



T.M.C. ASSER INSTITUUT

Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability

and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred around the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS



CLEER

A legal-institutional perspective on the European External Action Service

Bart Van Vooren

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS
T.M.C. Asser Instituut inter-university research centre

CLEER is hosted by the T.M.C. Asser Instituut,
Schimmelpennincklaan 20-22
2517 JN, The Hague, The Netherlands



CLEER

E-mail: info@cleer.eu
Website: <http://www.cleer.eu>

CLEER WORKING PAPERS 2010/7

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**A LEGAL-INSTITUTIONAL PERSPECTIVE ON THE
EUROPEAN EXTERNAL ACTION SERVICE**

BART VAN VOOREN*

CLEER WORKING PAPERS 2010/7

This text may be downloaded for personal research purposes only. Any additional reproduction, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year and the publisher.

The author(s), editor(s) should inform CLEER if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

- * Assistant Professor of EU Law, Faculty of Law, University of Copenhagen, <Bart.van.vooren@jur.ku.dk>; I am most grateful to Professors Steven Blockmans and Christophe Hillion, as well as Gilles Marhic and Leendert Erkelens for their comments and suggestions. Any omissions remain my own.

ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

© Bart van Vooren
Printed in The Netherlands
T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

ABSTRACT

It is beyond doubt that setting up the European External Action Service will have a deep impact on EU external policy making. Both in legal and policy terms, this new player thoroughly changes the institutional balance in EU external relations. The goal of this paper is to examine the legal side of that coin, by exploring the legal and institutional nature and position of the EEAS in the EU's external relations machinery. To that end, it queries the meaning of the EEAS' *sui generis* status in the EU institutional set-up: what does it mean to say that the EEAS is 'functionally autonomous' from the Council and Commission? What are the implications of its absence of legal personality? What are its formal powers – if any, and could the EEAS be subject or object of Court proceedings? Against the backdrop of seeking answers to these questions, the paper then queries to which extent the legal choices on the nature of the EEAS still reflect the age-old tension entrenched in EU external relations law: the EU's nature as an internally diverse entity, which seeks to present a coherent Union voice to the world.

1 INTRODUCTION

At a recent event on the future of EU foreign policy, the foreign minister of Finland Alexander Stubb, said the following: “Many may not realize it yet, but the institutional balance in EU external relations has changed fundamentally ... the EU diplomatic service is a real institution.”¹ The Lisbon Treaty has indeed brought about deep changes to the institutional and constitutional organization of EU external relations: the Common Commercial Policy now includes investment, the CFSP relationship to other external policies has been redefined, and the objectives of all EU external policies have been thoroughly overhauled. This Working Paper will focus on one particular aspect of the post-Lisbon institutional set-up, the new European External Action Service.² (EEAS) In highlighting that novelty, the purpose of this contribution is to move beyond policy discussions and political debates on structure and composition, and to provide a distinctly legal assessment of the words expressed by the Finnish foreign minister. To which extent has the institutional balance changed? What is the EEAS’ legal nature, what are its powers, and could it be subject or object of Court proceedings? Indeed, is the EEAS a new institution? This paper will then develop a broader argument, examining the final institutional choices on the structure of the EU External Action Service against the backdrop of what is generally considered the dominating tension of EU external relations law. That is, the tension between competence delimitation among EU institutions and between the EU and its Member States, and the need to present a coherent Union voice to the world.³

¹ Foreign Minister of Finland Alexander Stubb, speaking at an event organized by the Danish Institute for International Studies, Lighthouse Europe Series, 16 November 2010, Copenhagen, Denmark.

² B. Crowe, *The European External Action Service – A Roadmap for Success* (Chatham House, 2008); S. Duke, ‘The European External Action Service’, *DSEU Policy Paper* No. 2 (July 2010); M. Lefebvre and C. Hillion, ‘The European External Action Service: towards a common diplomacy?’, *SIEPS European Policy Analysis*, June 2010; S. Duke and S. Blockmans, ‘The Lisbon Treaty stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) establishing the organisation and functioning of the European External Action Service’, *CLEER Legal Brief*, 4 May 2010; S. Vanhoonacker and N. Reslow, ‘The European External Action Service: Living Forwards by Understanding Backwards’, 15 *EFA Rev.* (2010), 1-18.

³ C. Tietje, ‘The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy’, 2 *EFA Rev.* (1997), 211–233; S. Nuttall, ‘Coherence and Consistency’, in C. Hill and M. Smith (eds.), *International Relations and the European Union* (Oxford, Oxford University Press, 2005), 91-112; M. Cremona, ‘External Relations and External Competence: The Emergence of an Integrated Policy’, in P. Craig and G. de Búrca (eds.) *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), 137-169; M. Cremona, ‘Coherence through Law: What difference will the Treaty of Lisbon Make’, 3 *Hamburg Review of Social Sciences* (2008)11-36; C. Hillion, ‘Tous pour un, un pour tous! Coherence in the external relations of the European Union’, in M. Cremona (ed.) *New Developments in EU External Relations* (Oxford, Oxford University Press, 2008), 10-36.

In a first section, I will briefly expand on this ‘decades-old tension’ of EU external relations and briefly discuss how this tension influenced the negotiation process leading up to establishing the EEAS. In the second and largest section of this Working Paper, the legal nature of the EEAS is explained. Through characteristics such as legal personality, powers to adopt acts with legal effect, autonomy from the institutions, and standing before the Court, it is queried whether the diplomatic service is a new EU institution, an agency ... or indeed an inter-institutional body with a *sui generis* character? The fourth and fifth sections will then position the EEAS against the traditional institutional triangle, and will employ the duty of cooperation and its accountability to parliament to map the new institutional balance in EU external relations. The final section offers a brief conclusion which queries whether the decades-old tension of EU external relations has been resolved, alleviated, or simply continues with a new actor on stage.

2 COHERENCE VS. DELIMITATION IN THE NEGOTIATION OF THE EEAS

The position of the Union as an autonomous actor on the international scene has never developed by purposive design, but rather is a piecemeal construction of political and legal developments pushed forward by geopolitical and economic stimuli internal and external to the European continent. The early years of European Political Cooperation coincided with the process leading up to the Helsinki final act, as well as events in the Middle East.⁴ The birth of CFSP in the Maastricht Treaty could be linked to the collapse of the USSR, and the subsequent failure to formulate a common response to events in the former Yugoslavia spurred realization that the CFSP required reform through the Amsterdam Treaty. This dynamic has continued in the 21st century. For example, the first ever European Security Strategy was drawn up after the debacle over the Iraq war. Each of these geopolitical realities prompted EU-internal change to the legal and political machinery shaping ‘European Union’ external action.⁵ The European Union External Action Service is then a continuation of that process: a new institutional set-up against a decades-old struggle of the Union seeking to develop a single voice for the EU on the international scene, counterbalanced by the Member States’ desire to retain control over key aspects of foreign policy. The decades-old tension of *Union* external relations is then clear: the legal structures of the Treaties seek to separate different spheres of external relations authority, while recognizing that such fragmentation is an obstacle to speaking with a single voice. The broader purpose of

⁴ S. Nuttall, *European Political Cooperation* (Oxford, Clarendon Press, 1992); and S. Nuttall, *European Foreign Policy* (Oxford, Oxford University Press, 2000).

⁵ This argument is further developed in B. Van Vooren, *A Paradigm for Coherence in EU External Relations: The European Neighbourhood Policy* (Doctoral Thesis, European University Institute, Florence, 2010).

this contribution is then to examine where the EEAS can be positioned in this legal framework, and to study which direction the scale has tipped with the EEAS: coherence or delimitation? The following paragraphs will highlight this dynamic through outlining the different negotiation positions that shaped the EEAS Council Decision finally adopted on 26 July 2010.⁶

The Lisbon Treaty entered into force on 1 December 2009, and provides for establishing the EEAS in Article 27 (3) TEU. Due to the failed Constitutional Treaty and the bumpy road towards ratification of the Lisbon Treaty, the final institutional set-up was decided in a rather hurried negotiation that commenced in Autumn 2009. Predating the Lisbon Treaty's entry into force were two reports of 22 and 23 October 2009, the first by the European Parliament and the second by the Swedish Presidency, and both provide useful insights into the debate that was to follow.⁷

Starting with the report drawn up by Elmar Brok, coherence in EU external relations was mentioned several times, though it was by no means central to the Parliamentary Resolution.⁸ Instead, the document was most specific on how the EEAS should be structured. It spoke of the EEAS as “a logical extension of the *acquis communautaire* in the sphere of EU external relations”.⁹ It should be “a service that is *sui generis* from an organizational and budgetary point of view, [but] the EEAS must be incorporated into the Commission's administrative structure.”¹⁰ The report further added that the Council Decision on the EEAS “... should ensure in a legally binding manner [that the EEAS] is subject to the decisions of the Council in the traditional fields of external policy (CFSP and CSDP) and subject to the decisions of the College of Commissioners in the field of common external relations.”¹¹ In terms of policy substance, incorporating the CCP into the EEAS's field of action was never really on the table, but development was more contentious and Parliament addressed this specifically. It thought it necessary to remind the addressees of its Resolution that “development cooperation [is] an autonomous policy area with specific objectives and on an equal footing with other external policies.”¹² This was because many in the development community were worried that giving a role to the EEAS in EU development policy was a rouse of the Member States to ensure that aid resources presently managed by the Com-

⁶ For a full account of the process leading up to the Council Decision see L. Erkelens and S. Blockmans, ‘Setting Up the European External Action Service: An Institutional Act of Balance’, *CLEER Working Papers* 2010/8, forthcoming.

⁷ Report on the institutional aspects of setting up the European External Action Service, Committee on Constitutional Affairs, European Parliament, Rapporteur Elmar Brok, 20 October 2009, 2009/2133 INI (Adopted as EP Resolution on 22 October); Presidency report to the European Council on the European External Action Service, 14930/09, Brussels, 23 October 2009.

⁸ Report on the institutional aspects of setting up the European External Action Service, paragraphs 5 and 6b (consistency) and once in the preamble coherence is mentioned as well.

⁹ Report on Institutional Aspects, para C.

¹⁰ Report on Institutional Aspects, para 7.

¹¹ *Idem*.

¹² Report on Institutional Aspects, para I.

mission would be used for strategically directed objectives rather than long-term structural development objectives.¹³

The Swedish Presidency report of October 2009 was representative of the broad agreement among the Member States, and recognized that development should remain the responsibility of the relevant Commissioners and DGs of the Commission.¹⁴ The overall tone on the positioning of the EEAS was different, with coherence being more rhetorically present, and it also spoke more of cooperation and consultation between the Commission, Council, Parliament.¹⁵ The legal status and position of the EEAS in the 'EU system' were conceived differently from that proposed by Parliament: "The EEAS should have an organisational status reflecting and supporting its unique role and functions in the EU system. The EEAS should be a service of a sui generis nature separate from the Commission and the Council Secretariat."¹⁶ Hence, both reports recalled the overarching coherence objective of setting up the EEAS, but there was thorough disagreement on the institutional position of the EEAS.

After Catherine Ashton was appointed at the end of 2009, a High Level Group was formed to support her in the initial drafting of the Council Decision.¹⁷ By 25 March 2010 HR/VP Ashton published her proposal on the structure of the EEAS, prompting the immediate rejection (within the hour) of the European Parliament for lack of political accountability, the internal hierarchical organization of the EEAS and other reasons.¹⁸ In the following months a Quadrilogue unfolded through which the European Parliament forcefully used its powers in the ordinary legislative procedures on the necessary amendments to the Staff and Financial Regulations.¹⁹ Defining the nature of that Quadrilogue is itself illustrative of the negotiation environment from which the EEAS sprouted. In debating the Council response to a written question from an MEP on how the Council intended to cooperate with Parliament, the Netherlands emphasized that the text did not speak of 'quadrilat-

¹³ R. Youngs, 'Fusing Security and Development: Just Another Euro-Platitude?', 30 *Journal of European Integration* (2008), 419-437, 432. See, for example, the position of OXFAM International's EU Office quoted in Euractiv, 'The EU's new diplomatic service – Positions', 09 July 2010, <www.euractiv.com>.

¹⁴ Report of the Swedish Presidency, para 6.

¹⁵ See Report of the Swedish Presidency, paragraphs 3, 10, 13, 15.

¹⁶ Report of the Swedish Presidency, paragraph 16.

¹⁷ This group was chaired by Ashton and was composed of Ashton's Head of Cabinet, the Secretaries General of the Commission and Council respectively, the Directors-General from DG RELEX and DG E, heads of the respective legal services, the head of the EU delegations in third countries as well as the Director of the Policy Unit of the Council and representatives of the trio Presidencies.

¹⁸ Statement by Guy Verhofstadt (ALDE), Hannes Swoboda (S&D), Rebecca Harms and Daniel Cohn-Bendit (Greens/EFA), 25 March 2010.

¹⁹ Council Regulation (EC, Euratom) No. 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, *OJ L* 248, 16.9.2002, p. 1; Regulation No. 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, *OJ* 45, 14.6.1962, p. 1387/62. English special edition: Series I Chapter 1959-1962 p. 135.

eral *negotiations*' but rather of 'quadrilateral *talks*'. That Member State argued that "the Council does not negotiate with the EP on all aspects of the package, only on those parts of the EEAS on which they have competence."²⁰ The final version of the written reply indeed reads that the Council will engage with the European Parliament in the form of "quadrilateral consultations between the institutions concerned."

On 10 June 2010, the three rapporteurs of the European Parliament on the European External Action Service (EEAS), Brok, Verhofstadt and Gualtieri then presented their report on the quadrilogue. In it, they stated that agreement had been reached on the position of Human Rights promotion in the EEAS as well as crisis management. However, on several issues the Parliament stated that 'it would not compromise': The first was its submission that the Service should be communitarian rather than intergovernmental in character, and Parliament insisted that the service be attached to the commission rather than a separate *sui generis* body within the Union. The second was the exact position of development policy, and the role of the EEAS and Commission throughout the various programming stages. The third issue was that of staffing, where Parliament argued that the EEAS should be predominantly staffed by 'permanent *community* officials(sic)', and this for reasons of promoting the 'Union' spirit. By 21 June 2010 a final agreement was reached on the Council Decision, as well as two non-legally binding documents constituting the EEAS compromise: the 'political declaration on political accountability', and the 'statement to the plenary of the European Parliament on the basic organization of the EEAS central organization'.²¹ Though of unequal legal stature, these two documents should be considered an integral part of the soft and hard legal documents that define the EEAS' institutional status, together with the Council Decision which was published in the official journal on 3 August 2010.²²

There is little doubt that these three documents reflect the aforementioned dichotomy in the internal legal organization of EU external relations. The EEAS founding instruments oscillate between delimiting competencies and attaining a coherent external policy. The preamble of the Council Decision reaffirms that coherence remains the final objective of setting up the EEAS, and does this by copying and pasting the text of Article 21.3 second paragraph TEU.²³ Article 2 of

²⁰ Reply to written question E-1384/10 put to the Council by Elena Basescu (PEE), 9520/10. See notably amendments to the draft reply, 12 May 2010.

²¹ Draft Declaration by the High Representative on political accountability, *OJC* 210/1, 3.8.2010; Addendum to the Note, Adoption of a Council Decision establishing the organization and functioning of the EEAS, elements for the statement given by the High Representative to the plenary of the European Parliament on the basic organization of the EEAS central organization, 12401/10, Brussels, 20 July 2010.

²² Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJL* 201/30, 3.8.2010.

²³ Article 21, 3, second paragraph reads: "The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect."

the EEAS Decision then describes the two tasks of the EEAS attaining that objective. First, Article 2.1 states that it “shall support” the High Representative in fulfilling his mandates as outlined in Articles 18 and 27 of the TFEU. Three indents follow that statement, one for each of Mrs. Ashton’s hats. The first indent requires the EEAS to support Mrs. Ashton as High Representative while carrying out the CFSP and ensuring the consistency of the Union’s external action. The second and third indents require the EEAS to support her in her mandate as President of the Foreign Affairs Council and as Vice President of the Commission. Importantly, this is each time qualified by stating that “this is without prejudice to the normal tasks” of the General Secretariat of the Council, and the “normal tasks” of the Commission services respectively. Paragraph 2 of Article 2 further adds that the EEAS also functions to assist the President of the European Council (currently Van Rompuy), the President of the Commission (currently Barroso), as well as the Commission itself, “in the exercise of their respective functions in the area of external relations.” Hence, the division of labour that has permeated EU external relations in the past continues in the structure of the EEAS.

What then, are the ‘normal tasks’ of the General Secretariat and the Commission services different from those of the EEAS? Indeed, the very idea of normalcy has shifted dramatically with the introduction of the Lisbon Treaty and the EEAS.²⁴ Given that the EEAS is still in its transitional phase from launch to full operability, there is no conclusive answer to this question. According to one member of the Council Legal Service, the wording ‘normal tasks’ was chosen to be as neutral as possible.²⁵ According to him, that wording should be interpreted in line with existing practice under Article 23.1 of the Council rules of procedure: “The Council shall be assisted by a General Secretariat...”. Whether ‘business as usual’ is really possible with the arrival of the EEAS is however an open question, and as was the case with the creation of the CFSP itself, several years of practice will indeed be required to flesh out the new *modus vivendi* captured by this legal framework. That said, the rules laid down setting up the EEAS is of course not an empty vessel, and much of the language has been carefully drafted to reflect the political compromise reached during the summer of 2010. The following section will examine what the new institutional balance in EU external relations look like. Is the EEAS a new institution, or indeed, a *sui generis* cog in the EU’s institutional machinery?

²⁴ As pointed out in both M. Lefebvre and C. Hillion, *op. cit.*, 7, and S. Duke, *op. cit.*, 2.

²⁵ Comments by Gilles Marhic, discussant on the legal panel at the conference “The Diplomatic System after Lisbon – Institutions Matter”, 18-19 November 2010, Maastricht University.

3 THE 'SUI GENERIS' LEGAL NATURE OF THE EEAS AND ITS IMPLICATIONS

3.1 Mapping the Key Characteristics of the EEAS

The principle of institutional balance is both a legal and a political principle:²⁶ In legal terms it implies a principle to be respected by the institutions, and infringements can be sanctioned by the Court of Justice. In political terms, it describes the organization of the institutional interrelationships within the Union. Both legally and politically, the institutional balance in the field of EU external relations has changed thoroughly.²⁷ The Council Decision states that it establishes a *functionally autonomous body* of the Union *under the authority* of the High Representative.²⁸ (Article 1 of the EEAS Council Decision) To examine what that implies, it is necessary to reproduce that article in full:

“Article 1 – Nature and scope

*1. This Decision establishes the **organisation and functioning** of the European External Action Service (“EEAS”).*

*2. The EEAS, which has its headquarters in Brussels, **shall be a functionally autonomous body** of the European Union, **separate** from the General Secretariat of the Council and from the Commission with the **legal capacity necessary** to perform its tasks and attain its objectives.*

*3. The EEAS shall be placed **under the authority of the High Representative** of the Union for Foreign Affairs and Security Policy (‘High Representative’).*

4. The EEAS shall be made up of a central administration and of the Union Delegations to third countries and to international organisations.”²⁹

The status of the EEAS, and its position in the EU institutional set-up has been in flux throughout the negotiation process. In the October 2009 Presidency report it was stated that the EEAS should have an organizational status reflecting and supporting its unique function in the EU system.³⁰ This implied that “the EEAS should be a service of a sui generis nature separate from the Commission and the Council Secretariat.”³¹ The European Parliament argued against that direction on the new structure.³² According to Elmar Brok “the EU does not need a new bureaucracy located in the middle between the Council and the Commission which in the long term would lead a life of its own to become an independent kingdom outside our control.”³³

²⁶ J.-P. Jacqué, ‘The Principle of Institutional Balance’, 41 *CML Rev.* (2004), 383-391, 383.

²⁷ Later in this contribution I will query whether the EEAS can even be considered as part of the institutional balance at all.

²⁸ Preamble, para 1

²⁹ Emphasis added.

³⁰ Presidency Report, 14930/09, 23 October 2009, 6.

³¹ *Idem.*

³² Press Release, ‘The conference of Presidents on the External Action Service’, 10 June 2010.

³³ Quoted in Euractiv, ‘The EU’s new diplomatic service’, *op. cit.*

The Parliament has lost out in the final compromise, and the EEAS has not been attached to the Commission. Instead, it is defined as a body with functional legal capacity and functional autonomy under the authority of the High Representative. The vague notion of the EEAS' 'sui generis' employed in the Swedish Presidency report has not been retained in the Council Decision.³⁴ This is understandably so since it is not a satisfactory legal classification, and even from a heuristic perspective, its utility is largely colloquial. Hence, the Decision speaks of the EEAS as being 'functionally autonomous' from the Council and Commission in its function of assisting the High Representative which – in this author's view – still reflects the underlying idea of it having a sui generis status in the EU institutional set-up.

This contribution will seek to shed light on the legal implications of this deep shift in the EU's external relations machinery by comparing the EEAS to the key organizational features of the EEAS with those of EU bodies already in existence. The selection of characteristics examined here is perhaps slightly arbitrary, but these four features are arguably key towards defining the position of an actor in the EU legal order: 1) legal personality, 2) independence from, or relationship to the EU's political institutions, 3) powers to adopt decisions which resort legal effect, and 4) *locus standi* and review of legality before the EU Courts. An inquiry into these features will require utilizing existing examples from within the Union, and here too the selection of options most closely resembling the legal nature of the EEAS might seem somewhat arbitrary. The selected yardsticks for comparison are: the Service could be considered as (fulfilling the functions of) an EU institution proper (ex. Commission, Council), those of an Agency of the Union (ex. European Defence Agency), or those of an auxiliary body attached to the institutions (ex. Council Secretariat, Commission DG or COREPER³⁵). In selecting these examples the notion of functional autonomy was essential and hence, I have excluded bodies of a purely supportive nature such as the Office for Infrastructure and Logistics (OBI). More importantly, when contrasting the EEAS with the Council and Commission and these institutions' services (e.g. the General Secretariat and the Commission DG's), it is the idea of functional autonomy accorded to the EEAS from the Commission and Council – as opposed to the Secretariat and the DG's – which has led me to *legally* assimilate these services with the respective institutions as a whole. However, from an organizational perspective it will at times be appropriate to look specifically at the role of these two institutions' services. Exemplary of this is that in the Treaties the General Secretariat figures more distinctly *organizationally* than the Commission services. In Section 4 of Part 1, Title 1, Chapter 1 of the TFEU on the Commission as an EU institution, most Treaty articles are devoted to the procedure related to appointing the Commissioners.

³⁴ M. Lefebvre and C. Hillion, *op. cit.*, 5.

³⁵ Article 240, 1 TFEU: "A committee consisting of the Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the latter."

Additionally, in Article 249.1 TFEU the departments of the Commission only get briefly mentioned as follows: “The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate.” The Treaty is more generous in describing the role of the General Secretariat in relation to the Council and European Council. Article 240,2 of the TFEU states that “The Council **shall be assisted** by a General Secretariat, under the responsibility of a Secretary-General appointed by the Council.” (Emphasis added) The General Secretariat also provides support to the European Council, as mentioned in article 235 TFEU. Compare this with the TEU article that foresees in setting up the EEAS. Article 27,3 TEU reads: “In fulfilling his mandate, the High Representative **shall be assisted** by a European External Action Service. This service shall work **in cooperation with** the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. [...]” (emphasis added) Hence, from a legal perspective this text will normally assimilate the Council or Commission with its services, but from an organizational perspective it will at times be appropriate to compare the EEAS with the Council General Secretariat or with the Commission’s various DG’s. The highlighted passages ‘shall be assisted’ in above quotes are illustrative of this. These quotes give the impression that the EEAS is in an analogous position to the Council General Secretariat, an organizational line of enquiry worth exploring. However, as the following paragraphs will show, that is only superficially the case, and the EEAS is indeed legally, institutionally and organizationally ‘sui generis’.

3.2 Legal Personality & Legal Capacity of the EEAS

The first feature towards classifying the EEAS is that of legal personality and its corollary, legal capacity. Starting with EU Agencies as the comparator from the EU legal order, the practice of setting up agencies can be traced back to the early 1990’s. While these bodies are by no means uniform, one constant has been that they have all been explicitly granted legal personality.³⁶ The EEAS has not been granted such legal personality, in contrast with for example the European Defence Agency (EDA). Article 6 on legal personality of the 2004 Council Joint Action establishing the EDA states that “The Agency shall have the legal personality necessary to perform its functions and attain its objectives.”³⁷ The Joint Action then continues to impose on the Member States the obligation to ensure that the EDA enjoys “the most extensive legal capacity accorded to legal persons under their

³⁶ E. Chiti, ‘An Important Part of the EU’s Institutional machinery: Features, Problems and Perspectives of European Agencies’, 46 *CML Rev.* (2009), 1395-1442; A. Ott, ‘EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield between European and International law’, 13 *EFA Rev.* (2008) 515-540.

³⁷ Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, *OJ L* 245/17, 17.4.2004.

laws”, so that it can “acquire or dispose of movable and immovable property, and be a party to legal proceedings.” In the Council Decision on the EEAS, the analogous provision has been split into two articles. Towards the end of the Decision is Article 12 which deals solely with immovable property without mentioning legal personality to acquire it, and instead Article 1 on the scope and nature of the EEAS partially deals with this issue. In Article 12.1 it is said that the Council Secretariat and the Commission services “shall take all necessary measures” so that the transfer of personnel can be accompanied by the transfer of immovable property necessary for the functioning of the EEAS. Hence, unlike the EDA there seems no need to acquire movable or immovable property independently, and no statement is made on the EEAS’ possibility to be a party to legal proceedings. Article 1 of the EEAS Decision is indeed interestingly different from the EDA Joint Action, since the EEAS founding instrument states only that it has the “legal capacity necessary to perform its tasks and attain its objectives.” The difference between legal capacity and legal personality not merely differentiates the EEAS from the many agencies of the EU, but it has broader implications on the exact nature of this new body. Legal personality is the legal quality through which the entity can participate in legal life: engage itself (extra-) contractually, be subject to rights and responsibilities, enforce its prerogatives before a Court of law, and so on. Legal capacity then denotes the scope of its power to engage in such legal relationships.

The state of affairs where the EEAS has the capacity to enter into legal relationships without having been conferred legal personality is analogous to that of the European Union itself before the Lisbon Treaty. Prior to 1 December 2009, Article 24 TEU-Nice allowed for the EU to conclude international agreements in the context of the Common Foreign and Security Policy, without however having been explicitly conferred legal personality. In the case of the European Union, the reason for that absence was political, namely the aforementioned dichotomous relationship between power delimitation and the single EU voice in international relations. It was evident that for the Union to act effectively on the international scene, it would need the capacity to conclude international binding agreements. While the Amsterdam Treaty thus gave the Union such capacity, the discussions at the IGC made it clear that certain Member States were not prepared to recognize the Union as a distinct actor carrying out *its* Common Foreign and Security Policy.³⁸ Legal personality was thought to do exactly that. In a similar vein, the absence of *explicit* legal personality of the EEAS is arguably not so much a legal choice as it is a political one: it solely had the objective of diminishing the ‘distinct political nature’ of the EEAS as against the EU institutions to ensure that the EEAS would not become – as Elmar Brok called it – “a separate kingdom”³⁹ with no political

³⁸ See for example the discussion at the Westendorp Reflection Group: Westendorp Report, ‘Report by the Reflection Group: A Strategy for Europe, presented to the European Council’, 5 December 1995, <www.ena.lu>.

³⁹ See note 33.

accountability to Parliament and changing the nature of ‘Community’ external action. For the European Parliament, the EEAS should not have existed separately from the Commission at all, but that position proved to no avail. While the conferal of legal capacity without legal personality therefore does not indicate a choice to deprive this body of the ability to act in legal life, it should be queried whether this is without impact on the EEAS? For example, does this have any impact on the possibility for the EEAS to defend its prerogatives through review of legality before the Court of Justice? Arguably not, but I will return to this issue separately below, since a further consideration of the nature of the EEAS and the legal effect of its acts is prerequisite towards considering their eligibility for review before the European Courts.

In sum, where the EEAS has no legal personality, its position is thus formally dissimilar from that of regulatory agencies, and seemingly closer to that of the Council General Secretariat or the Commission DG’s: A position of support with no legal existence distinct from the institution – or in this case the hybrid position of the HR/VP – to which it is connected by the EU Treaties.

3.3 The EEAS’ Formal Powers in the EU Policy-making Process and its ‘Functional Autonomy’

The second feature positioning the EEAS is its role in the EU’s political decision-making process, and whether it has any power to formally and legally decide on the direction of EU external policy. The third related feature specific to the EEAS, is its ‘functional autonomy’ stated in article 1.2 of the EEAS Decision, and the fact that it is ‘separate’ from the Council and Commission. Defining its formal powers and the meaning of functional autonomy and separateness from the institutions will be carried out using three yardsticks: the EU institutions as listed in Article 13 TEU, the EU Agencies as the yardstick, and the legal position of COREPER and the Council Secretariat in relation to the Council. Autonomy in this context is interpreted broadly: In policy terms it is defined as the extent to which the EEAS could independently steer the EU policy making process, and the extent to which it is bound by instructions from the Council or Commission in carrying out its mandate. In legal terms it is the extent to which the EEAS has been conferred powers to do so in a legally binding fashion.

First, could the EEAS be considered as an equivalent to a new institution of the Union, in the sense of Part Six, Title 1, Chapter 1 of the TFEU? A purely formalistic answer in the negative can be deduced from Article 13 of the TEU, which firmly and exhaustively states that “the Union’s institutions shall be [...]”, thereafter naming the seven institutions. The EEAS is not listed and therefore formally not an EU institution. But more substantive indicators do exist. Aside from the fact that the references to its *sui generis* nature indicate the absence of political will to create an institution proper, the Council Decision indicates that the EEAS is treated as an ‘institution’ solely within the meaning of the Financial and Staff Regulations, i.e. specifically for the application of those two specific instruments

of secondary law.⁴⁰ This means that the EEAS has a separate heading in the budget like the EU institutions proper, and is subject to discharge by the European Parliament. The final argument with most strength is of course that a new institution can only be set up through primary law, and it is clear that the Lisbon Treaty had no intention of doing so: Article 27.3 TEU solely foresees in setting up a ‘service’ “to assist” the High Representative. Where that article states that the ‘organisation and functioning of the EEAS’ shall be established by Council Decision, the EEAS cannot be considered a new institution of the Union.

Second, if its powers of ‘assisting’ the HR/VP are not akin to those of an institution proper, could the EEAS be considered as having been delegated powers of the EU institutions, and whether, hence, the *Meroni* doctrine applies? According to this doctrine, it is compatible with the Treaty to delegate powers of the EU Institutions which are clearly circumscribed by specific objectives set by the delegating authority, and which are of an executive or administrative nature only.⁴¹ It is then incompatible with the principle of institutional balance to delegate wider discretionary authority of the EU institutions, namely powers through which the secondary body has discretion in substantive policy-making. If this doctrine were to apply, that would allow characterising the autonomy and policy role of the EEAS as analogous to that of some of the EU regulatory agencies. The question as to whether the *Meroni* doctrine applies to the EEAS is however largely moot, given that the establishment of the EEAS has been explicitly provided for in primary law. Article 27.3 TEU then makes clear that the Council Decision is not so much delegating authority of the Institutions, but rather setting up ‘a body’ meant to ‘assist’ the office of the High Representative. That role of assistance is entirely separate from the institutions of Article 13 TEU. The EEAS is therefore neither an institution with the prerogatives that this entails, nor is it in a relationship of delegated powers to the Institutions.

While the EEAS is *formally* not in a position of delegated authority, the example of EU Agencies does provide a useful yardstick against which to assess the *substantive* tasks of the EEAS. That, in turn, will provide inroad into substantiating the functional autonomy and legal capacity of the EEAS. The EDA – one of the three agencies in the area of the CFSP – provides a useful further comparison. That Agency was set up in 2004 and has since received an explicit legal footing in the TEU. (Art. 42.3 TEU) The limitations flowing from the *Meroni* doctrine applying to the EDA are then clearly visible. Contrast notably Article 45 TEU, elaborately describing the EDA’s supportive function to the Council, with the brief mentioning of the EEAS in Article 27 TEU in relation to the High Representative.

⁴⁰ See paragraph 8 of the preamble of the EEAS Council Decision.

⁴¹ Cases C-9/56 and C-10/56 *Meroni v High Authority*, [1957-1958] ECR 133; I have followed the description of the broad academic consensus on the *Meroni* doctrine as formulated by E. Chiti, ‘An Important Part of the EU’s Institutional machinery: Features, Problems and Perspectives of European Agencies’, 46 *CML Rev.* (2009), 1395-1442, at 1421. See also G. de Búrca, ‘The institutional development of the EU: A Constitutional Analysis’, in P. Craig and G. de Búrca *op. cit.*, at 77.

Article 45 TEU is extraordinarily detailed in outlining and circumscribing the EDA's tasks in contributing to the CSDP; whereas Article 27 TEU only says that it will 'assist' the High Representative in her mandate.

Hence, the constitutional and institutional positioning of the EDA and that of the EEAS is distinct, though in substance the opposite may be true. A comparison of the EEAS' functions with those of the regulatory EU agencies may then provide further insight into the former's substantive tasks. In the recent discussion on the position of agencies in the EU's system of governance, the Commission has classified the powers of the more than two dozen regulatory⁴² agencies according to the functions they perform.⁴³ There are five kinds in that classification: Those agencies that can adopt individual, legally binding decisions (ex. OHIM⁴⁴); those that provide technical or scientific advice (ex. ERA⁴⁵); those that coordinate operational activities (ex. FRONTEX⁴⁶), those that gather and analyze information and set up stakeholder networks (ex. CEDEFOP⁴⁷); and finally those that provide practical services to agencies and institutions. (ex. CDT⁴⁸) It bears repeating that these agencies cannot have the power to adopt general regulatory measures. Their powers are limited to taking individual decisions in specific areas where a defined technical expertise is required, and this under clearly and precisely defined conditions. Agencies cannot have genuine discretionary power, and cannot be entrusted with responsibilities explicitly conferred on the EU institutions.

Given that the tasks of the EEAS are made hierarchically dependent on – and are proscribed in function of – those of the High Representative, the EEAS' substantive powers can only be defined by looking at the definition of the High Representative's mandate. Subsequently, the crux of the issue is to examine what it means for the EEAS "to assist" her in that function, and how this compares to the functions fulfilled by EU agencies.⁴⁹ I shall first examine the scope of the EEAS tasks in function of those of the HR/VP, and subsequently examine the interpretation of 'to assist'.

There is no single description of the HR's mandate, and it needs to be puzzled together from different articles in the Treaty on European Union. According to the TEU, the High Representative 'shall conduct the CFSP' (Art. 18.2 TEU); 'shall be responsible within the Commission for responsibilities incumbent on it in external

⁴² I exclude here the executive agencies which have the task of administering EU programmes.

⁴³ Communication from the Commission to the European parliament and the Council, European Agencies – The Way forward, COM(2008) 135 final, 11.3.2008.

⁴⁴ Office for the Harmonization of the Internal Market.

⁴⁵ European Railway Agency.

⁴⁶ Coordination of Member States in management of EU external borders.

⁴⁷ European Centre for the Development of Vocational Training.

⁴⁸ The EU translation centre.

⁴⁹ Stated differently, the EEAS merely assists the HR/VP, and it operates under her legal and political authority. Where Article 27.3 TEU uses the terminology of 'shall assist' it is perhaps not explicit about that 'line-of-command', but Article 1.3 of the EEAS Council Decision states so explicitly. The HR/VP and EEAS can therefore not be equated in organisational terms, and hence the need to examine the meaning of the relationship of assistance of Article 27.3 TEU.

relations and for coordinating other aspects of the Union's external action' (Art. 18.3 TEU); 'shall ensure the unity, consistency and effectiveness of action by the Union in the CFSP' (Art.26.2 second indent TEU, together with the Council); shall 'put into effect the CFSP' (Art. 26.3 TEU); 'shall chair the Foreign Affairs Council' (Art. 18.3 TEU & 27.1 TEU); 'shall contribute through his proposals towards the preparation of the CFSP' (Art. 18.2 TEU & Art. 27.1 TEU); 'shall ensure implementation of the decisions adopted by the European Council and the Council' (Art. 27.1 TEU); 'shall represent the EU for matters related to the CFSP'; 'shall conduct political dialogue on the Union's behalf'; she 'shall express the Union's position in international organisations and at international conferences'(Art. 27.2 TEU) and finally, she has an important role in (initiating) decisions relating to the CSDP (Article 42.4 TEU) Now consider that description of the mandate of the High Representative against the functional classification of EU Agencies – keeping in mind of course that the EEAS' position is one of assistance to the High Representative's mandate: The most strongly formulated tasks of the High Representative are those of conducting the CFSP, coordinating EU external action, ensuring its unity and effectiveness and implementing decisions of the (European) Council. The EEAS' function of assisting Mrs. Ashton thus – at the very least – requires gathering information, providing expert advice, provide assistance to the institutions, and coordinating standpoints and networks at EU and Member State level. It is indeed not the EEAS which 'puts into effect' the CFSP but the High Representative, and given the position of assistance, the *substantive* tasks of the EEAS its position is at least partially parallel to that of some the EU's agencies. The question is then whether the EEAS is endowed with a certain level of policy discretion, beyond the limits imposed on EU agencies as required by the Meroni doctrine? Depending on the answer to that question, what does this imply for the legal nature of its acts?

The High Representative has a significant role in preparing the policy initiatives of the European Council, Council and Commission; as well as implementing them upon approval. In assisting the HR/VP in these tasks, the EEAS could be considered to combine most if not all of the tasks of EU agencies currently in existence, except for the adoption of individual legally binding decisions. One qualification is therefore crucial; assisting the HR in carrying out her mandate as described above in no way confers final, independent policy discretion. That remains with the Institutions proper, and with the office of the High Representative as described in the TEU. In terms of our institutional taxonomy, some of the EEAS administrative and executive tasks resemble those of agencies, but in legal terms the EEAS is closer to services of the Commission and the Council General Secretariat, and bears little resemblance to the position of EU agencies.

The EEAS would not be *sui generis* if there were no exceptions to that finding, and it is a rather crucial one, the EEAS' new role in EU development policy: A specific task not mentioned in the Treaty on European Union but in the EEAS Decision itself is the EEAS' role in the multi-annual planning cycle of EU development policy.⁵⁰ The EEAS is given the (shared) responsibility of preparing the Commission decisions on the three strategic, multi-annual steps within the development programming cycle: country and regional allocations; country and regional

strategy papers; and national and regional indicative programmes. (Article 9 EEAS Decision) This function in particular has the consequence that the EEAS powers are beyond duties delegated to agencies, duties which are clearly circumscribed by specific objectives set by the delegating instrument. Indeed, the power given to the EEAS in development involves identifying funding priorities to attain objectives set at the EU's highest political echelons. This entails at least some policy discretion, beyond the scope of the *Meroni* doctrine. The fact that the Policy Unit of the Council Secretariat as well as DG RELEX and parts of DG Development are transferred *en bloc* to the EEAS supports that description of the EEAS' substantive policy role. While the nature of the EEAS' powers thus includes discretion beyond that of agencies, no independent decision-making powers are conferred. Indeed, all initiatives prepared by the EEAS still require approval by the appropriate political decision-making authorities of the Union. In development notably, the EEAS contributes to preparing decisions of the Commission, but does not take the decision itself.

In conclusion, a distinction must be made between the EEAS political role and its legal position: In policy terms the EEAS is without a doubt vested with significant influence on EU external relations policy-making; in legal terms it has not been formally conferred with powers to adopt instruments to as an EU institution steer EU policy.

That being the assessment of the EEAS, does that mean that this body should then be considered an auxiliary body to the EU institutions *pur sang*? As mentioned, according to Article 1 of the EEAS Decision, the Service is placed "under the authority" of the High Representative. Article 2 of the Council Decision describes the EEAS' tasks, and contains two paragraphs. The first states that it is to 'support' the High Representative and the second says that it is to 'assist' the presidents of the European Council and the Commission, and the Commission itself in exercising their external relations functions. Given this statement of assistance and relationship of authority, might one view the EEAS' institutional position as similar to that of COREPER? (Article 240, 1 TFEU) This organ equally has great influence on EU policy-making, but possesses formally no independent decision-making powers. While politically and organisationally there is certainly no identity between COREPER and the EEAS, it may legally be the case? In its judgment on voting arrangements to the FAO, the Court of Justice stated that "Coreper is not an institution of the Communities upon which the Treaty confers powers of its own but **an auxiliary body of the Council**, for which it carries out **preparation and implementation work**."⁵¹ The consequence of the FAO judgment was that COREPER could not have 'adopted' a decision on how to vote at that international organisation, and that its decision did not resort legal effect. Instead the Decision of the Council was subject to the ECJ's review of legality. Recall furthermore that according to the Council rules of procedure "Coreper shall be responsible for **preparing the work** of the Council and for carrying out the tasks **assigned**

⁵⁰ See for an assessment of this power as against primary Treaty law: S. Duke and S. Blockmans, *op. cit.*

⁵¹ FAO judgment, para. 26 (emphasis added).

to it by the Council.” (Art. 19.1 Council Rules of Procedure⁵², emphasis added) Viewing the EEAS’ institutional position as identical to COREPER is however not entirely satisfactory. While there are certainly overlaps in its supportive tasks, COREPER is much more deeply connected to the Council than the EEAS. While the Committee of Permanent Representatives ‘carries out the tasks assigned to it’ by that institution, the Council Decision on the EEAS is unequivocal about its ‘separateness’ from the Council or the Commission and its ‘functional autonomy’. The EEAS is not an intra-institutional body responsible for attaining consensus among the Member States, it is an inter-institutional body with legal capacity under authority of the HR/VP.

Given the negotiation history to the EEAS these notions of functional autonomy and separateness should arguably be interpreted as meaning that in supporting the High Representative, the EU diplomatic service does not take instructions from the Council or the Commission. Its instructions come from the *office of the High Representative*,⁵³ who is in her turn accountable to the EU institutions proper – notably the Parliament. The EEAS is therefore not an auxiliary body to the EU institutions, it has no powers delegated to it by the institutions, nor is it an institution itself. The diplomatic service is certainly part of a command structure which runs vertically via the High Representative, then through to the Council and up to the European Council, but not horizontally as an institutional participant in the EU’s institutional balance, nor as part of an Institution itself.

To further situate its position of functional autonomy, one could compare the Service with the independence the European Central Bank. That EU institution has a strong measure of independence to avoid being captured by public or private interests. According to the TFEU the ECB “shall not seek or take instructions” from anyone at EU or Member State level. (Art. 130 TFEU) The institutional position of the EEAS has a similar rationale: sitting (slightly uncomfortably) atop what were formerly first and second pillar EU competences, it should neither be a purely intergovernmental or communitarian body.⁵⁴ Hence, it can only take (most of its⁵⁵) instructions from the one office that combines the Council and Commission hat, that of Mrs. Ashton. This kind of strong definition of independence is therefore not applicable to the EEAS, and its functional autonomy lies somewhere

⁵² Council Decision of 22 March 2004 adopting the Council’s Rules of Procedure, O.J. L 106/22, 14.4.2004.

⁵³ It should be noted that the Heads of the EU delegations can receive instructions from the Commission in areas where they exercise powers conferred upon it by the Treaties. Otherwise the Delegations only receive instructions from the High representative (Art. 5.3 EEAS Decision).

⁵⁴ Note that trade is entirely excluded from the EEAS’ ambit. That this separation is somewhat artificial is illustrated by the appointment of the new head of delegation to the WTO on 23 November 2010. Indeed, it was Catherine Ashton who appointed the former deputy head of the EU delegation in Washington to that crucial position for the EU’s trade policy. In her statement, she said “As I continue the process of setting up the External Action Service I am delighted to appoint Angelos Pangratis as the new head of the EU Delegation to WTO. The Geneva WTO Delegation is central to the delivery of the EU’s common trade policy.” See Document A 237/10. High Representative / Vice President Ashton, 23 November 2010, Brussels.

⁵⁵ See note 54 above.

‘in between’ that enjoyed by the ECB and by COREPER. A further analogy between the EEAS and the European Defence Agency may serve to qualify where on the sliding scale the diplomatic service finds itself. In the Joint Action establishing the EDA it is stated that the Agency “shall act under the Council’s authority” (Art. 1.2 EDA Joint Action⁵⁶), whereas the EEAS “shall be placed under the authority” of the High Representative. (Art. 1.3 EEAS Decision) Arguably the EDA formulation is more constraining since it will only ‘act’ under the authority of the Council, given also the clearly circumscribed mandate of Article 45 TEU; whereas ‘being placed’ under the HR’s authority implies carrying out tasks within broad chalk lines set by the chain of command.⁵⁷ That interpretation is in line with the EEAS being “a functionally autonomous body of the European Union”: it has less autonomy than the ECB, less than the institutions proper, but more than COREPER or the EDA.

3.4 The EEAS’ actions and the Court of Justice of the European Union

Returning to the description of the tasks of the High Representative, how then should the nature of the EEAS’ powers in ‘assisting’ and ‘supporting’ her to fulfill that mandate be defined? What legal consequences do acts of the EEAS entail, and can they be reviewed by the ECJ? What is arguably certain is that the *formal* powers of the EEAS go further than those of COREPER: Whereas the Court decided that COREPER is a purely preparatory organ which cannot adopt decisions which resort legal effect vis-à-vis third parties, the EEAS has the ‘legal capacity to perform its tasks and attain its objectives.’ Recalling the parallel with EU agencies, the EEAS Decision does not give the Service any powers to adopt individual and binding decisions vis-à-vis third parties.⁵⁸ However, in the EEAS Council Decision one can find at least two explicit instances where actions of the EEAS will directly resort legal effect, or indirectly affect legal positions:

- First, the EEAS has been explicitly given the possibility of concluding “service-level arrangements” in accordance with Article 3.3 of the Council Decision. These kinds of acts could potentially entail legal effects vis-à-vis third parties, within the meaning of Article 263 TFEU on the review of legality. Given that no such arrangements have as of yet been negotiated, their content is uncertain. However, one possible example which has already been sig-

⁵⁶ Quoted above.

⁵⁷ Compare this further with Article 4.1 on the Central administration of the EEAS which states that “The EEAS shall be managed by an Executive Secretary-General who will operate under the authority of the High Representative.” Operate is arguably also more restrictive than ‘being placed under the authority’.

⁵⁸ Given that the purpose of this contribution is to provide a more macroscopic look at the new institutional balance, I do not specifically study the issue of staffing the EEAS and decisions which may pertain individually to them.

- nalled is an inter-service agreement on the support services the EEAS will receive from the Council General Secretariat.⁵⁹
- Second, the EEAS has been given a substantial role in the multi-annual programming cycle for development. Article 9.3 of the EEAS Decision states that “the EEAS shall contribute to the programming and management cycle for the [financing instruments pertaining to development] on the basis of the policy objectives set out in those instruments. It shall have the responsibility for preparing the ...decisions of the Commission regarding the strategic, multi-annual steps within the programming cycle.” The final sentence of this passage implies that the EEAS is vested with what could be (perhaps boldly) called ‘quasi-institutional’ prerogatives in the process of implementing EU development policy. Part of the task which was previously carried out by DG Development under the authority of the Commissioner for development has now been transferred to the EEAS for reasons of coherence in policy-making. While this is borne out at the level of secondary law, the formulation of the EEAS’ relationship with the Commission implies a set of prerogatives which are reminiscent of institutional prerogatives in the EU decision-making process. In the case of the EU institutions proper this would be captured by the principle of institutional balance at the level of primary law. That principle does not apply to the EEAS – at this stage in its development at least – but the Council Decision is an EU instrument laying down policy prerogatives of the EEAS with legal binding effect.

In sum, while practice will be required to further define the nature of the EEAS’ actions as a legal actor in the EU legal order, there should be no doubt that the Service’s actions may resort, or be directly or indirectly endowed with legal effect. That is a finding crucial to considering whether the EEAS’ actions could be subject to review of legality before the Court? Additionally, could the EEAS itself seek legal enforcement of its prerogatives before Union Courts, or should Union institutions have to do so on its behalf? If so, would Mrs. Ashton have to act via the Council or the Commission, and would that not be schizophrenic if it pertains to an inter-institutional conflict between these two actors?

Continuing the parallel of agencies; an agency such as Office for the Harmonization of the Internal Market has been endowed with final administrative powers is subject to full review by the Union Courts. While the EEAS does not have final decision-making authority that resembles the position of that Office, it can conclude inter-service arrangements, it possesses legal capacity of which the full extent of its use is not yet known, and it has what resembles institutional prerogatives which could be infringed upon by the Commission.⁶⁰ If perhaps not self-evident,

⁵⁹ General Secretariat of the Council to COREPER, Note on the annex to the draft Decision Establishing the organization and functioning of the EEAS, 8804/10, 20 April 2010, 2.

⁶⁰ See more elaborately on this caselaw in the post-Lisbon Treaty setting B. Van Vooren, ‘The Small Arms Judgment in an Age of Constitutional Turmoil’, 14 *EEA Rev.* (2009), 231-248. See also under the Nice-Treaty legal setting from the same author: ‘EU/EC External Competences

there should be no doubt that the new institutional setup of EU external relations has the potential of leading to inter-institutional litigation. One such possibility is the following: Recall that the October 2009 report of Parliament on the EEAS expressed concern over the position of the EEAS in EU development policy, and that the development community was concerned that development objectives might be subjugated to foreign and security policy objectives. While formally the first and second pillars have been abolished, this distinction remains in the substance of the TEU and TFEU. (Art. 40 TEU) The CFSP remains separate in chapter two Title five of the TEU, and EU development competence remains in the TFEU. (Art. 208 TFEU) This distinction has in the past led to litigation between the Commission and the Council, where the former argued that the latter had infringed upon the EC's development competence by adopting a decision to combat illegal trade in small arms and light weapons.⁶¹ Where the EEAS has been set up to overcome that decades-old schism of EU external relations, it could end up in the eye of the storm on continuing disagreement on the security-development nexus in EU external policy.

Two scenarios ought then to be considered: whether actions by the EEAS can be subject to review under Article 263 TFEU (former article 230 TEC); and whether the EEAS itself could seek to protect its prerogatives or legality review of acts that are of direct concern to it.

As regards the first scenario, actions of the EEAS could indeed be subject to review by the Court of Justice. The absence of legal personality of the EEAS has no bearing on that issue, and the formulation of Article 263 TFEU leaves no doubt that acts of the EEAS could be reviewed: "acts of bodies, offices or agencies of the Union" can be reviewed by the Court, on the condition that they are "intended to produce legal effects vis-à-vis third parties." Two further questions then emerge: Does the EEAS have the legal capacity to adopt instruments that produce legal effects against third parties? And if yes, to which extent is review complicated due to the position of the EEAS in the CFSP? The first issue has been previously touched upon: The EEAS' legal capacity is functional towards attaining its objectives, i.e. circumscribed by its objectives, although the Council Decision is entirely silent on the kinds of acts the EEAS could independently adopt with legal effect. Silence on that issue does not necessarily entail absence of such powers, though in this contribution I have argued that the Service has no independent decision-making authority. The form of acts resorting legal effect has never been considered relevant for the Court of Justice,⁶² and this means that acts of the

after the Small Arms Judgment', 14 *EFA Rev.* (2009), 7-24. Further: C. Hillion and R. A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness', 46 *CML Rev.* (2009), 551-586; A. Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences', in A. Dashwood and M. Maresceau (eds.) *Law and Practice of EU External Relations* (Cambridge, New York, Cambridge University Press, 2008), 70-103.

⁶¹ Case C-91/05, *Commission v Council (Small Arms/ECOWAS)*, [2008] ECR I-03651.

⁶² Case C-60/81 *IBM v Commission* [1981] ECR 2639, para 9.

EEAS could for example be reviewed for being ultra vires. Furthermore, its participation in the policy-making process is such that institutional prerogatives are potentially at stake – especially in relation to the security-development nexus – and the EEAS can be party to “service level arrangements” to ensure their protection. However, this notion of ‘arrangements’ used in Article 3 of the EEAS Council Decision was without a doubt chosen to differentiate it from ‘inter-institutional agreements’.⁶³ The latter have now been giving explicit legal basis in the Lisbon Treaty, and that article is explicit that they can be legally binding. (Article 295 TFEU) The choice for a different name thus implies an intention by the drafters of the Decision to avoid agreements with legal effect; although it could also be read as being due to the fact that the EEAS is not an institution. Legal effect is therefore not *a priori* excluded, and in any case, in the past the Court has ruled that the form in which acts having legal effects is immaterial for review under Article 263 TFEU. Recall then that Article 2 in the EEAS Decision spoke of the EEAS tasks being to support the Council and Commission, without prejudice to these institutions’ normal tasks. Insofar as these inter-service arrangements outline which are the ‘normal tasks’ of the Council or Commission as against the EEAS, such arrangements cannot be denied the capacity of affecting the legal interests of either these EU institutions or the functionally autonomous body of the Union. Given the procedure laid down in Article 263 TFEU and the grounds for review of legality, it remains to be seen whether a case with the EEAS as respondent could actually emerge? Assuming that a dispute would not arise over an inter-service arrangement itself, but rather over an act that infringes it, the inter-service arrangement could be seen as ‘any rule of law relating to the application of the Treaty’ as stated in Article 263 TFEU. However, the act of the EEAS would have to be the definitive act which resorts legal effect. Given the character of the EEAS as assisting/supporting the High Representative, it is more likely that such would be an act of the Commission or Council. Then, as the Court pointed out in *IBM v. Commission* “whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step.”⁶⁴ That would then have the politically awkward consequence that cases on prerogatives of the EEAS would be litigated between the Commission and Council. The EEAS and the unique position held by Mrs. Ashton which combines the roles of High Representative for the CFSP and Vice President of the Commission were exactly drawn up to pre-empt such inter-institutional disputes, and avoid that such disputes would hamper coherent and effective EU external action. A further legal question is then whether the Institutions could in fact act on an infringement of the EEAS’ prerogatives laid down in secondary law? The EEAS might not be the actor whose acts constitute the defi-

⁶³ An assessment confirmed by Mr. Gilles Marhic at the Conference on the EU Diplomatic System after Lisbon, *op. cit.*

⁶⁴ Case C-60/81 *IBM v Commission*, *op. cit.*, para 12.

nite legal act, but it is arguably not compatible with the EEAS Decision that the Institutions act on behalf of a functionally autonomous body of the European Union.

The second scenario is then whether the EEAS itself could enforce its own prerogatives laid down in an inter-service arrangement, or any other legal document? Or would perhaps the High Representative/Vice President have to act on its behalf, and is that even possible?

Assume that the EEAS has concluded an agreement with the Commission DGs involved in the implementation of EU development policy, thereby further fleshing out EEAS – Commission cooperation and their respective ‘normal tasks’ as outlined in Article 9 of the EEAS Decision on ‘External Action Instruments and Programming’. The EEAS has a distinct role to play in the development programming cycle, prerogatives which are not those of the Commission and not those of the Council. According to Article 263 paragraph 1 TFEU acts of bodies of the Union intended to produce legal effects can be reviewed, and paragraph 5 adds that the acts setting up those bodies may lay down conditions concerning actions brought by natural or legal persons against such acts. That fifth paragraph is a new addition inserted with the Lisbon Treaty, and is directed at the organisation of review of individual acts of EU agencies, for example trademark cases directed against OHIM. That article is silent on the standing of such Union bodies themselves as against EU institutions, and in such a case the rules on standing for non-privileged applicants provide the only possible avenue. (Art. 263 para 4 TFEU.) That of course raises a number of issues: First of all, that paragraph speaks of ‘any natural or legal person’ which may institute proceedings. That could encompass the EEAS, but it may be problematic that – as seen – it has not been conferred legal personality. That is a minor obstacle as the Court could resolve that by stating that legal personality can be logically implied from it exercising its legal capacity. Second, the case-law on direct and individual concern developed in relation to direct actions from individuals in the Member States is very strict, and seems hardly suitable to the present hypothesis. Illustrative is that so far – to the best of this author’s knowledge – there are no cases where Union bodies such as agencies have brought cases against an EU institution.⁶⁵ Third, the grounds for review in Article 263.4 TFEU are restricted to individual acts addressed to that person and to regulatory (and therefore non-legislative) acts which directly concern them. A case relevant for the present inquiry would be *Fédération nationale d’agriculture biologique des régions de France*. Here the Court refused standing to the applicant where it argued a breach of the institutional balance since it was not individually and directly affected by breach of that principle of EU law.⁶⁶ Suppose that the procedural prerogatives laid down in Article 9 EEAS Decision on development are not respected by the Commission. It is likely not possible for the EEAS – not

⁶⁵ OHIM itself has of course been subject to many proceedings, and setting up an agency has also been subject to an action by the United Kingdom. See Case C–217/04, *United Kingdom v Parliament and Council (ENISA)*, 2 May 2006.

⁶⁶ Case C-345/00 P *Fédération nationale d’agriculture biologique des régions de France v Council* [2001] ECR I-3811, para 41.

being an institution itself – to invoke a breach of the institutional balance and be individually affected? If its prerogatives laid down in the Council Decision have not been respected, it is not even certain whether the institutional balance is the relevant legal ground for review? The EEAS falls outside of the institutions named in Article 13 TEU, and its prerogatives pertain to the implementation of rules laid down in secondary law, not primary law. The same reasoning *mutadis mutandis* applies to the office of the HR/VP, and hence, in the end, should legal enforcement of EEAS prerogatives be necessary, it would have to be the Council or Commission defending the EEAS' interests as the case may be. The ground for review in such cases would then most likely be overstepping competence boundaries as seen in the litigation over the initiatives combating trade in small arms, and not so much the principle of institutional balance.⁶⁷ However, aside from the political awkwardness due to Mrs. Ashton's different institutional hats, it is then unsure whether that scenario is possible since the EEAS is 'functionally autonomous' and is 'separate' from those institutions. In sum, should the institutional or substantive position of the EEAS be the subject of litigation, it will most likely be as the passive subject of proceedings between Parliament, Commission, or Council. Where the EEAS Council Decision foresees that the EU's Diplomatic Service will have a legal department, its role is unlikely to be one of litigation before the ECJ. (Art. 4.3.b EEAS Decision)

Against these – admittedly abstract – procedural considerations, a further obstacle is the fact that the Court's jurisdiction has been limited in the area of CFSP to the monitoring of Article 40 TEU (the non-affect clause) and review of legality of decisions taken on the basis of Article 275 TFEU (sanctions). In the Eurojust judgment, the ECJ found Spain's action to review the legality of staff appointment measures inadmissible largely because it was an EU rather than an EC agency.⁶⁸ Article 263 TFEU now explicitly includes bodies such as agencies or the EEAS, but the restriction of jurisdiction remains. This implies that acts with legal effect of (or perhaps: acts in which it is involved) the EEAS could be subject only to partial review by the ECJ, depending on whether the disputed act is outside of the CFSP, unless the dispute itself concerns whether the act should or should not have been adopted on a CFSP or other EU legal basis.⁶⁹

In sum, the sui generis nature of the EEAS has broken new ground for review of legality by the Court of Justice. While scenarios in which the EEAS is an applicant or respondent before the Court are difficult to envisage, they cannot be a priori excluded. The EEAS is sure to acquire significant influence over EU decision-making in the formation of EU external relations and questions of institutional positioning, form and policy substance in which it is involved are sure to

⁶⁷ Case C-91-05, see note 62.

⁶⁸ Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077.

⁶⁹ The fact that legislative acts are excluded in the CFSP context has no bearing on this issue, since the distinction legislative vs. non-legislative has no bearing on whether or not an act has legal effects. See for more on this issue: M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', 45 *CML Rev.* (2008), 617-703, at 624.

arrive in due course. The key message from this theoretical inquiry is that, as the Court argued in *les Verts*, in a Union based on the rule of law⁷⁰ lacunae in legal accountability are to be avoided.

4 THE EEAS' LEGAL DUTY OF COOPERATION

The core ratio behind setting up Mrs. Ashton's triple-hatting and the structures and procedures that tie EEAS to the Union's other institutions was exactly to avoid inter-institutional disputes. Exemplary of that reasoning is the rather lengthy Article 3 of the Council Decision, which spells out the duty of cooperation between the EEAS and various other services and institutions. The duty of cooperation is a fundamental principle of the law governing EU external relations,⁷¹ and there should be no doubt that this principle which governs interactions between EU institutions and member states in the pursuit of EU Treaty objectives equally applies to the EEAS.

The general duty of sincere cooperation is laid down in Article 4.3 TEU, with a specific provision for the CFSP in Article 24.3 TEU and a duty applicable specifically to the EU institutions in Article 13.2 TEU. While successive case-law of the ECJ has elaborated a duty that arguably weighs more heavily on the shoulders of the Member States than on the institutions in the vertical relationship,⁷² Article 3 of the Council Decision articulates elaborately how the EEAS shall cooperate with other bodies of the Union. The first paragraph of Article 3 reads that it "shall support and work in cooperation with the diplomatic services of the Member States, as well as with the General Secretariat of the Council and the services of the Commission, in order to ensure consistency between the different areas of the Union's external action and between those areas and its other policies." Although this formulation gives the impression of a 'one-way street' incumbent on the EEAS, as an elaboration of the more general duty of sincere cooperation this article should arguably be read as going in both directions. This especially since the Court of Justice has both in the horizontal inter-institutional, and the vertical EU-Member State context emphasized this duty's reciprocal nature.⁷³ In the broader institutional balance the EEAS will henceforth assume the position of interlocutor between all different levels and actors that form EU external relations, and that

⁷⁰ That is the reasoning which brought the Court to include acts of Parliament to be included in judicial review. Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339.

⁷¹ M. Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance', in M. Cremona and B. De Witte (eds.) *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford, Hart Publishing, 2008), 125-169.

⁷² See for example the most recent ruling of the Court of Justice in C-246/07 *Commission v Sweden* (Stockholm Convention on persistent organic pollutants), nyr.

⁷³ C. Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the 'Duty of Cooperation'', in C. Hillion and P. Koutrakos (eds.) *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford, Hart Publishing, 2010), 87-115.

objective can but be achieved if there is full reciprocity in cooperating towards a coherent EU external policy. The negotiations leading up to this provision do however paint a different picture.⁷⁴ The version of the EEAS Decision as originally proposed by Mrs. Ashton on 25 March 2010 only spoke of ‘working in cooperation’, and did not mention that the EEAS ‘shall support’ the diplomatic services of the Member States.⁷⁵ Blockmans has rightly argued that that change in language should be read in step with the change to Article 5 (9) of the EEAS Council Decision.⁷⁶ The proposal of Mrs. Ashton indeed originally spoke of EU delegations working in close cooperation with the diplomatic services, and stating that they shall provide all relevant information “on a reciprocal basis”. The final version of Article 5 (9) now reads that EU delegations shall work in close cooperation and share information with the diplomatic services, without mentioning said reciprocity. These *travaux préparatoires* thus illustrate the tension that was outlined at the outset of this paper. It is almost a truism to state that reciprocal cooperation is indispensable towards coherent EU external relations, but other interests often gain the upper hand in EU institutional negotiations to the detriment of the coherence objective in EU external relations. (Articles 21 TEU and 2 (1) EEAS Decision)

That desirable sense of reciprocity is explicit in the next paragraph of Article 3 EEAS Decision, which concerns specifically the relationship between the Commission and the EU diplomatic service. There it is stated that the EEAS and Commission services “shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions except on matters covered by CSDP”. That passage thus starts out well by employing the words “each other”, implying the kind of reciprocity required to attain coherent external relations. Unfortunately the scope of this obligation is limited by the use of ‘within their respective functions’ and by excluding matters covered by CSDP. The latter exclusion is understandably the consequence from Member States’ sensitivities regarding security and defence matters,⁷⁷ though again raises questions from the perspective of policy coherence. Considering the example of coherence between EU development and security initiatives, CSDP missions commonly concern the more strategic deployments of the Union in crisis areas. Development is generally viewed as the structural socio-economic engagement of regions beyond the Union’s borders. However, the dividing line between CFSP and development is sometimes thin, and initiatives such as those undertaken under the Stability Instrument⁷⁸ are

⁷⁴ See L. Erkelens and S. Blockmans, *op. cit.*

⁷⁵ Credit goes to Prof. Dr. Steven Blockmans for pointing this out to me.

⁷⁶ *Idem.*

⁷⁷ X. Kurowska, *The Politics of a Policy: Framing European Security and Defence Policy* (Doctoral Thesis, European University Institute, Florence, 2008); M. Merlingen and R. Ostrauskaitė (eds.), *European Security and Defence Policy – An Implementation Perspective* (London, Routledge, 2008).

⁷⁸ See for example the policy priorities laid out in ‘The Instrument for Stability – Multi-annual Indicative Programme 2009-2011’, C(2009)2641, 8.4.2009.

arguably a follow-up to the objectives pursued by EU CSDP missions.⁷⁹ Hence, there would be no harm in legally requiring a duty of reciprocal consultation where such could be evidently useful to attain policy coherence. However, given that the second paragraph of Article 3 only excludes a duty of consultation on CSDP, one can conclude through an *a contrario* reasoning that between the Commission and the EEAS (and of course *within* the EEAS!), a weaker duty of information does exist in initiatives where CSDP and other Union policies such as development are interrelated. That argument is borne out by Article 21 TEU (to which the EEAS Decision regularly refers), the constitutional requirement of external policy coherence.

In paragraph 4 of Article 3 of the Council Decision, the EEAS is mandated “to extend appropriate support and cooperation” to the other institutions and bodies of the union, “in particular to the European Parliament.” While the EP gets special mention for cooperation, it is significant that this institution is mentioned separately from the earlier paragraphs, and the key question is then what constitutes ‘appropriate support’ from the EEAS to the parliament, and whether that is a weaker obligation of cooperation from previous paragraphs? When contrasting the notion ‘appropriate support’ with the obligation of consultation between the EEAS and the Commission in Article 3.2, it is safe to assume that the EEAS’ obligations under this article imply a status quo. At the very least it requires the continuation of appearances and discussions such as those by Javier Solana and Benita Ferrero-Waldner before the plenary and in the relevant committees in the past.

The relationship between the European Parliament and the EEAS cannot be captured solely through the prism of that provision of the EEAS decision on the duty of cooperation. Through the Quadrilogue Parliament has obtained from HR Ashton an agreement on a ‘political declaration on political accountability’, as well as ‘a statement to the plenary of the European Parliament on the basic organization of the EEAS central organization’. These documents are important towards a better understanding of two aspects of the new institutional balance in EU external relations: the relationship of accountability of the EEAS to the European Parliament, and more generally, the role of Parliament in EU external action.

5 THE EEAS’ RELATIONSHIP WITH THE EUROPEAN PARLIAMENT

The declaration on political accountability⁸⁰ (DPA) by the High Representative reflects many of Parliament’s past complaints over its role in EU external relations. According to the single introductory paragraph, this declaration addresses Ashton’s relationship with Parliament in line with its role in ensuring political

⁷⁹ While the EEAS has a say in the multi-annual programming cycle of the Stability Instrument, the day-to-day administration and implementation remains with the Commission.

⁸⁰ Draft Declaration by the High Representative on political accountability, *op. cit.*

accountability, as well as the adjusted role of the High Representative through the new TEU. The declaration is explicit that it builds on past commitments on consultation, information and reporting undertaken by Solana and Ferrero-Waldner. Importantly, the declaration is applicable to all functions of Mrs. Ashton, i.e. both in her role in the CFSP as well as a member of the Commission and President of the Foreign affairs council.

The first numbered paragraph of the political declaration is an interpretative provision to Article 36 TEU which lays out the obligation of the HR to consult with Parliament ‘on the main aspects and the basic choices of the CFSP’. An important concession on the part of the High representative is that exchanges of views on mandates and strategies on the CFSP will take place *prior* to their adoption rather than *ex post facto*. However, the conduct of foreign policies often requires a certain expediency and level of secrecy, and balancing political accountability and democratic involvement against those exigencies can be challenging. The DPA reflects this when it comes to hearings of newly appointed Heads of Delegations and EU Special Representatives. Parliament requested that it could hold hearings of new potential appointees to countries and organizations the Parliament considers of strategic importance. Committing to such an obligation would have gone too far for the HR,⁸¹ and Parliament can now hold ‘exchanges of views’ (which the Declaration explicitly says is different from a hearing)⁸² after their appointment but before they take up their posts. Although not as far-reaching as initially sought-after, Elmar Brok was pleased with this right to ‘hear’ EU ambassadors. Early October 2010, this arrangement soon led to serious disagreement between Parliament and the HRVP in the lead-up to the appointment of the new EU envoy to Japan, Austrian diplomat Hans Dietmar Schweisgut.⁸³ Ms. Ashton called off the plan to allow these hearings to go forward after the EP’s foreign affairs committee had planned to hold hearings in public, and before having been formally installed in their posts. The spokesperson for the High Representative stated that “It is the HR/VP’s wish that if these hearings eventually take place, they should take place as previously agreed with parliament, *in camera*. The HRVP reminds everybody that these hearings are in no way so-called Congressional-style hearings.”⁸⁴ Practice will indeed have to shape the final outlook of the EU’s external relations machinery, and legal and institutional rules paint only part of the picture.⁸⁵

⁸¹ C. O’Shea, ‘Ashton cedes ground to Parliament’, *Europolitics*, 11 May 2010.

⁸² Paragraph 5 of the political declaration.

⁸³ EU Observer, ‘Ashton calls off EU ambassador hearings’, <<http://euobserver.com/9/30957/?rk=1>> (last consulted on 5 October 2010).

⁸⁴ *Idem*.

⁸⁵ For a more elaborate discussion on the relationship between Parliament and the EEAS see L. Erkelens and S. Blockmans, *op. cit.*

6 CONCLUSIONS: PLUS ÇA CHANGE, PLUS ÇA RESTE LA MÊME CHOSE?

Two threads of argument ran through this working paper, the first related to the legal-institutional position of the EEAS in the European Union, the second concerning its impact on that ever elusive goal of coherent EU external relations.

On the first point, the EEAS certainly deserves its *sui generis* label. The new diplomatic service is partially a preparatory organ to the institutions, possibly an organ of the Union for purposes of international representation, an EU institution for the purposes of budget and staff, with powers that resemble but go beyond those of EU agencies. While the comparison never led to a finding of complete identity between the EEAS and the chosen yardstick, it did provide useful insight into the institutional and legal position of the EEAS. The diplomatic service does not have legal personality, which may be due to political sensitivity as to its institutional (in)dependence now and in the future. In that sense its position was closer to that of the Council General Secretariat than to that of EU regulatory agencies. As to its independence, the EEAS is not in a position analogue to that of the European Central Bank, but it is also not as dependent as COREPER on the Council. In substance, the EEAS' powers do not go as far as some of the EU agencies which are endowed with powers to take individually binding decisions with legal force. Nonetheless, its functional legal capacity, its possibility of concluding serve-level arrangements and its specific prerogatives in EU external policy making are such that legal effects of its acts or actions cannot a priori be excluded. It was argued that this has important consequences on the EEAS' position before the Court of Justice.

Second, does setting up the EEAS with such a complex legal framework do anything to resolve, alleviate, or continue the decades-old tension of EU external relations under a new guise?

Article 3 on the duty of cooperation is exemplary of the carefully crafted new institutional balance in EU external relations: Clearer links have been established with national diplomatic services, though practice will show whether that is a reciprocal cooperative relationship. Arguably, the general duty of cooperation laid down in the Treaties requires that it is. The legal obligations of cooperation are the strongest between the Commission and the EEAS, while relations with the Council and its 'normal tasks' are less clear. While not covered exhaustively in this article, it is clear that the accountability of the EEAS to Parliament is extensive. The separation of CFSP/CSDP from former Community competences remains, as does the tensed relation between Parliament's wish for greater involvement in external relations, and the Council's push to keep that institution out. Much has changed, so does everything remain the same?

As to its future contribution to coherent and effective EU external relations, no inter-institutional reconfiguration is perfect and the diplomatic Service is clearly a compromise between the many different institutional and member state interests involved. As was argued at the outset of this article, EU external relations have always developed in a piecemeal fashion, as a Harlequin's costume of failed or successful initiatives, institutional and political innovations, and ad hoc responses

to geopolitical and socio-economic stimuli within and outside the European continent. This is exactly the case with the EEAS as well. In many areas the new diplomatic service has merged elements that used to function separately, but past tendencies of delimitation remain. The role of the EEAS as an interlocutor between various desks, services and institutions, and the merger of staff from the three key spheres of authority in EU external relations provides good ground for avoiding conflicts such as those in small arms. However, the legal and institutional innovations are far from perfect and will require further elaboration through practice. Success in implementing a coherent external voice for the EU will then not necessarily depend on further tweaking of EU institutional structures or EU law, but on commitment off all those directly involved to make the EEAS work. The spat between Mrs. Ashton and Parliament of early October 2010 shows that this is very much a work in progress.

Should review of the EEAS' institutional setup be necessary – and this article has indicated that several lacunae remain – the final provisions of the EEAS Decision foresee that by mid 2013 the High Representative will review the functioning and organization of the EEAS. Subsequently, the Council should make a decision on adjusting the Service as appropriate no later than the beginning of 2014. The importance of such an a priori built-in mechanism should not be underestimated, given the tendency of EU external relations to develop in a piecemeal fashion as against international geopolitical and socio-economic events. When the CFSP was inserted into the TEU with the Treaty of Maastricht, this fledgling policy formed an awkward compromise between what could be crudely termed the intergovernmentalist and communitary camps of the 1992 IGC. The 'pro-Community' camp had clutched the compromise that the CFSP would be put to review by 1996, in what became the Amsterdam Treaty. Whereas the Amsterdam Treaty has often been viewed as a relative failure, some important innovations took place in the sphere of EU foreign policy, among others, the streamlining of CFSP instruments, the creation of the post of High Representative and EU treaty making powers. Those innovations took place against the debacle in the former Yugoslavia, and arguably strengthened the CFSP on its path to maturation. Similarly, the EEAS will have to continue along this path of 'progressive experimentation' that marks the development of coherent and effective EU external action.

In conclusion, the EEAS is not more of the same, but has the potential for being the sea-change that the Union needs to bridge its decades-old capability-expectations gap.⁸⁶ Perhaps it is appropriate to end as this article started, by paraphrasing the Finnish Foreign Minister: "The EU should pursue a dignified foreign policy." This implies "first, putting our own house in order and avoiding mixed messages; second, speaking in harmony across all 27 Member States; and thirdly, speak softly, in compromising terms, employ a big carrot, and hold on to European values."⁸⁷ This author is optimistic – albeit cautiously – on the future role of the EEAS in attaining that goal.

⁸⁶ C. Hill, 'Capability-Expectations Gap, or Conceptualizing Europe's International Role', 3 *Journal of Common Market Studies* (1993), 305-328.

⁸⁷ Foreign Minister of Finland Alexander Stubb, speaking at an event Organized by the Danish Institute for International Studies, *op. cit.*