

# **A Contested Consensus Rule**

## How to Make the OSCE More Effective

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## Abstract

The article tests the wisdom of amending the OSCE rule of consensus against past experiences of introducing a “consensus minus one” procedure, establishing mandatory cooperative “mechanisms” which can be triggered by a qualified minority of states, or introducing autonomously operating institutions. It argues that amending the consensus rule does not per se lead to a stronger Organization for Security and Co-operation in Europe. While the participating states could benefit from more independent OSCE institutions, decisions leading in that direction would need time to mature, particularly in the current political environment marked by the very low level of mutual trust within the OSCE.

## Keywords

OSCE – rule of consensus – conflict prevention – crisis management – co-operative security

## Introduction

The Conference on Security and Cooperation in Europe (CSCE) – from 1995 the Organization for Security and Cooperation in Europe (OSCE) – was virtually born with the consensus rule. Established in 1973 by the Final Recommendations of the Helsinki Consultations, it informed the way in which the Organization has operated for the last forty years. Consensus became one of the pillars of the CSCE/OSCE identity alongside with the inclusive membership, comprehensive approach to security, flexibility in addressing any issues the participating States wanted it to deal with, and its nature as a cooperative security institution – one which does not possess means to enforce its norms or decisions but relies exclusively on cooperation of participating States in implementing their commitments.

However, participating states have repeatedly contested the wisdom of this rule. Reportedly, the first to do so was the veteran Soviet foreign minister Andrei Gromyko who, at the inaugural CSCE ministerial meeting in July 1973, threatened to abandon it should Malta not compromise on its demand to grant some Southern Mediterranean states special status in the conference.<sup>1</sup>

The debate over the rule of consensus resurfaced time and again. Abandoning, amending or strictly adhering to this rule became the underlying question of more recent discussions concerning the OSCE reform. This is particularly true with the view to the debate over strengthening the Organization’s capacity to act in a crisis<sup>2</sup> as the rule of consensus is often seen as an impediment to prompt and effective action. For this reason, it appears plausible that it should be abolished.<sup>3</sup> The stronger the pressure on the consensus rule, the harder the opposition

to its abolition. Particularly a number of post-Soviet states led by Russia act as the most vocal defenders of that rule, not least out of the fear being outvoted by the growing number of European Union (EU) and NATO members who, together with associated countries, now comprise almost 70 per cent of the OSCE participating states.<sup>4</sup> Russia most explicitly has articulated this policy while insisting that “all OSCE activities at all stages of conflict prevention and crisis management” should be based on decisions made “in accordance with the rule of

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1 A. Zagorski, *Hel'sinkskii protsess (The Helsinki Process: Negotiations within the Conference and Security in Europe 1972–1991)* (in Russian), Moscow, 2005, p. 71.

2 Organization for Security and Co-operation in Europe, Permanent Council, 2013 Annual Security Review Conference, Vienna, 19 and 20 June 2013, Chairpersons Report, pc.del/730/13, 29 July 2013, pp. 3, 19.

3 For a recent example see: Helsinki+40. Implications for the Transatlantic Relationship: Final Report, November 18–19, 2014, Washington, DC, Written by T. Budak, p. 2.

4 A. Zagorski, ‘Auf verlorenem Posten? Die Zukunft der OSZE im europäischen Sicherheitssystem’, in *Osteuropa*, Vol. 62 (2012), no. 2, p. 119.

consensus” and require prior consent and active support of all parties involved in a particular crisis situation.<sup>5</sup>

But it is not only Russia or a number of its allies who continuously and strongly resist any revision of the consensus rule. Smaller participating states, particularly those who are not members of any alliance, have always tended to rely on consensus, which provided them with unique leverage in the process of OSCE decision-making.

Last year, after a series of controversial discussions, the Swiss Chairmanship concluded that it was unrealistic to change the existing OSCE practice.<sup>6</sup>

In its practice, however, the OSCE has always been more flexible than it may appear against the background of the concentration of the current debate on the rule of consensus. While acknowledging the benefits of consensus, the participating states have always looked for ways to minimize its straightjacketing effects. They put in place different “mechanisms” to improve cooperation in particular areas of concern without requiring prior consensus of all states. It is important to realize, at the same time, that the effect of applying such “mechanisms” has proved limited. Simply transcending the consensus rule *per se* is not a panacea. While often helpful for promoting cooperation among states, it is not a silver bullet that can fix all problems the Organization is confronted with.

### Consensus Minus

Critics of the current way, in which the organization operates, shall realize that consensus has been and remains essential to keep the OSCE community together. It not only provides the participating states with a sense of ownership. It is also a unique prerequisite for keeping states accountable for their promises. The rule of consensus commits everyone to the entire OSCE *aquis* – its principles and more specific norms and commitments. It makes it possible, though not necessarily easier, to claim their implementation in good faith. Time and again, whenever any participating state sought to escape from the binding effect of particular OSCE commitments, other states reminded it that everything adopted by consensus was equally binding for all without exception. States regularly resorted to this argument whenever they wanted to claim more proper implementation of specific commitments.<sup>7</sup>

Proponents of the rule of consensus, in their turn, shall admit that its strict application is far from perfect<sup>8</sup> and realize that the CSCE/OSCE already has a long record of compensating its imperfectness by putting in place a number of cooperative “mechanisms” which don’t require consensus to allow specific action.

The participating states have explored, time and again, as they continued doing these days, the option of taking decisions in a “consensus minus one” procedure in order to minimize the risk that one country would abuse the rule of consensus or would simply obstruct the decision-making process.

For example, in July 1983, the generally available consensus on the Concluding Document of the Madrid Follow-up

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5 The Permanent Mission of the Russian Federation to the OSCE and the Delegation of the Russian Federation on Military Security and Arms Control, Proposal for a draft decision on conflict prevention and crisis management in the OSCE area, FSC-pc.del/1/10/Corr.1, 19 January 2010; Russian Federation, Crisis management in the OSCE Area (Food-for-Thought Paper in the framework of the Corfu Process), pc.del/413/10/Corr.1, 19 May 2010.

6 Swiss Confederation. OSCE Ambassadorial Retreat Bas Erlach, 5–6 June 2014. Chairmanship’s Perception Paper. cio.gal/121/14, 15 July 2014.

7 A. Zagorski, *The Helsinki Process: Negotiations within the Conference and Security in Europe 1972–1991*, pp. 284–285.

8 A. Zagorski, *Strengthening the OSCE. Building a Common Space for Economic and Humanitarian Cooperation, and Indivisible Security Community from the Atlantic to the Pacific*, Russian International Affairs Council, Moscow, 2014, p. 13.

Meeting of the CSCE was blocked by Malta. Looking for a practical way out of the deadlock, the participating states considered to endorse already agreed provisions of the document, without formally departing from the consensus rule, by unilateral statements of 34 out of 35 participating states should Malta not agree to compromise on its demands. It ultimately did so in September 1983.<sup>9</sup>

The CSCE came back to the issue in 1992. Against the background of violent breaking apart of Yugoslavia, the second Council meeting in Prague decided that appropriate action may be taken by the CSCE, “if necessary in the absence of the consent of the State concerned, in cases of clear, gross and uncorrected violations of relevant CSCE commitments”.<sup>10</sup> However, action available under the “consensus minus one” procedure was limited to adopting political declarations or other political steps “to apply outside the territory of the State concerned”. It did not entail any enforcement possibilities.

Although the Council requested the 1992 Helsinki Follow-up Meeting to consider further modalities in applying this decision, this path was never pursued further. Suspending the participation of Yugoslavia in May 1992 was the single decision by the CSCE adopted in the “consensus minus one” mode.

The focus of the current debate is apparently shifting towards admitting the possibility to allow “certain practical and administrative decisions to be made by the Permanent Council on a qualified majority basis” in order to enable the OSCE, inter alia, to deploy relevant resources in a conflict area.<sup>11</sup> The merits of this proposal have yet to be explored, but it raises a number of difficult questions:

What qualified majority would suffice for such decisions? Consensus minus one, two, three, four, or how many? Would such decisions be binding for participating states which do not consent to them, not least whether those states would be supposed to contribute financially to their implementation? Would such decisions imply the possibility of deploying any sort of OSCE presence on the territory of a state, which does not give its consent to it, or would it entail eventual enforcement mandate against parties to a conflict without their consent? If not, what would be the added value of such decisions as compared to those adopted by consensus.

Those questions are difficult not only for political reasons, which make the adoption of such proposals unrealistic now, as acknowledged in 2014 by the Swiss chairmanship. Eventually, they may challenge the Helsinki 1992 decisions, which encompassed a wide range of measures as part of the OSCE conflict cycle toolbox but explicitly prohibited enforcement measures. It would also challenge the nature of the OSCE as a cooperative security institution, which exclusively relies on cooperation of its participating states.

### Qualified Minority

Instead of further exploring the “consensus minus” formula, in the early 1990s, the CSCE embarked on the road of establishing a number of cooperative mechanisms to allow a qualified minority of participating states to trigger specific cooperative action which would be mandatory for the requested state. There were essentially four such mechanisms established at the end of 1980s or early in the 1990s:<sup>12</sup>

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9 A. Zagorski, *The Helsinki Process: Negotiations within the Conference and Security in Europe 1972–1991*, pp. 177–178.

10 Conference on Security and Co-operation in Europe, Second Meeting of the Council, Prague, 1992, Prague Document on Further Development of CSCE Institutions and Structures, p. 16.

11 Helsinki+40. Implications for the Transatlantic Relationship: Final Report, p. 2.

12 Organization for Security and Cooperation in Europe, *Compendium of OSCE Mechanisms and Procedures*, sec.gal/121/08, 20 June 2008.

- Mechanism for Consultation and Cooperation with regard to emergency situations, or the “Berlin mechanism” adopted by the first Council Meeting in 1991;
- The Human Dimension Mechanism established by the Vienna Follow-up Meeting in 1989 and further enhanced by the meetings of the Conference on the Human Dimension of the CSCE in Copenhagen (1990) and Moscow (1991), widely known as the “Moscow Mechanism”;
- Mechanism for Consultation and Cooperation as regards unusual military activities, or the “Vienna Mechanism”; and
- The “Valletta Mechanism” for peaceful settlement of disputes established in 1991 and followed up by the 1992 Convention on Conciliation and Arbitration within the OSCE.

Those mechanisms allow participating states to request information or explanation on specific cases, issues or activities of their concern, address those concerns in bilateral and, subsequently, multilateral meetings thus raising awareness of other participating states of eventual or alleged cases of non-compliance with the view to resolving specific cases. All participating states are committed to act responsively and cooperate within the established bilateral and multilateral procedures.

Except for the Vienna mechanism on unusual military activities, which can be activated by a single state, other cooperative mechanisms established by the CSCE identified the minimal “qualified minority” of participating states sufficient to trigger mandatory procedures. The mandatory part of the Moscow mechanism (establishing a group of rapporteurs), for instance, operated in the “1 + 5” mode (one requesting state with the support of at least five other participating states). The Berlin mechanism established a somewhat higher threshold and required the support of no less than twelve states (or one third of the then participating states) to expedite a senior level emergency meeting. Decisions of such a meeting were supposed to be taken by consensus although, more recently, it was suggested to amend the Berlin mechanism by allowing an extraordinary conference of OSCE participating states to adopt decisions, recommendations or conclusions without the consent of parties to an armed conflict.<sup>13</sup>

All those mechanisms with the exception of the Valletta Mechanism, which has remained dormant all the time, as has the OSCE Court of Conciliation and Arbitration, were used frequently and effectively in the early 1990s based on cooperation among participating states.<sup>14</sup> The frequency, and effectiveness of applying those mechanisms, however, has declined since the late 1990s, although participating states have occasionally resorted to them. In particular, the Vienna mechanism as regards unusual military activities was activated several times in 2014 and 2015 in the context of the Ukraine crisis.

The cooperative nature of the result oriented procedures of various OSCE mechanisms, the features which provide them with particular strength, turn out to be their weak point, at the same time, as their effectiveness entirely depends on the availability of political will of participating states and their openness to cooperation. The latter

<sup>13</sup> United States of America, Food-For-Thought on Conflict Prevention and Crisis Management in the OSCE Area, pc.del/93/10, 19 February 2010.

<sup>14</sup> A. Bloed and P. van Dijk, ‘Supervisory mechanism for the human dimension of the CSCE: Its setting-up in Vienna, its present functioning and its possible development towards a general procedure for the peaceful settlement of CSCE disputes’, in A. Bloed and P. van Dijk (eds), *The human dimension of the Helsinki process – the Vienna Follow-up meeting and its aftermath*, Dordrecht; Boston; London, 1991, p. 79; P. Dunay, ‘Coping with Uncertainty: The “Vienna and Berlin Mechanisms” in Light of the First Decade of Their Existence’, in *OSCE Yearbook 2000*, Baden-Baden, 2001, pp. 125–138.

cannot always be taken for granted, however.

The Berlin mechanism has practically not been engaged after the establishment of the Permanent Council of the OSCE which can and does come together for an emergency meeting, including in the “reinforced” format which implies the participation of senior officials from the capitals. At the same time, the readiness of participating states to act in a responsive and cooperative way within other relevant OSCE “mechanisms” has remarkably declined over the past ten years or more. For instance, Turkmenistan (in 2002) and Belarus (in 2011) denied cooperation with the OSCE missions of rapporteurs established under the mandatory procedure of the Moscow mechanism.<sup>15</sup> Repeated activation of the Vienna mechanism as regards unusual military activities in the context of Ukraine crisis also became highly controversial as regards the inadequate level of cooperation of the states concerned.<sup>16</sup>

### Independent Institutions

Early in the 1990s, the CSCE began establishing institutions and structures which act largely independently within their mandates. This concerns, in the first instance, the Warsaw-based Office for Democratic Institutions and Human Rights (ODIHR), the OSCE High Commissioner on National Minorities (HCNM), the OSCE Representative on Freedom of the Media. This largely applies also to operations of various field missions and presences. A number of structures within the Secretariat, such as coordinators of economic and environmental activities or the activities in the area of transnational threats reveal rudimentary features of independent institutions, which eventually can grow out of them.

Independent OSCE institutions are not detached from the main political bodies of the Organization. Their heads are appointed and budgets approved by the Permanent Council or the Council. They regularly provide reports to the Permanent Council on their activities. However, their activities, although sometimes controversial, are not micromanaged. Nor are they subject to consensus in the Permanent Council.

Although widely appreciated by participating states, it is exactly the autonomy of those independent institutions which has been increasingly criticized by a number of participating states over the past ten years. The critics have increasingly sought to deprive the relevant institutions of their autonomy, or to limit it to the extent possible by increasingly subordinating their activities to the consensus available (or not available) in the Permanent Council. This is particularly true as regards activities of ODIHR and especially its elections observation, as well as activities of field missions and presences of the OSCE.

Critics have effectively prevented the expansion of independent activities of the OSCE to other areas, including conflict prevention and crisis management. For instance, while generally accepting the idea of allowing the Chairmanship to conduct special inspections under Chapter III of the Vienna Document on Confidence and Security Measures (risk reduction including the Vienna mechanism as regards unusual military activities), the Russian Federation has continuously insisted that such inspections could only be launched by a consensus based decision of the OSCE Forum for Security Cooperation (FSC).<sup>17</sup>

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15 A. Zagorskij, ‘Auf verlorenem Posten? Die Zukunft der osze im europäischen Sicherheitssystem’, p. 131.

16 See statements by various delegations in the Joint Meetings of the OSCE Forum for Security Co-operation and the Permanent Council on 7, 17 and 30 April 2014. See also the statement by the Delegation of the Russian Federation, FSC Journal No 777, 19 November 2014, Annex 1.

17 Statement by the Delegation of the Russian Federation in the 653rd Plenary Meeting of the FSC, fsc.jour/659, 27 July 2011, Annex 2.

The controversy over whether the OSCE institutions should be granted greater autonomy (thus avoiding to address the contentious issue of revising the rule of consensus), or whether their autonomy should be reduced or entirely abolished has become one of the major issues of contention during the last ten years. As the critics of the “excessive” autonomy of OSCE institutions have failed to substantially reduce it, they have sought to shield themselves, to the extent possible, from those activities, inter alia, by unilaterally straightjacketing elections observation by ODIHR, withdrawing consensus on the issue of further extending mandates of OSCE presences on their territory, or seeking to downgrade the status of those presences.<sup>18</sup>

As a result, by seeking to assert and expand their tight ownership over the Organization, participating states have kept OSCE institutions weak enough and affectively prevented them from becoming more independent and stronger. This outcome is rightly seen by experts as one of the major deficiencies of the OSCE structures<sup>19</sup> and a major obstacle on the way of properly strengthening the OSCE. Should the OSCE be further empowered in a meaningful way, expanding the areas and scope of its independent activities without necessarily revising the rule of consensus would be the reasonable way to go. Maintaining status quo, or even narrowing the autonomy of OSCE institutions would further marginalize the Organization despite its current renaissance against the background of the Ukraine crisis.

## Conclusion

Previous experiences gathered within the OSCE shall inform the critics of the rule of consensus that simply abandoning that rule and introducing whatever sort of majority decision-making, or a “consensus minus x” rule is not necessarily a solution, which would lead to a stronger OSCE. The deliverables of the existing non-consensual mechanisms of the Organization to date are mixed, at the best. The progressive departure from the rule of consensus, on the other hand, may further undermine responsiveness and cooperativeness of participating states – probably the main value added by the Organization considering its inclusive membership.

The defenders of the iron rule of consensus, in their turn, shall learn that, for a long time, the OSCE already has operated in a more flexible way, and that its non-consensual cooperative mechanisms have helped to boost cooperation among states although they were far from perfect either.

Both shall learn that they can benefit together from more independent and stronger OSCE institutions as, for instance, from more transparent (unbiased) and balanced multilateral verification and inspection activities that could be eventually conducted by the OSCE within the scope of the evolving Vienna Document. Or from professional mediation should the OSCE be allowed to establish independent mediation groups, as proposed some time ago by Switzerland.

One needs to realize that any decisions ultimately leading toward stronger and more independent OSCE institutions need time to mature. They would not be easy any way, but they appear particularly difficult in the current environment, which is marked by the lowest level of mutual trust between East and West ever since the end of the Cold War. It will take time for the simple fact that, whatever decisions on strengthening the OSCE the participating states may finally agree upon, those decisions will have to be taken by consensus. And they shall

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18 A. Zagorskij, ‘Auf verlorenem Posten? Die Zukunft der osze im europäischen Sicherheitssystem’, p. 131; A. Zagorski, Strengthening the OSCE. Building a Common Space for Economic and Humanitarian Cooperation, and Indivisible Security Community from the Atlantic to the Pacific, p. 18.

19 P. Dunay, The OSCE in crisis, Chaillot Paper no 88, Paris, EUISSP, 2006, p. 30; A. Zagorski, Strengthening the OSCE. Building a Common Space for Economic and Humanitarian Cooperation, and Indivisible Security Community from the Atlantic to the Pacific, p. 28.

respect the nature of the OSCE as a cooperative security organization.







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