<sup>2</sup>

The second set is the literature on *brusselization*, defined as the gradual shift of foreign policy authority from the European capitals to Brussels (Juncos and Pomorska 2011: 1098; Allen 1998: 54). The Lisbon Treaty has further strengthened a process that started years ago and is intertwined with the Constructivist concept of socialization, i.e. a process of social interactions leading to the creation of a group of norms (Juncos and Pomorska 2011: 1098; Johnston 2001: 493). Constructivism has been used more recently and it focuses on the Europeanization of political processes in Europe. The key elements to this are identity, institutions and socialization.

The third one is on 'supra-national inter-governmentalism' (Howorth 2000: 36). There is an overlap between supra-nationalism and intergovernmentalism, but '[w]hile many scholars quoted this neologism, none attempted to develop it theoretically' (Howorth 2010: 434). Indeed, there are a number of studies focusing on the role of EU institutions in the decision-making for CFSP and Common Security and Defence Policy – CSDP (Mérand 2008; Salmon and Shepherd 2003; Smith 2003), but analytical tools that would facilitate cross-case comparisons are still underdeveloped.

The decision-making process in defence matters has been the focus of other studies and it has been generally argued that decisions are increasingly made by 'small groups of relatively well-socialised officials in the key committees' (Howorth 2012: 436). By relying on the distinction between the two levels of socialization – socialization and internalization – the argument is that the search for consensus at the European level goes well beyond the diplomatic practices that would exist among independent states. These literatures were useful inasmuch as they triggered debate about how to draw a line between intergovernmentalism and supranationalism. They were the starting point that led Sjursen (2011) to identify four conditions to understand when intergovernmentalism would be applicable. Firstly, only sovereign states can be actors with decision-making powers. Secondly, states would not accept a kind of majority rule replacing unanimity in CFSP matters or the veto power constrained in 'less formal ways'. Thirdly, states can revoke or renegotiate powers that were delegated to Brussels-based actors, and the fourth is that the intergovernmental system which was created to serve the interests of the states should not have interests on its own. The violations of any of these four conditions would represent a departure from the intergovernmental model.

Building on the Sjursen model, this article sets out three conditions that allow for the use of the term supranational intergovernmentalism. The first condition is the reversal of the information dependency problem. Having information is a power source and the reluctance of member states to share information with other EU members and with EU institutions would be explained by the desire to maintain this dependency link with the EU. In Brussels, EU institutions need the information provided to them by the member states. If member states become dependent on the information that is possessed by EU institutions the balance of power would be reversed. In other words, the principals would become EU institutions and the agents the EU member states. It is acknowledged that the asymmetry of information was never totally in favour of member states, but this

article identifies a trend according to which the balance is shifting in favour of supranational institutions.

The second condition is that decision-making powers are taken away from the capitals and are shifted to EU institutions. This is a similar condition to the first one identified by Sjursen. An intergovernmental approach establishes that decisions are made with the consent of EU members and that decisions would not be made if vital interests were at stake as pointed out in the Luxembourg compromise. However, if EU institutions decide against the will of member states and/or demonstrate the commitment to get involved in the decision-making process, then intergovernmentalism may not serve to understand CFSP decisions.

Finally, the third condition is that Brussels-based institutions become the exclusive forum for CFSP decisions. The intergovernmental approach would maintain the possibility of member states embarking on policies in pursuit of their interests, even if outside of the EU system. This is complementary to the third condition by Sjursen as member states may not be in the position to renegotiate the power delegated in the past. If the states have devolved decision-making power to the EU to a point that they cannot decide unless they go to Brussels to do so, then intergovernmentalism does not suffice to explain the functioning of the EU.

*Table 1: Three conditions for intergovernmentalism*

Condition One	EU institutions dependent on EU member states for information
Condition Two	Decision-making powers in EU capitals
Condition Three	Lack of exclusive fora for decision-making in Brussels

According to intergovernmentalists, EU member states are the driving force of integration or of the lack of it. However, there are policy areas wherein member states would not, or cannot, act outside of the EU framework, as in the case of sanctions. The case study of a specific CFSP instrument – sanctions or restrictive measures – provides an interesting ground of investigation to verify whether the conditions mentioned above indicate a departure from intergovernmentalism has occurred in the CFSP domain.

## **THE RESTRICTIVE MEASURES OF THE EUROPEAN UNION**

The Treaty of the European Union (TEU) includes restrictive measures as one of the possible tools that can be employed to pursue the goals of the CFSP. The Council imposes sanctions also when mandated by the Security Council of the United Nations and according to the terms of the Cotonou Agreement, the Partnership Agreement between Africa, the Caribbean and the Pacific countries and the European Union. This agreement allows the EU to suspend humanitarian aid and to change the conditions of the agreement when signatory states have poor human rights records (Art 96). The focus of this article is on sanctions that are imposed independently from the will of the Security Council and on actions that fall beyond the scope of Cotonou. This is justified by the need to analyse security governance in decisions that are taken by the EU institutions.

Sanctions have been an available instrument since the Treaty of Rome in 1957, but they are the product of a strong coordination between different governments (Kreutz 2005: 7-8). The focus here is restricted to the sanctions imposed by the Maastricht Treaty, which came into force in 1993. The decision to design one of the EU's three pillars in

order to coordinate the foreign and security policy of the twelve member states represents the keystone for the external action of the EU as an international actor (Giumelli 2010). Thence, the range of purely economic instruments under the first pillar was joined by political instruments in the form of sanctions and military missions, in the second pillar. The Saint-Malo declaration (1998) and the creation of the European Security and Defence Policy (ESDP) in 1999 inaugurated the foreign presence of EU contingents abroad and was renamed CSDP with the entry into force of the Lisbon Treaty in 2009. Despite the fact that sanctions have been used more frequently over the years – in a growing trend there were 17 ongoing regimes administered by the EU in 2013 versus only two in 1992 (Giumelli 2013: 39) – and the Council has deliberated launching new operations abroad, the two instruments, sanctions and missions, were never really integrated in a comprehensive approach (Jones 2007; de Vries and Hazelzet 2005). Study of the sanctioning decision-making process to identify the specific role that the different actors play enhances understanding of EU security governance and contributes to us being able to draw lessons on how other foreign policy instruments are used.

Sanctions have evolved from their classical form of inter-state foreign policy instruments to a more 'targeted' version that goes beyond the boundaries of classifying them as foreign policy devices. While the typical form of restrictive measures used to be the 'embargo', namely the prohibition of trading with one political community (a city, region, state), the most frequently used targeted sanctions are now travel bans, commodity boycotts, financial sanctions and arms embargoes (Giumelli 2011; Cortright and Lopez 2002). Targeted sanctions, also known as smart sanctions, differ from the classical form of sanctioning as they are aimed at non-state actors (i.e. individuals, groups or companies for the most part) and/or they regard only specific economic sectors or specific products. The objective is to design the restrictive measures in order to maximise their impact on the actors responsible for violations, and to minimise the unintended consequences on innocent civilians (Cortright and Lopez 2002). This evolution began in the early 1990s, when the UN sanctions on Iraq and Haiti were accused of causing more harm than that which they were supposed to fight (Ali and Iqbal 1999; Gibbons 1999). Thereafter, the EU evinced signs of having learned the lessons of the UN's sanctioning experience and today mostly imposes targeted sanctions.

The political will to resort to sanctions created the demand for further institutionalisation, so member states prepared three documents establishing procedures for a sanctioning policy that aimed at improving the design, implementation and the effectiveness of restrictive measures. On 8 December 2003, the Council approved the 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy' (hereafter 'the Guidelines'). This document, which was updated in 2005, 2009 and 2012, contains definitions and directives on how to design restrictive measures, important information in regard to the different types of restrictions that can be imposed and on how to measure their effectiveness (European Union 2009c). The main principles that inspire the adoption of sanctions are presented in the 'Basic Principles on the Use of Restrictive Measures (Sanctions)' (hereafter 'Basic Principles'). This is the second relevant key document of the EU restrictive measures policy that was approved by the Council in June 2004 and it states that the EU should impose sanctions in accordance with the UN, but also autonomously whenever 'necessary' to meet the objectives of the EU (European Union 2004). Finally, the third document is a living text (i.e. susceptible to frequent change) on the implementation of restrictive measures that was initially passed in December 2004. The last version of 'EU Best Practices for the effective implementation of restrictive measures' (hereafter 'the Best Practices') was approved in April 2008 and it contains relevant information on how to identify the correct designated individuals or entities, and on the administrative modalities for freezing assets and banning products, including the procedure on how to grant exceptions and exemptions to the measures (European Union 2008b).

The use of sanctions is considered to lie within the realm of foreign policy, therefore the EU can adopt them in order to fulfil any of these objectives: advancing in the wider world 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law' (Article 21, Paragraph 2 of the TEU). In more specific terms, restrictive measures have been adopted to support democracy and human rights, to preserve peace, to prevent conflicts, to strengthen international security, and to promote an international system based on stronger multilateral cooperation and good global governance.

The imposition of sanctions falls within the CFSP domain and its process is disciplined by articles 30 and 31 of the TEU. The right of initiative lies with any member state and in the hands of the High Representative of the Union for Foreign Affairs and Security Policy (HR), who as Vice-President (VP) of the Commission can act with its support. The sanction proposal is discussed by the subcommittees of the Council: the competent geographical group, the Political and Security Committee (PSC), and the Foreign Relations Counsellors Working Group (RELEX) in special 'Sanctions' sessions, which draft the legal text for the measures. Subsequently, it is the Committee of Permanent Representatives II (COREPER II) that has the responsibility for agreeing a text to be submitted to the Council for final approval.

As illustrated above, there are different types of targeted sanctions that fall within the former first and second pillars as described in the Treaty on the Functioning of the European Union (TFEU). When the Council decides under Chapter 2 of Title V of the TEU concerning CFSP, then trade and financial sanctions require a Council regulation according to Article 215 of the TFEU (financial and economic relations) to be implemented.<sup>3</sup> Under this procedure, the European Parliament should be informed but Article 75 of the TFEU establishes an exception: when the EU acts to prevent and combat terrorism and related activities, the Council and the European Parliament should adopt a regulation via the ordinary legislative procedure. This new instance has opened a litigation case between the European Parliament and the Council that has been brought before the Court of Justice (European Parliament v Council of the European Union 2012). This is an interesting development that will be discussed later in the article.

Sanctions, namely travel ban and arms embargoes, that fall under the former second pillar, CFSP, do not need further legislation from the EU beyond the decision of the Council (mostly Common Positions until the Treaty of Lisbon, Council Decisions since). The movement of people from and to EU countries is disciplined by national governments, responsible for monitoring their borders and to ensure that the decisions of the Council are duly implemented. Arms embargoes are an exceptional case because of a provision on national security that has been part of the Treaties since 1957,<sup>4</sup> even if the Common Rules on arms exports approved by the Council in 2008 strictly regulate the terms under which weapons can be sold. Together with travel bans, arms embargoes are probably the form of sanctions most typifying the resistance of member states to the establishment of a coherent foreign policy, but the next section highlights how the assumption according to which member states are the sole or main determinant for EU foreign policy may be misleading.

## **GOVERNANCE, SANCTIONS AND SUPRA-NATIONAL INTERGOVERNMENTALISM**

The EU has acquired substantial experience in imposing restrictive measures (Beaucillon 2013; Eriksson 2011; Giumelli 2011). Analysis of the decision-making process can therefore provide an interesting test case to identify and understand those conditions and practices of security governance which mark a departure from the intergovernmental model and allow for the use of the term 'supranational' in the CFSP domain.

**Condition one: EU institutions dependent on EU member states for information**

This condition would be met if only member states had the necessary information to determine the EU's final decisions in the area of sanctions. However, this is challenged by the growing importance of the EEAS via its independent actions, the Heads of Missions and its role in RELEX. Member states used to decide whether to release information and, by doing so, they were the principal mandating what the agent did. This dynamic seems to be changing by inverting the power relations between Brussels-based institutions, which know increasingly more on sanctions, and EU member states, which know increasingly less and are dependent on the EU institutions to make decisions in this area.

The EEAS is in a position to collect exclusive institutional knowledge<sup>5</sup> of the EU's restrictive measures policy. Despite the intention behind the Lisbon Treaty to move implementing powers in foreign policy from the Commission to the Council, and therefore back to the states, the institutional setting of the EEAS preserves its supranational character. The EEAS members participate in Council meetings and bring experience and specific knowledge that is not available at the Council and that used to belong to the Directorate General of External Relations (DG-RELEX) of the Commission until its inclusion in the EEAS (Bicchi 2012; Carta 2012; Lloveras Soler 2011). It is now the EEAS that provides legal expertise and institutional knowledge of sanctions cases to EU member states, which inevitably are influenced in their decisions by the EEAS. The EEAS's exclusive knowledge, supported by the expertise of the Commission on trade and financial issues, allows it to affect what states decide. This information gap materialises in the RELEX meetings where EEAS experts from the Security Policy Division take part and play the fundamental role in drafting the text since they bear the institutional memory of the EU in the field of sanctions. It is the rules that discipline the RELEX meetings that shape the decisions of the EU in sanctions matters. It is a clear example of supra-national understanding rather than an intergovernmental process, whereby the institutional knowledge of the RELEX Committee becomes centrally dominant in designing and deciding restrictive measures, rather than the interests of the member states.

The EEAS has another essential task in selecting the targets of sanctions. With the Lisbon Treaty, delegations were placed under the authority of the EEAS. The Heads of Missions (HoMs) are directly involved in selecting the targets, even though the role of member states is still important as HoMs have to rely on other EU embassies and on the information provided by the informative services of EU member states. Member states identify individuals to be included on the blacklist for sanctions, sending their reports to HoMs, who thus constitute not only the contact point for member states to discuss who will be on the list but also the locus for negotiating different views in order to agree solutions that will allow them to speak with a single voice. The HoMs' role, therefore, is one of competent broker. In addition, they are knowledge-bearers in their own right: given they are also in the field, they are in a position to make suggestions and influence the final list of targets that is sent to Brussels.

The EEAS is only a few years old, but it has already developed a specific competence which renders it a more relevant organisation, such that the member states become increasingly dependent upon it for information. Despite the continued dominance of a narrative according to which the capitals are responsible for setting up the foreign policy of the EU, the case study of sanctions draws attention towards the narrowing information deficit, a deficit which previously undermined the EU as an actor. The EEAS alone maintains a complete set of records about what was done, the legal framework and the eventual problems that could arise, therefore the EU member states are dependent on a Brussels-based institution for certain information. The intergovernmental premise is thereby weakened.

### **Condition two: decision-making powers in EU capitals**

Another condition that would confirm the utility of the intergovernmental approach is if CFSP decisions in general, and sanctions in particular, were taken in the EU state capitals rather than in Brussels. Even this condition is at least partially discredited. Despite the heavy influence of certain member states in the decision-making process, Brussels-based institutions are increasingly making binding decisions and seeking greater roles outside of the will of the member states. The role of RELEX has already been outlined, but the new practice of implementing regulations is empowering the Council (versus the Commission), including that institution's committees and the EEAS itself, not just the member states. Additionally, the Court of Justice is annulling decisions of the Council and the European Parliament is claiming far more competence in this field since the Lisbon Treaty entered into effect.

The second element is the adoption of the silent procedure that constrains the role of the capitals in the decision-making process. The innovation in this procedure is given by Article 291 of the TFEU, which in the case of sanctions allows the Council to adopt an 'implementing act' when the list of targets has to be modified and this can be done with qualified majority voting instead of unanimity. Before Lisbon, the practice was that any alteration of the list that involved additional names of individuals or non-state entities required unanimity, this procedure gave the Council and EU institutions more power than in the past. Given the emergency under which certain decisions may need to be taken, the Council used the silent procedure to modify the listing of targets, which represents a novelty in CFSP. Since the Maastricht Treaty, the Council was the body that was supposed to vote and approve sanctions. A sense of urgency was passed on to EU member states by the sudden events that characterised the 'Arab Spring' in 2011, which favoured the use of a written procedure, (with no explicit vote of the Council) to impose restrictive measures. The crises following the Arab Spring were the first in which the Council resorted to this procedure, but they were considered by Article 7 of the Rule of Procedures approved in 2009 (European Union 2009b). Basically, COREPER II would agree on a list of targets and make it available to the 27 (now 28) governments of the EU for evaluation within a short timeframe (usually between 24 and 36 hours). In case no objection was raised, the measures would enter into force. This procedure had been in place already, but it was used by the Commission to implement regulations in first pillar policy areas, not by the Council in external relations matters (interview with EU officials February 2012). The third element is the key role of the Court of Justice in reviewing sanctions. EU restrictive measures are bound by the provisions of international treaties, UN regulations and, additionally, EU legislation. When individuals, companies or institutions feel that the rights granted by EU laws have been violated, they can appeal to the courts to exercise the right of remedy and to ensure due process. The CJEU plays a key role in the shaping and making of EU restrictive measures.

Targets of EU sanctions can make a request to be de-listed to the General Court of the European Union (GCEU – formerly the Court of First Instance, CFI). From an initial trend of rejecting the demands of applicants based on the principle that the Court did not exercise authority over such issues, the Court of First Instance and the Court of Justice reversed this trend in 2008, when the Court repealed certain decisions of the Council in the cases of Kadi and Al Barakaat (Yassin Abdullah Kadi v European Commission 2010) and Jose Maria Sison (Jose Maria Sison v Council of the European Union 2009). Alarmed by this trend, the Council decided to delist the People's Mojahedin Organisation of Iran (PMOI) before the judicial review was completed (Runner 2009). These precedents had the effect of boosting the enthusiasm of targets and in 2011 over 80 de-listing requests were registered (Rettman 2011).

The most well-known case is the Kadi and Al Barakaat decision delivered by the Court of Justice in September 2008. Yassin Abdullah Kadi from Saudi Arabia and the Al Barakaat Foundation, located in Sweden, were included in the UN counter-terrorist list and, therefore, their financial assets were frozen. Kadi and Al Barakaat appealed against the

EU regulation that implemented the resolution of the Security Council by claiming that their right to property and right to defence had been violated. After the case was rejected by the CFI on the basis of its inappropriateness since the court was not empowered to question matters of *jus cogens* (i.e. UN Security Council resolutions), the European Court of Justice (ECJ)<sup>6</sup> upheld the appeal and annulled the regulation that froze the assets of the applicant on the basis of patent violation of the rights of the defence and the right to be heard, including the right to have access to the motivation of the listing. Thus, the ECJ decided that the assets of Kadi and Al Barakaat were to be unfrozen within three months, had the Council not acted in the meantime to solve the procedural irregularities identified (Kadi and Al Barakaat International Foundation v Council and Commission 2008). Kadi and Al Barakaat appealed again against the EU regulation and the General Court decided to annul the regulation on 30 September 2010 (Yassin Abdullah Kadi v European Commission 2010). The Commission appealed against this decision and the case is still pending at the CJEU (Commission v Kadi 2010). The conclusion of this case, which became known as Kadi II, is likely to have relevant consequences in the area of sanctions specifically, as well as in the relations between international and EU law. More generally, it will also have relevant consequences for how the governance of security works in the European Union.

While the Kadi case is probably the most well-known of this type (Vara 2011; de Búrca 2010; Isiksel 2010), it is by no means the only one. A further case of delisting occurred in January 2009, when the Council delisted the PMOI before the judicial process was completed. This case was slightly different from the previous one as the PMOI appealed because the right to information was violated, but also because the national courts of the state who proposed the listing decided to remove the organisation from its own national terrorists' list. A first ruling of the CFI annulled the decision of the Council on the basis that it failed to inform the PMOI about the reasons motivating its listing, but the restrictive measures were not lifted because the Council was given the opportunity to remedy. Following a decision of the UK government to de-list the PMOI, the Council based the motivation to deny delisting on the decision of a French prosecutor to open an investigation against the PMOI. When the French government failed to provide the classified information, the CFI decided to annul the contested regulation and asked the Council to remove the PMOI from the list (People's Mojahedin Organization of Iran v Council 2008). Renouncing the right to appeal at the ECJ, the Council decided to remove the Iranian organisation from the list with Decision 62 of 26 January 2009 (European Union 2009a). In the meantime, France had contested the decision of the CFI de-listing the PMOI, but the CJEU closed the case in favour of the PMOI on 21 December of 2011 (France v People's Mojahedin Organization of Iran 2011).

Another delisting Court case involves Jose Maria Sison, founder of the Communist Party of the Philippines (CPP) and its armed wing, the New People's Army (NPA), but also a Dutch citizen. The CPP and NPA were included in the list in 2001, and Sison first appealed against the freezing of his funds in the forms of savings and social benefits in 2005, although in this case the CFI did not annul the Council regulation. Subsequently, Sison appealed against the decision of the Council to base the listing on previous rulings of Dutch courts that condemned Sison for crimes linked to his political militancy. In fact, the Court rulings were not based on terrorist accusations, and therefore they could not be used by the European Union to justify his listing on the counter-terrorist list. Thus, the CFI annulled the Council decisions insofar as they regard Sison (Jose Maria Sison v Council of the European Union 2009). These cases are instructive as indicators of a trend, to which the cases of the son of Tay Za (Pye Phyo Tay Za v Council 2012) and the Iranian banks Mellat and Saderat (Bank Mellat v. Council of the EU 2013; Bank Saderat v. Council of the EU 2013) could be added, that sees the Courts taking a direct and more active role in the sanctioning policy of the EU.

EU courts have been overwhelmed by requests for annulment coming from eighty two individuals and entities. The large majority have come from the crisis in Cote d'Ivoire

(37), but numbers are also high from Iran (14), Syria (11), Libya (6), Tunisia (6) and Egypt (3) (Rettman 2011). These decisions combined with the growing concern of further legal problems have given great importance to the Court of Justice and judicial power in general in the sanctioning process of the EU. More importantly, the Courts are playing a crucial role in shaping the practice of how the EU utilises a typical foreign policy instrument, which is usually outside the judicial review of national courts.

The Courts have not been the only Brussels actors to carve a discernible role for themselves, but they have also been used by other EU institutions to extend their powers. The European Parliament did not play a crucial role in foreign policy in the past, and the Treaty of Lisbon did not change this situation, but it opened a small window of opportunity in the field of sanctions to increase its influence. Article 75 of the TFEU establishes that the ordinary legislative procedure should be adopted when sanctions are to counter terrorism posing an internal threat to the Union. Basically, such a measure is considered as an instrument of the Freedom, Security and Justice field. The European Parliament was keen to extend its powers and it did not wait long to act. On 2 December 2009, the Council adopted Council regulation N. 1286, which amended regulation (EC) N. 881/2002 'imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban'. This was almost an ordinary act since the UN Security Council imposed financial sanctions after the terrorist attacks of 09/01. The Parliament claimed that such a measure fell under Article 75 of the TFEU or alternatively, that the conditions of Article 215 were not satisfied and filed a complaint before the CJEU on 11 March 2010. The Court rejected this interpretation (European Parliament v Council of the European Union 2012) on the basis that the contested regulation was adopted by the EU in order to implement a resolution of the Security Council imposed after the terrorist attacks of 11 September 2001, which qualified as a decision of foreign policy outside the scope of Article 75. However, the case is relevant to signal that the governance of European security is likely to see a more active European Parliament that looks eager to play a greater role in this field. As further evidence of this, in 2010 the General Directorate for External Policy of the European Parliament commissioned for the first time a study on the impact of sanctions and a report was published in June 2011. The results of the report did not bear any mandatory power for EU decisions in the area of sanctions, but it signals that the European Parliament is keen to participate in the process not only as a policy-maker, but also as an opinion-maker in the field and that this is likely to happen again in the future.

### **Condition three: Lack of exclusive fora for decision-making in Brussels**

Intergovernmental systems rely on the assumption that states can decide to cooperate in their interests, but they can also decide not to cooperate if it is not in their own interests and, therefore, act independently. This does not appear to be the case when it comes to sanctions. Despite EU member states retaining part of their sovereignty through being able to implement sanctions, it is very rare to see EU member states imposing sanctions in isolation from their partners. In theory, EU member states could veto the imposition of new sanctions, but they do not have the capacity to impose sanctions autonomously from other EU members. Brussels has become the only place wherein sanctions can be imposed as we have seen in recent years (Eriksson 2011; Giumelli 2011; de Vries and Hazelzet 2005).

Member states are also required to implement and monitor the restrictive measures. Economic and financial restrictive measures are imposed with Council regulations, which 'provides that Member States must lay down rules on penalties applicable to infringements of the provisions of the Regulation and take all measures necessary to ensure that they are implemented' (European Union 2009c: 16). Member states need to decide when exemptions can be granted and notify EU institutions. The national agencies

that can be asked to implement and monitor the restrictive measures also fall under the responsibility of member states (European Union 2009c).

When arms embargoes and travel bans are agreed upon, states shall enforce the decision of the Council, but since no regulation is needed, they are free to decide how they want to implement it. When an arms embargo is in place, a list of items cannot be sold to targets and member states shall deny any sale unless differently specified by the decision of the Council. The EU has a list of military items that was adopted on 21 February 2011 and published in the Official Journal of the European Union on 18 March 2011 (European Union 2011). Member states retain the power to grant export authorisations following the principles and the indications agreed in Brussels and they have to follow the 'Common rules governing control of exports of military technology and equipment' approved in 2008 (European Union 2008a), but since there is little apparent EU monitoring of what is decided at the national level, it is difficult to discern how much power is still in the hands of the capitals in this domain.

The recent debate about lifting the arms embargo on Syria confirms the exceptionality of EU member states 'bowling alone' in the field of sanctions. The arms embargo imposed by the EU on Syria does not discriminate between rebels and governmental forces. Since the Assad regime was from the beginning better equipped and supported by Russia and Iran, France and the UK suggested that the embargo should be changed to allow the exports of weapons to the rebel forces. The British Prime Minister, David Cameron, even threatened to move unilaterally if the embargo imposed by the EU was not modified (Chaffin 2013). Eventually, the Council decided to drop the arms embargo and confirm the other measures in place, which confirms the fact that unilateral action from one EU member state would be a rupture with the established praxis. Brussels became the exclusive forum to make decisions in the area of sanctions and the intergovernmental approach does not account for it.

## CONCLUSIONS

The supranational and intergovernmental approaches have been useful to understand the EU in the past, but their distinction and even their opposition have become less useful in recent years. The newer concept of 'supranational intergovernmentalism', amongst others, is an attempt to create analytical tools that provide a better understanding of the problem, but the theoretical elaboration of the conditions under which intergovernmentalism loses its particularities is still underdeveloped. This article identified three conditions of intergovernmentalism that would justify the use of this term. The case study of sanctions has demonstrated that these three conditions are not valid any longer or are not likely to be in the near future. While not declaring the end of intergovernmentalism, this article found that intergovernmentalism does not fully explain and deliver understanding of a crucial security issue when, at least in theory, it should be the theory best suited to do so.

The first condition is that EU institutions are dependent on EU member states for information. The EEAS has already acquired the specific expertise and competence necessary for EU member states to make decisions at the EU level. This information gap materialises in the RELEX meetings and it is reduced by the competent brokering of the Heads of Missions in determining the targets of sanctions. The second condition is that decision-making powers remain in EU capitals, but even this condition is not fully met anymore. The role of RELEX, the Court of Justice and increasing pressures from the European Parliament would justify the claim according to which decision-making powers are also in Brussels. The third condition is that Brussels should not be the exclusive forum for EU decisions, but it has become so when it comes to imposing restrictive measures. Since the creation of the second pillar with the Treaty of Maastricht, the EU has slowly emerged as a sanctioning power. Its member states have increasingly

coordinated their policies of sanctions in Brussels, while also maintaining their own independent judgement. Today, the freedom of manoeuvre for member states lies in preventing sanctions from being imposed (voting against the decision of the Council when the use of veto is conceivable depending on the situation) and in implementing sanctions, but they no longer impose sanctions outside of the EU framework.

Brussels-based actors have acquired relevance at different phases of the sanctions cycle. The adoption of the written procedure in this regard empowers the representatives of member states to make decisions with a speedy procedure that, given the strict time limit, reduces the window of opportunities for business and political groups to influence the decisions through exercising pressure on their own governments. The role of EU Heads of Missions and the creation of the EEAS aims to institutionalise memory on the imposition of restrictive measures. Knowledge is power and it is foreseeable that the information gathered in Brussels will, over time, have more influence in designing sanctions. The role of EU institutions is relevant, especially considering the activity of the Court of Justice in recent months. Restrictive measures are subject to the judicial review of the Court and there have been multiple cases in which the procedures have changed in accordance with the Court's rulings, but regulations have also been annulled.

The governance approach applied to security has allowed us to identify emerging patterns in actors' behaviour that enhance the understanding of a policy process outcome. This article highlighted a shift of importance in deciding sanctions from European capitals to Brussels-based actors. However, more should be done to capture this apparently emerging trend. For instance, the findings of this article should be followed by a thorough investigation of individual case studies in order to trace the marginal weight of individual state preferences versus the dominant consensus in the Council of Ministers. Tracing the process of individual decisions can also contribute to understanding the extent to which member states consider sanctions as an EU tool or one at their own disposal. Finally, an additional field of investigation regards the undefined role of civil society groups in the whole sanctioning process, from design to evaluation. These studies would advance our knowledge on the governance of external security in the European Union in light of the radical changes taking place, change which clearly demands further theoretical attention.

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<sup>1</sup> 'Brussels' is intended as the locus of a political entity, namely the EU. Expressions such as Brussels-based actors and Brussels-based institutions are often used in the text to refer to this concept.

<sup>2</sup> For a complete review of the literature, please refer to Merlingen (2011).

<sup>3</sup> Before the Treaty of Lisbon, the Council used to approve Commission regulations. Since December 2009 and according to the new guidelines adopted in December 2009, the Council resorts to Council regulations to implement economic sanctions.

<sup>4</sup> Art. 57 of the Treaty of Rome, ex-article 296 and now article 346 of the TFEU.

<sup>5</sup> Knowledge, information and expertise are used as synonyms in this article. The terms refer to the fact that the EEAS is increasingly acquiring exclusive information on sanctions vis-à-vis member states.

<sup>6</sup> This is the former name of the CJEU before the Lisbon Treaty entered into force. ECJ will be used when a judgment was issued before December 2009.

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