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CLEER

The European Union's external relations a year after Lisbon

Panos Koutrakos (ed.)

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**THE EUROPEAN UNION'S EXTERNAL RELATIONS
A YEAR AFTER LISBON**

PANOS KOUTRAKOS (ed.)

CLEER WORKING PAPERS 2011/3

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THE EUROPEAN UNION'S EXTERNAL RELATIONS A YEAR AFTER LISBON – INTRODUCTION

Panos Koutrakos*

During the Russia-Georgia crisis in 2008, President Sarkozy of France, then holder of the rotating EU Presidency, argued that, had the Lisbon Treaty entered into force, the Union would have had the appropriate institutions to deal with international crises.¹ This statement illustrates the high expectations which the Lisbon Treaty, raised about the Union's international posture.

These expectations may appear justified in the light of the central position which the Union's external relations occupied right from the start of the political and legal process which led to the drafting and ratification of the Treaty Establishing a Constitution for Europe, and, later, the Lisbon Treaty. The Laeken Declaration on the Future of the European Union, which initiated the process of reform of the Union's Treaties in December 2001, referred prominently to 'Europe's new role in a globalised world' and raised the bar quite high: 'Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?'.² The role it envisaged was directly linked to 'its responsibilities in the governance of globalisation' which 'Europe needs to shoulder'.³

The Lisbon Treaty maintained this focus, and was widely viewed as enabling the Union to carry out a more effective and coherent foreign policy. Indeed, the coherence of the EU's international action as a normative and political imperative has been central to any assessment of the EU's international affairs. This was acknowledged in the mandate of the 2007 Intergovernmental Conference which mentions it in its very first paragraph.⁴ Similarly, the 2008 Report on the Implementation of the European Security Strategy states that '[t]he provisions of the Lisbon Treaty provide a framework to achieve [the coherence of the EU's action through better institutional co-ordination and more strategic decision-making].'⁵ This focus on the coherence of the EU's external action becomes all the more pronounced in the light of the considerable energy which the Union's institutions have spent in order to address this issue in specific areas such as

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¹ 'La Russie doit se retirer sans délai de Géorgie', *Le Figaro*, 18 August 2008.

² European Council, Laeken Declaration on the Future of the European Union, 14-15 December 2001, at 2.

³ *Ibid.*

⁴ See IGC 2007 Mandate, Council SG/11218/07, POLGEN74, para.1.

⁵ *Report on the Implementation of the European Security Strategy: Providing Security in a Changing World*, Brussels, S407/08, 11 December 2008, at 9.

development⁶ and humanitarian aid,⁷ but also more generally in the context of the European Security Strategy which made it one of the main priorities for the Union's international role,⁸ and the 2008 Report on the Implementation of the European Security Strategy reaffirmed it.⁹ Against this background, it is hardly surprising that the main changes introduced by the Lisbon Treaty in the area of external relations aim at enhancing the coherence of the Union's external action.

Against this background of high expectations and even higher ambition, it is appropriate to pause and examine the first year of the application of the Lisbon Treaty provisions. Has the revamped institutional framework enhanced the coherence and the effectiveness of the Union's external action? Has the visibility of the Union's role been raised? What has been the impact of the abolition of the pillar structure for the conduct of the policies which were governed by different sets of rules under the pre-Lisbon constitutional configuration? And to what extent has the interaction between the Union's institutions been facilitated by the new arrangements? Even if it is still too early to assess the impact of some of the changes, for instance the European External Action Service, the story of its genesis is instructive and the different dynamics which have underpinned its establishment worth-examining.

Based on papers given at a workshop organised by the University of Bristol in February 2011 under the aegis of the Jean Monnet Chair and with funding by the European Commission, this collection does not purport to provide an exhaustive analysis of the changes introduced at Lisbon in the area of external relations. Instead, its aim is threefold. First, it sheds light on the practice of the Union institutions and the various actors in the first year of the application of the Lisbon Treaty, hence providing a first overview of the legal and policy challenges raised by the implementation of the Union's new constitutional arrangements. Second, it gauges the implications of the Lisbon reforms in both legal and policy terms for the Union institutions, the Member States as well as third

⁶ See Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', *The European Consensus on Development*, OJ 2006 C 46/1. Also, the European Council Resolution on Coherence between the Community development cooperation and its other policies (Annex to Development Council meeting of June 5, 1997), and the subsequent documents by the Parliament (Resolution on the coherence of the various policies with development policy, B5-0117/2000, OJ 2000 C 339/208), and the Commission (Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *Policy Coherence for Development, Accelerating progress towards attaining the Millennium Development Goals*, SEC(2005) 455, COM (2005) 134 final, 12.4.2005. Furthermore, and following a request by the Council (on 19 November 2002), the Commission refers specifically to progress in terms of coherence in its annual report on development policy).

⁷ See Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission, *The European Consensus on Humanitarian Aid*, OJ 2008 C 25/1.

⁸ A Secure Europe in a Better World, European Security Strategy, 12 December 2003, at 13.

⁹ 'We must strengthen our own coherence, through better institutional co-ordination and more strategic decision-making', at 9.

parties. Third, it brings together different communities: legal scholars, legal advisers of the Union's institutions, legal advisers of Member States, and political scientists. Therefore, it approaches the Lisbon provisions on external relations from different perspectives, and addresses the different interests which have underpinned their application in the last year.

The first set of papers focuses on the impact of the Lisbon amendments on the Union's institutions. It starts off with a paper by Ricardo Gosalbo Bono which provides an overview of the Lisbon amendments, and points out the scope for the Member States and the Union's institutions to ensure their successful application. Esa Paasivirta sets out the ways in which the external representation of the Union has been affected, and navigates the often rocky waters where the interests of the Member States and the Union may clash. He also explores the ways in which the coexistence of the Member States and the Union may be managed, not least in the context of mixed agreements, in the light of the Lisbon amendments. Ricardo Passos focuses on the considerably stronger position which the Lisbon Treaty accords the European Parliament in the area of external relations, and explains how it has become an active participant in their conduct. He explores the mechanisms of cooperation between the Parliament and the other institutions, and makes suggestions about their improvement.

The paper in Part II seeks to provide the national perspective on the implication of the Lisbon changes. Ivan Smyth explores the implications of the Lisbon amendments for the management of the Union's external competences, the negotiation and conclusion of international agreements, and the external representation of the Union.

The third set of papers deals with substantive policies and new actors. Simon Duke tells the story of the establishment of the European External Action Service, identifies problems and makes concrete suggestions about its functioning and management which would enable it to make a positive contribution to the coherence of the Union's external action. Frank Hoffmeister explores the considerable impact of the new Treaty on the Union's trade policy and examines recent examples where this has brought about specific changes. He focuses on specific examples of the application of Article 207 TFEU in the first year of the application of the Lisbon Treaty, and sets out what he describes as the modernisation, politicisation, and democratisation of the Union's external trade policy. Geert De Baere tackles environmental policy as a case study of how the Union coexists with the Member States in the area of external relations, and focuses on the negotiations on a legally binding instrument on mercury within the framework of the United Nations Environment Programme. Finally, Steven Blockmans explores the implications of the Lisbon amendments for the Union's relations with its neighbours in the light of the political events of the last few months in the Union's periphery, and reflects on the interpretation of the 'special relationship' which is set out in the new provision of Article 8 TEU.

The starting point for all these contributions is that the conduct of the Union's external relations in general, and the application of the Lisbon amendments in particular, is a process in a state of constant flux. This collection provides a first attempt to reflect on the state of this process.

PART I
The Institutions

THE ORGANIZATION OF THE EXTERNAL RELATIONS OF THE EUROPEAN UNION IN THE TREATY OF LISBON

Ricardo Gosalbo Bono*

The Treaty of Lisbon has introduced major changes in the organisation of the external relations of the Union. The following lines assess those changes as well as how the changes have been implemented so far.

1. THE NEW UNION AS A SUBJECT OF INTERNATIONAL LAW

Pursuant to Article 1(3) of the (post-Lisbon) Treaty on European Union (TEU) “The Union shall replace and succeed the European Community”. By virtue of this provision the Union has indeed experienced a merger with the European Community both for internal purposes and for the purpose of international law.¹ The new entity that has emerged is a continuation of the old in a different form. In particular, the legal effects of the acts and international agreements of the institutions, bodies, offices and agencies of the Union prior to the entry into force of the Treaty of Lisbon are “preserved” (Article 9 of the Protocol 36 on the Transitional Provisions annexed to The Treaty of Lisbon). Therefore, in accordance with international law, the succession that has taken place has had the effect of the replacement of the former European Community and the continuation of the Union by the new Union in the responsibility for international relations.² In order to make the succession effective, the Union sent a series of *notes verbales* to third countries and international organisations communicating to them that, as from the date of the entry into force of the Treaty of Lisbon, the European Union exercises all rights and assumes all obligations of the European Community whilst continuing to exercise the existing rights and assume the obligations of the European Union (e.g. membership/other participating status). In addition, as from that date, all agreements between third countries and international organisations and the European Community/European Union, and all commitments made by the European Community/European Union to third countries and international organisations and made by third

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¹ The European Union has not replaced or succeeded to the European Atomic Energy Community, which continues to be governed by the EURATOM Treaty as it results from the amendments introduced by the Treaty of Lisbon (Protocol No. 2), which entered into force on 1 December 2009.

² E.g. Articles 2(1) (b) of the 1978 and 1983 of the Vienna Conventions on Succession of States in respect of Treaties, State Property, Archives and Debts.

countries and international organisation to the European Community/European Union, are assumed by the European Union. As from that date, the Delegation of the Commission of the European Communities accredited (to the Government of, or the appropriate international organisation) becomes the “Delegation of the European Union”.³

The new Union is founded on the new TEU and on the Treaty on the Functioning of the European Union (TFEU). Both treaties “have the same legal value” (Article 1(3) TEU). In those treaties the Union has explicitly been attributed legal personality (Article 47 TEU) within the limits of the competences conferred to it by the Treaties (principle of conferral, Article 5(1) TEU). Therefore, within those limits, although not a state, the European Union is a subject of international law and may act in international fora, conclude international agreements, is legally responsible according to international law, and possesses a right of legation (active and passive). In particular, the EU shall “establish all appropriate forms of cooperation” with the UN and its specialised agencies, the Council of Europe, the OSCE and the OECD, and shall “maintain such relations as are appropriate with other international organisations”, these provisions being implemented by the Commission and the High Representative (Article 220 TFEU). The former Commission delegations in third countries and at international organisations – which have become “Union delegations” and “represent the Union” – are placed “under the authority of the High Representative” and act “in close cooperation with Member States’ diplomatic and consular missions” (Article 221 TFEU), in particular by “ensuring that decisions defining Union positions and actions are complied with and implemented”, by “exchanging information and carrying out joint assessments” and by contributing “to the implementation of the right of citizens of the Union to protection in the territory of third countries” (Article 35 TEU and Articles 20 and 23 TFEU).⁴

2. GENERAL PROVISIONS ON THE UNION'S EXTERNAL ACTION

The international action of the Union is founded on the values of respect for human dignity, freedom, democracy, equality (of the Member States before the Treaties and equality between women and men), solidarity, the rule of law and respect for fundamental rights resulting from the Charter of Fundamental Rights of the European Union (which has “the same legal value as the Treaties” (Article 6(1) of the TEU))⁵, from the European Convention of Human Rights (to which the Union shall accede)⁶ and from the constitutional traditions common

³ See Draft notification to third parties before the entry into force of the Treaty of Lisbon, Document of the Council No. 16654/1/09 REV 1 of 27 November 2009.

⁴ See more extensively below.

⁵ Charter of Fundamental Rights of the European Union of 7 December 2000, OJ 2010, C 83/389. Poland and the UK have Protocol 30.

⁶ The Union shall accede to the European Convention for the Protection of Human Rights in compliance with the conditions laid down in Protocol No. 8 and Declaration 2. See also Article 17 of Protocol No. 14 to the European Convention on Human Rights (Strasbourg, 13 May 2004, CETS No. 194, entered into force on 1 June 2010), which inserted a new paragraph in Article 59 European Convention on Human Rights stipulating that “[t]he European Union may accede to this

to the Member States which “constitute general principles of the Union’s law” (Articles 2 and 6 TEU). In its relations with the wider world, the Union’s aim is “to promote peace, its values and the well-being of its people” (Article 3(1) TEU). It “shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, as well as to the strict observance and the development of international law, including respect for the principles of the UN Charter” (Article 3(5) TEU).

All the Union’s action on the international scene shall respect the principles and pursue the objectives of democracy, rule of law, human rights, equality and solidarity, UN Charter, international law, promotion of multilateral cooperation and good global governance (Article 21 TEU). The strategic interests and objectives of the Union’s external actions are identified by the European Council unanimously on a recommendation from the Council (Article 22 TEU). These objectives are pursued “by appropriate means commensurate with the competences which are conferred upon it by the Treaties” (Article 3(6) TEU).

3. COMPETENCES

3.1. General

As pointed out above, the external action of the Union is governed by the “principle of conferral”: the Union acts only to the extent that the TEU has specified objectives to be attained in common and only to the extent that the Member States have conferred competences on it (Articles 1, 2 and 5 TEU). The Union is not authorised “to legislate or act beyond its competences” (Declaration 24 annexed to the Treaty of Lisbon). In particular, while the Union may act “if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers” pursuant to Article 352 TFEU, this cannot serve as a basis for widening the scope of Union’s powers and cannot be used as a basis for adoption of provisions amounting to an amendment of the Treaties (Declaration 42). In addition, the exercise of the Union’s competences is governed by the principle of subsidiarity and proportionality (Article 5 TEU).

The Union possesses several types of external competences:

- Exclusive: customs union; competition rules for the functioning of the internal market; monetary policy on the euro; conservation of marine biological

Convention’. The Council of the EU adopted negotiating directives for the EU’s accession to the European Convention on Human Rights on 4 June 2010 and the negotiations started on 7 July 2010. See <http://www.coe.int/t/der/brusselsoffice/Articles/RestArticles/Jagland_Redding_070710_en.asp>.

- resources; common commercial policy⁷ or “for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope” (in accordance with the case law of the Court) (Article 3 TFEU).
- Shared competences between the Union and its Member States in the following areas: internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health; research, technological development and space;⁸ and the areas of development cooperation and humanitarian aid.⁹ The Member States exercise their competence to the extent that the Union has not exercised its competence; the Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.
 - Coordination of the economic, employment and social policies of the Member States (Article 5 TFEU).
 - Actions to support, coordinate or supplement the actions of the Member States on human health; industry; culture; tourism; education, vocational training, youth and sport, civil protection; and administrative cooperation (Article 6 TFEU).
 - Specific provisions on the Common Foreign and Security Policy (Title V, Chapter 2 of the TEU).

The Treaty of Lisbon has introduced important amendments to the following areas of competence: the Common Commercial Policy (section 3.2); development cooperation policy (section 3.3); economic, financial and technical assistance & humanitarian aid (section 3.4); and restrictive measures (section 3.5).

3.2. Common commercial policy

The Treaty of Lisbon has introduced important amendments to the EU competences relating to the EU external commercial policy.¹⁰ Pursuant to Article 207(1) TFEU, the EU common commercial policy, in which the Union has an exclusive competence (Article 3(1)(e) TFEU), now comprises “changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and ser-

⁷ Pursuant to Article 207(6) TFEU “The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.”

⁸ Pursuant to Article 4(3) TFEU “the exercise of that competence shall not result in the Member States being prevented from exercising theirs.”

⁹ Pursuant to Article 4(4) TFEU “the exercise of that competence shall not result in Member States being prevented from exercising theirs.”

¹⁰ See the analysis in this volume in Hoffmeister, ‘The European Union’s common commercial policy a year after Lisbon – Sea change or business as usual?’.

vices, and the commercial aspects of intellectual property, foreign direct investments, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies". The measures "defining the framework for implementation" of the common commercial policy are to be adopted by means of regulations in accordance with the ordinary legislative procedure (co-decision) by the European Parliament and the Council. It is to be noted that the Treaty of Lisbon has introduced many and important substantive amendments to the former Article 133 TEC:

- (i) First, "Trade in services" and "commercial aspects of intellectual property" become areas of exclusive competence. This will include in principle all matters covered by the GATS and the TRIPS agreements within the context of WTO;
- (ii) Second, "Foreign direct investment", which was not covered by the former 133 TEC becomes an area of exclusive competence. It would appear that the notion of "foreign direct investment" excludes portfolio investments and perhaps post-establishment investment protection.
- (iii) Third, the scope of the exercise of the competences under Article 207 is limited by the provision of Article 207(6) in two ways:
 - (a) On the one hand, the first part of the sentence comprising Article 207(6) states that "the exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States". This provision does not address the question of the existence of competence under the common commercial policy. It does not therefore limit the competence of the Union under the common commercial policy. Rather it focuses on the consequences of the *exercise* of that competence, stating that it shall not affect the division of competences between the Union and the Member States: the existence of a broad external competence does not affect limitations on the internal competences of the Union. Therefore the added value of this provision is to specify that the conclusion by the Union of a trade agreement containing commitments which the Union could not have adopted internally does not create new internal competences for the Union beyond those which are provided for in other parts of the Treaty (e.g. the limitations to market access for mode 3 hospital services and limitations to mode 3 and 4 services referring to economic needs, nationality or citizenship requirements). In other words, the internal powers of the Union are limited to those specifically provided for by the Treaties.¹¹

¹¹ An alternative interpretation of the first part of Article 207(6) TFEU according to which it would constitute a limitation on external competence under the common commercial policy to the Union's internal powers would both contradict Article 207(4) third subparagraph and empty the second half of Article 207(6) TFEU of its useful effect. According to the third subparagraph under (b) of Article 207(4) relating to social, educational and health services, where "agreements risk

- (b) On the other hand, according to the second part of Article 207(6), the exercise of competences conferred by Article 207 “shall not lead to the harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation”. This provision replicates the example mentioned in (former) Article 133(6) first subparagraph TEC. Its purpose is to exclude from the scope of the Union’s common commercial policy provisions of agreements that would lead to the harmonisation of national laws and regulations in areas such as social security, education, culture and public health in which the Treaty specifically prevents any harmonisation of norms. (e.g. it excludes harmonisation of incentive measures designed to protect and improve human health (Article 168(5) TFEU).
- (iv) Fourth, it is not clear what the terms “framework for implementation” mean in Article 207(2) TFEU: does the notion of “framework” counterbalance the notion of “implementation” laid down in Article 291 TFEU? Does implementation by the Commission apply to all autonomous (urgent) anti-dumping measures? Do the terms mean all measures defining the framework within which the common commercial policy shall be implemented?
- (v) Fifth, the Commission is required to report regularly on the progress of negotiations, not only to the Council Special Committee but also to the European Parliament (Article 207(3) TFEU).
- (vi) Sixth, the consent of the European Parliament is required for agreements covering fields to which the ordinary legislative procedure (co-decision) applies.¹² Within the Council, separate voting rules (qualified majority or unanimity) apply to the different subject matters. The Council acts by qualified majority except for agreements on trade in services, commercial aspects of intellectual property and foreign direct investment, where the Council acts unanimously if for EU internal measures unanimity is provided for in the Treaties. In any event, the Council acts unanimously for the negotiation and conclusion of agreements in the fields of trade in cultural and audiovisual services where these agreements risk prejudicing the Union’s cultural and linguistic diversity; and in the field of trade in social,

seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them”, the Council acts by unanimity for their negotiation and conclusion. In regulating the voting rule applicable within the Council in respect of such agreements, the provision presupposes that a Union competence exists. However, according to Article 168(7) TFEU, the Union does not possess an internal competence to this effect: “Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.[...]” This example illustrates the fact that according to Article 207(4) third subparagraph, the Council, within the framework of the common commercial policy, has the power to conclude agreements reaching beyond the Union’s internal sectoral competence. To interpret the first part of Article 207(6) as a limitation on external competence under the common commercial policy to the scope of the Union’s internal powers would be incompatible with Article 207(4) third subparagraph.

¹² On the role of the European Parliament under the Treaty of Lisbon, see the analysis in this volume in Passos, ‘The European Union’s External Relations - A Year after Lisbon: A first evaluation from the European Parliament’.

educational and health services, where these agreements risk seriously disturbing the national organisation of such services. Finally, in the field of transport, the negotiation and conclusion of agreements is governed by Title VI of Part Three TFEU and by Article 218 TFEU.

3.3. Development cooperation policy

The Treaty of Lisbon has also introduced changes in the field of development cooperation. In particular, pursuant to Articles 208 and 209 TFEU development cooperation becomes a “policy” of the Union. This policy of the Union and those of the Member States “complement and reinforce each other” (Article 208(1)) by coordinating their policies, by consulting each other on their aid programmes, by undertaking “joint actions” and, “if necessary”, by Member States contributing “to the implementation of Union aid programmes”, the Commission being charged with taking “any useful initiative with this regard” (Article 210 TFEU). The objective of the Union development cooperation policy (“reduction and, in the long term, eradication of poverty”) is to be interpreted broadly but it is a shared competence.

3.4. Economic, financial and technical assistance & humanitarian aid

The Union can also adopt ancillary measures relating to the economic, financial and technical cooperation applicable to third countries other than developing countries (“without prejudice to the other provisions of the Treaties”) as laid down in Article 212 TFEU. In addition the Treaty of Lisbon has introduced an explicit competence in the field of humanitarian aid to be exercised by the Union within the framework of the “Union’s operations” relating to *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters (Article 214(1) TFEU). The action of the Union is to be conducted “in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination” (Article 214(2) TFEU). A European Humanitarian Aid Corps is to be set up by the European Parliament and the Council (co-decision) in order to establish a framework for joint contributions “from young Europeans” (Article 214(5) TFEU).

3.5. Restrictive measures

Finally, external restrictive measures are adopted by the Council acting unanimously by means of a CFSP decision. Where a CFSP decision provides for the interruption of economic and financial relations with third countries, or restrictive measures against natural or legal persons and groups or non-state entities, the Council adopts by qualified majority the “necessary measures” including the “necessary provisions or legal safeguards” on a joint proposal from the High Representative and the Commission. The European Parliament

is informed (Article 215 TFEU). Restrictive measures as regards preventing and combating terrorism and related activities within the European Union are adopted by co-decision by the European Parliament and the Council in accordance with Article 75 TFEU.

The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, ensure consistency between the different areas of the Union's external action (Article 21(3) TEU).

4. THE INSTITUTIONS OF THE NEW UNION

For the purposes of external relations, the relevant institutions and bodies are the European Parliament, the European Council (which has become formally an institution of the Union), the Council, the European Commission, the Court of Justice of the European Union and the High Representative of the Union for Foreign Affairs and Security Policy, who is assisted by the European External Action Service. With the exception of the latter, none of these is entirely new, but the Treaty of Lisbon has significantly changed their respective roles and competences.

4.1. The European Council

The European Council is composed of its President, the Heads of State or Government of the Member States, and the President of the Commission. The High Representative "shall take part in its work" (Article 15 TEU). The European Council does not "exercise legislative functions" (Article 15(2) TEU) rather it provides "the Union with the necessary impetus for its development" and defines "the general political directions" and lays down strategic guidelines for Union external action (Article 16(6) TEU). The European Council adopts decisions acting unanimously on the external strategic interests and objectives of the Union, on a recommendation from the Council (Article 22(1) and Article 26 TEU). The European Council acts by qualified majority in a number of cases.¹³ It acts by simple majority on procedural questions and for the adoption of its Rules of Procedure (Article 235(3) TEU).¹⁴ In other cases, the European Council acts by consensus (Article 15(4) TEU). Finally the President of the European Council "shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative" (Article 15(6) TEU). In practice, the President of the European Council repre-

¹³ See, especially, for the election of its President, Article 15(5) TEU; for the appointment of the High Representative, Article 18(1) TEU; for proposing the President elect of the Commission, Article 17(7) TEU; for adopting decisions on Council configurations, Article 236 TFEU and for decisions appointing members of the Executive Board of the European Central Bank, Article 11(2) of Protocol 4.

¹⁴ European Council Decision 2009/882/EU of 1 December 2009 adopting its Rules of Procedure, OJ 2009 L 315/51.

sents externally the Union at the level of heads of state and government (e.g. at international summits).

4.2. The Council of the European Union

The Council of Ministers exercises, jointly with the European Parliament, legislative and budgetary functions and it carries out policy-making and coordinating functions (Article 16(1) TEU). With regard to the external action of the Union, it concludes international Agreements, including in the field of the Common Foreign and Security Policy (CFSP) (Article 37 TEU and Article 218 TFEU), it frames the CFSP and the Common Security and Defence Policy (CSDP) and it takes decisions on the basis of strategic guidelines defined by European Council (Article 26), and it takes decisions defining operational actions, positions and arrangements (Articles 25, 26, 28 and 29 TEU) and other “necessary decisions” (Article 28 TEU). It acts by qualified majority vote “except where the Treaties provide otherwise” (Article 16(3) TEU), which is *inter alia* generally the case for the CFSP (see below). Finally, the Council meets in different configurations which are, in principle, presided by the six-monthly Presidency held by the Member States representatives in the Council on the basis of equal rotation (Article 16(9) TEU and 236 TFEU). The rotating presidency is exercised in accordance with the decision by the European Council (pursuant to Declaration 9 annexed to the Final Act), adopted on 1 December 2009.¹⁵ There is an exception to those principles: the Council meeting in its Foreign Affairs configuration (FAC), which “elaborates the Union external action on the basis of strategic guidelines laid down by the European Council” and ensures “that the Union’s action is consistent” (Article 16(6) TEU), is presided by the High Representative (Article 18(3) TEU), who may, where necessary, ask to be replaced by the member of the FAC holding the rotating Presidency (Article 2(5) of the Council’s Rules of Procedure). The implementing measures on the exercise of the Presidency of the Council and on the chairmanship of preparatory bodies of the Council is the subject of a decision by the Council adopted on the same day.¹⁶ The Political and Security Committee as well as most of the other preparatory bodies of the Council dealing directly with the CFSP, as well as the geographical working parties, are chaired by a representative of the High Representative, whereas the working parties on trade and development are chaired by the rotating presidency, as are RELEX, COTER, COCOP, COCON, COJUR and COMAR, while the EU Military Committee and its Working Group continue to be chaired by an elected chairman.¹⁷

¹⁵ European Council Decision 2009/881/EU of 1 December 2009 on the exercise of the Presidency of the Council, *OJ* 2009 L 315/50. The handover between Presidencies (i.e. the rotating Presidency, the Presidency of the European Council, and the High Representative) has been the subject of specific measures in accordance with Declaration 8.

¹⁶ Council Decision 2009/908/EU of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, *OJ* 2009 L 322/ 28.

¹⁷ See Article 2 of the above European Council Decision and Article 4 and Annex II of the above Council Decision.

4.3. The European Commission

The European Commission exercises coordinating, executive and management functions, takes initiatives and oversees the application of Union law. It submits proposals and recommendations to the Council for the purpose of negotiating, signing and concluding international agreements and adopting decisions and international positions (Article 218 TFEU). It also ensures “the Union external representation” except in the common foreign and security policy and in other cases provided for in the Treaties (Article 17(1) TEU).

4.4. The European Parliament

The European Parliament exercises, jointly with the Council, legislative and budgetary functions and political control and consultation (Article 14 TEU). The European Parliament is regularly consulted by the High Representative on the main aspects and basic choices of CFSP and is informed of how those policies evolve (Article 36 TEU); it has a right to have its views “duly taken into consideration” (Article 36(1) TEU); may ask questions to the Council or the High Representative and may make recommendations (Article 36(2) TEU); it holds a debate twice a year on progress in implementing the CFSP and the CSDP (Article 36(2) TEU); has a right to be immediately and fully informed on negotiations, suspension or positions on CFSP agreements (Article 218(10) TFEU); it has a right to be consulted before the Council adopts a decision establishing the specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the CFSP (Article 41(3) TEU); it gives its consent or its advice prior to the conclusion of international agreements by the Council except where agreements “relate exclusively” to the CFSP as laid down in Article 218(6) TFEU.

4.5. The High Representative

The High Representative of the Union for Foreign Affairs and Security Policy (hereinafter HR or High Representative) is appointed by the European Council, acting by a qualified majority, with the agreement of the President of the Commission (the European Council may end his/her term of office by the same procedure (Article 18(1) TEU)). The HR ensures consistency of the Union external action (Article 18(4) TEU) and has three hats:

- as President of the Foreign Affairs Council (Article 18(3)), the HR performs the functions attributed to the Presidency of the Council (*inter alia* the chairing of joint Councils with third States in accordance with their rules of procedure and the consultation of the European Parliament);
- as Vice-President of the Commission, the HR performs the functions of External Affairs Commissioner (Article 18(4) TEU), and is responsible within the Commission for responsibilities on external relations and for co-

- ordinating other aspects of external action and only in those matters is bound by Commission's procedures (Article 18(4) TEU);
- as HR, she/he “conducts” the Common Foreign and Security Policy as well as the Common Security and Defence Policy (Article 18(2) TEU); takes initiatives and submits proposals (a right that, except for the appointment of special representatives and recommendations for negotiating agreements, the HR shares with the Member States) in accordance with Articles 18(2), 27(1), 30(1) and 42(4) TEU); the HR may also submit joint initiatives with the Commission (the Commission alone no longer has a right of initiative within the CFSP) where such power is laid down in the Treaties (e.g. proposals to use both national resources and Union instruments as laid down in Article 42(4) TEU, and the joint CFSP/Union proposals laid down in Article 22(2) TEU). The HR represents the Union for CFSP matters, conducts political dialogue and expresses the Union's international positions (Article 27(2) and Article 34(2) TEU); s/he puts into effect the CFSP together with the Member States (Articles 18(2) and 26(3)); s/he organises coordination of Member State actions in international organisations and conferences (Article 34(1)); s/he negotiates international agreements under the CFSP (Article 218(3) TFEU); s/he consults and informs the EP (Article 36 TEU and 218(10) TFEU) and has authority over the Special Representatives (Article 33 TEU).¹⁸ The Political and Security Committee (PSC) exercises the political control and strategic direction of EU operations under the responsibility of the Council and the HR (Article 38(2) TEU).

The HR is “assisted” by a European External Action Service (EEAS), whose organisation and functioning has, pursuant to Article 27(3) TEU, been established in Council Decision 2010/427/EU of 26 July 2010.¹⁹ The EEAS is made up of a central administration and of the Union Delegations to third countries and to international organisations, and is placed under the HR's direct authority (Article 1(4) of the Council Decision of 26 July 2010 and Article 221 TFEU).

4.6. The Court of Justice

Finally, the Court of Justice of the European Union ensures that in the interpretation and application of the external action provisions of the treaties “the law is observed” (Article 19(1) TEU). It has jurisdiction to hear and determine actions or proceedings brought against the acts of the Union as provided for in Articles 256 to 272 TFEU. However the Court does not have jurisdiction with respect to the CFSP, except to monitor compliance with the dividing line between CFSP and non-CFSP matters laid down in Article 40 TEU²⁰ as well as to review

¹⁸ Persons appointed by the Council with a mandate in relation to particular policy issues.

¹⁹ Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010 L 201/30. See the analysis in this volume in Duke, *A Difficult Birth: the Early Days of the European External Action Service*.

²⁰ Pursuant to Article 40 TEU, “The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions

the legality of the external restrictive measures laid down in Article 275(2) TFEU²¹ (Article 24(1) TEU).

5. INNOVATIONS CONCERNING PROVISIONS ON THE COMMON FOREIGN AND SECURITY POLICY

The CFSP continues to be “subject to specific rules and procedures” (Article 24(1) TEU) and remains a very special form of cooperation within the Treaty:

- When acting in the field of the CFSP, the EU does not operate as a “supra-national” entity: CFSP continues to mainly operate on the basis of unanimity (Articles 24(1) and 31(1) TEU), is subject only to weak parliamentary control by the EP (Article 36 TEU), and there is only weak judicial control at the level of the Union (see above).
- There is no permanent CFSP *acquis*: it can be amended or revised at any time without limitation and the principle of irreversibility of powers does not apply to CFSP.
- The CFSP objectives do not carry with them a permanent limitation of the sovereign rights of the Member States (unlike the other EU objectives).
- The CFSP objectives²² are wide in scope and not operational *per se* (unlike other objectives of the Union such as the establishment of a common commercial policy).
- The CFSP (in contrast with some other competences of the Union) does not involve the notion of exclusive power.
- CFSP decisions, although legally binding, are not legislative acts (i.e. acts to which the legislative procedure applies) (Articles 24(1) and 31(1) TEU and Declaration 41).
- In CFSP matters judicial review and remedies are exercised and provided at the level of the Member States (Articles 19(1), second subparagraph, 24(1) TEU and Article 275(1) TFEU – see also above).

laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.”

²¹ Pursuant to Article 275(2) TFEU, “However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.”

²² Pursuant to Article 24(1) TEU, “The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security (...)” and pursuant to Article 23 TEU, “The Union’s action on the international scene, pursuant to this Chapter [on the CFSP], shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1” (which sets out the Union’s horizontal external relations objectives).

- The general “residual” legal basis laid down in Article 352 TFEU where no explicit powers in the Treaty exist, does not apply to the CFSP (Article 352(4) TFEU).
- The Commission plays only a limited role within the CFSP (e.g. it does not have an autonomous right of initiative, and exercises only its powers of implementation of the EU budget) as defined by the TEU.
- The adoption of rules on processing of personal data by the Member States on CFSP activities are subject to a specific, non legislative procedure (Article 39 TEU and Article 16(2) TFEU).
- In CFSP the only available legal instrument is the decision (Article 25(b) TEU) which is binding (Article 28(2) and 29 TEU; this covers both the pre-Lisbon Council Joint Actions and Council Common Positions).
- The general rule is that the Council takes CFSP decisions acting unanimously (Articles 24(1) and 31(1) TEU). Exceptionally, the Council may act (it has never done so in practice) by qualified majority voting with regard to:
 - decisions defining Union actions and positions implementing European Council strategic decisions;
 - decisions based on proposals submitted by HR following a specific request from the European Council (made by consensus);
 - implementing decisions;
 - appointments of Special Representatives; and
 - whenever the European Council so decides (Article 31(2) and (3) TEU).
- Decisions having military and defence implications are always taken unanimously (Article 31 (4) TEU) except:
 - for the establishment of the procedures on the start-up fund where the Council acts by qualified majority (Article 41(3) TEU); and
 - for the decision defining the European Defence Agency’s statute, seat and operational rules, the Council acts by qualified majority (Article 45(2) TEU).
- Procedural questions are decided by the Council acting by simple majority voting (Article 31(5) TEU).
- International agreements in the area of the CFSP (Article 37 TEU), which are “binding upon the institutions of the Union and on its Member States” (Article 216(2) TFEU), are concluded by unanimous decision of the Council in conformity with Article 218(3) and upon a recommendation of High Representative if they relate exclusively or principally to the CFSP. The High Representative is the negotiator. Constructive abstention is possible (Article 31(1) TEU).

The CFSP provisions do not change the present situation as regards the competences of Member States since:

- The CFSP provisions “do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their external national representation” (Declaration 13).

- The CFSP provisions “do not prejudice the specific character of the security and defence policy of the Member States” (Declaration 13; see also Article 42(2) and (7) TEU on the CSDP).
- The EU and its Member States remain bound by the provisions of the UN Charter and in particular the primary responsibility of the Security Council for maintenance of international peace and security (Declaration 13).
- Provisions on the High Representative and the External Action service “will not affect the existing legal basis, responsibilities and powers of the Member States” (Declaration 14).
- The CFSP provisions do not give “new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament” (Declaration 14).

All “the Union’s external action” is elaborated by the Council in its Foreign Affairs configuration which also ensures the consistency of the Union’s external action (Article 16(6) TEU). Thus, the FAC is responsible for the CFSP, including CSDP, as well as common commercial policy, development cooperation and humanitarian aid (Article 2(5) of the Rules of Procedure of the Council).

In particular, the Treaty of Lisbon builds upon an important *acquis* in the field of the “Common Security and Defence Policy” (previously the European Security and Defence Policy or EDSP). At the time of its entry into force, some 23 operations (7 military, 15 civilian and 1 mixed) had been launched. After the entry into force of the Treaty of Lisbon, the Council has established the EU Training Mission Somalia and the EU Force Libya. Within the CSDP, certain bodies and services of the Council, and now also of the EEAS, have a special role. The PSC has decision-making powers in crisis management operations (Article 38 TEU) and is *inter alia* advised by the EU Military Committee and the Committee for Civilian Aspects of Crisis Management (CIVCOM). These bodies also rely on the work of the Civilian Planning and Conduct Capability (CPCC), the Crisis Management and Planning Directorate (CMPD) and the EU Military Staff, which are now part of the EEAS. Pursuant to the Treaty of Lisbon, the CSDP shall provide the Union with an operational capacity “drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States” (Article 42(1) TEU). The CSDP includes all questions relating to the Union’s security, including “the progressive framing of a common Union defence policy. This will²³ lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.” (Articles 24 and 42(2) TEU). In particular, the CSDP includes a wide range of crisis management tasks (Articles 42(1) and 43(1) TEU) as well as commitments in terms of capabilities, as notably ex-

²³ Article 24 TEU provides that it “might lead”, whereas Article 42(2) TEU provides that it “will lead”.

pressed in “headline goals”, and the Berlin Plus arrangements with NATO. There is also provision for the establishment of a “start-up fund” made up of Member States’ contributions for (preparatory) activities not charged to the Union’s CFSP budget. The procedures for this Fund are to be adopted by the Council acting by qualified majority on a proposal from the High Representative (Article 41(3)). Finally, the Treaty of Lisbon anchors the European Defence Agency (EDA) in the TEU (Articles 42(3) and 45 TEU): the Agency “shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities”. The EDA is open to all Member States wishing to be part of it (except to Denmark which has opted out from decisions and actions of the Union which have defence implications as laid down in Article 5 of Protocol 22 on the position of Denmark).

An important feature of the Treaty of Lisbon is the flexibility it provides for the participation of the Member States in the action of the Union:

- The Council may entrust a task using civilian and military means to “a group of Member States” which are willing and have the necessary capability (Articles 42(5) and 44(1) TEU).
- There is also a possibility for the establishment of “a permanent structured cooperation” (PeSCo) open to those Member States whose military capabilities fulfil higher criteria, and which have made more binding commitments to one another with a view to the most demanding missions (Article 42(6)). Those Member States notify their intention to the Council and to the High Representative. Within three months the Council, acting by qualified majority vote, after consulting the High Representative, establishes the PeSCo and the list of participating States. Decisions within PeSCo are taken unanimously (Article 46 TEU). Protocol 10 on PSC sets out further modalities.
- In addition, a group of Member States can also establish enhanced cooperation between themselves under certain conditions: there has to be a minimum of nine Member States (Article 20(2) TEU); it has to be used as a last resort; all Member States take part in the deliberations within the enhanced cooperation but only those participating in the enhanced cooperation vote (Article 20 TEU). The procedural and substantive conditions for the establishment of enhanced cooperation are laid down in Article 326 et seq. TFEU. In particular, Article 331(2) provides that “Any Member State which wishes to participate in enhanced cooperation in progress in the framework of the common foreign and security policy shall notify its intention to the Council, the High Representative [...] and the Commission. The Council shall confirm the participation of the Member State concerned, after consulting the High Representative [...] and after noting, where necessary, that the conditions of participation have been fulfilled. The Council, on a proposal

from the High Representative, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation. However, if the Council considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request for participation.” For the purposes of this paragraph, the Council shall act unanimously (Articles 330 and 333(3) TFEU).

There is also provision for the so-called “foot-bridges” (*“passerelles”*) according to which it would be possible for decisions for which the unanimity of the Council is required to be taken by qualified majority under the following conditions:

- whenever the European Council decides to authorise the Council to act by qualified majority (Article 48(7) TEU) in a specified area of the CFSP where unanimity applies (Article 31(3), except decisions having military or defence implications (Article 31(4) TEU)); and
- whenever the Council, acting unanimously according to the specific arrangements laid down in Article 330 TFEU (participating members in an enhanced cooperation), adopts a decision stipulating that it will act by qualified majority (Article 333(1) TFEU) except decisions having military or defence implications (Article 333(3) TFEU).

The Decision of Heads of State and Government of 19 June 2009, adopted following the first Irish referendum on the Treaty of Lisbon, clarifies that the Treaty of Lisbon does not provide for the creation of a European Army or for conscription to any military formation.

Finally, the Treaty of Lisbon has introduced two types of solidarity clause:

- Pursuant to Article 42(7) TEU, if a Member State is the victim of armed aggression on its territory, the other Member States “shall have towards it an obligation of aid and assistance by all the means in their power” in accordance with Article 51 of the UN Charter. It does not prejudice the specific character of the security and defence policy of certain Member States and it shall be consistent with commitments under NATO. This provision does not turn the EU into a military alliance.
- If a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster, “The Union and its Member States shall act jointly in a spirit of solidarity”; “The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States” and “the other Member States shall assist it at the request of its political authorities” (Article 222(1) TFEU). The Standing Committee on internal security (Article 71 TFEU) and the PSC are involved.

6. INTERNATIONAL AGREEMENTS AND MIXITY UNDER THE TREATY OF LISBON

The Union can conclude international agreements. Once concluded, these agreements “are binding upon the institutions of the Union and on its Member States” (Article 216 TFEU). Except with regard to commercial policy agreements (which are negotiated and concluded in accordance with Article 207 TFEU, agreements are negotiated and concluded in accordance with the procedure laid down in Article 218 TFEU. According to this procedure the Council authorizes the opening of negotiations, adopts negotiating directives, authorises the signing of agreements and concludes them subsequently on the basis of the Commission’s (or those of the HR in the field of the CFSP) recommendations and proposals. It is up to the Council to nominate “the Union negotiator or the head of the Union’s negotiating team”. In addition the Council’s decision on signature of the agreement may “if necessary” provide for the provisional application (of the agreement) before entry into force. Except with regard to CFSP agreements, the decision concluding the agreement is adopted by the Council after obtaining the consent of the European Parliament in the following cases: association agreements, agreements on EU accession to the Council of Europe’s Convention on Human Rights, agreements establishing a specific institutional framework, agreements with important budgetary implications, agreements concerning fields to which either the ordinary procedure applies or where the consent by the European Parliament is required in the case of the special legislative procedure. In other cases the Council concludes an agreement after consulting the EP. The procedures relating to derogations or modifications of international agreements, suspension of agreements or the establishment of positions to be adopted in a body set up by an agreement do not offer any particularity. The European Parliament shall be “immediately and fully informed at all stages of the procedure” (Article 218(10) TFEU).

It is clear that mixity will continue to be possible in the negotiation and conclusion of international agreements for the future.²⁴ Article 5(1) TEU explicitly provides that “The limits of Union competences are governed by the principle of conferral”, while Article 4(1) TEU states that “(...) competences not conferred upon the Union in the Treaties remain with the Member States.” The above provisions make it even clearer than before that Member State competences continue to exist. They must therefore be accommodated appropriately. It is also clear that mixity will continue to be possible even in respect of areas in which the TFEU declares that the Union has exclusive competence but which are not entirely covered by this competence. For example, Article 3(e) TFEU provides that the Union shall have exclusive competence for common commercial policy, but the precise meaning of concepts such as “foreign direct investment”, which falls within the common commercial policy pursuant to Article 207(1) TFEU, is not spelt out in the Treaties and investment related matters that fall outside this notion remain within Member State competence.

²⁴ See the analysis in this volume in Paasivirta, ‘The EU’s External Representation After Lisbon: New Rules, A New Era?’.

Within mixity, the Union institutions and the Member States continue, as before, to have a duty to cooperate closely where the subject matter of an agreement or convention falls in part within Union competence and in part within that of the Member States. “That obligation flows from the requirement of unity in the international representation of the Community (...)”.²⁵ The question arises to what extent the new architecture of the Treaties requires mixity to be treated differently from the past.

Firstly, concerning traditional “*mixity*” (i.e. agreements dealing with ex-Community competences now covered in the TFEU as well as Member State competences in the same areas such as environment, transport, culture, education or development), it can be assumed that the same arrangements will apply as now. In practice, the Commission will normally negotiate the agreement, in consultation with a special committee where necessary. The rotating Presidency may also be involved where Member States choose to confer negotiating authority on it with respect to the matters falling within national competence. The current practice whereby Member States may choose to confer negotiating authority exclusively on the Presidency where a mixed agreement predominantly concerns matters falling within national competence also remains possible in principle, although this will not be appropriate where the Commission requests a negotiating mandate in respect of those aspects of the proposed agreement which unquestionably fall within the exclusive competence of the Union. At the time of conclusion the definitive legal bases will be determined in so far as the Union is concerned, and the Member States will also ratify where this is considered necessary.

The position is more complex for agreements which concern CFSP matters as well as ex-Community competences. Member States have to date concluded such agreements alongside the Community. Now there would appear to be two options as follows.

The first option is that the CFSP matters would be dealt with by the Union itself and that (where mixity is not otherwise required), the Union alone would conclude the agreement. This option has the practical advantage of avoiding the need for lengthy national ratification processes. Moreover, it has been rendered more viable than in the past for several reasons:

- (a) Article 40 TEU (ex-Article 47 TEU) now provides for “mutual respect” as between the CFSP and the other competences of the Union.
- (b) The TEU now provides explicitly that the Union shall have legal personality (Article 47 TEU).
- (c) Title I of the TFEU on the categories and areas of Union competence confirms the distinctive nature of CFSP competence, which is governed solely by the provisions of the TEU and which is not subject to the “shared competence” rule set out in Article 2(2) TFEU pursuant to which the Member States may only exercise their competence to the extent that the Union has not exercised its competence. This means that the exercise by the

²⁵ Opinion 1/94, *WTO Agreements* [1994] ECR I-5267, para. 108.

Union of its competence in CFSP matters does not impinge on the exercise by Member States of their competence in foreign affairs (subject to their obligation under Article 24(3) TEU to “support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area (...). They shall refrain from any action which is likely to impair [the Union’s] effectiveness as a cohesive force in international relations.”).²⁶ This may render this option more acceptable to Member States.

The second option is that Member States would still choose to treat the foreign affairs matters within an agreement as a matter of national competence and therefore to insist on becoming parties themselves to that agreement for that purpose. The TEU and TFEU do not prevent the Member States from choosing this option, given the distinctive nature of the CFSP.

There are certain cases where the first option must clearly be used. For example, an agreement relating to participation by a third state in an EU CSDP operation should be concluded by the Union alone, in the exercise of its CFSP competence, and not by Member States too. Other agreements concerning CSDP operations (status of mission agreements (SOMAs) and status of forces agreements (SOFAs) which are concluded with the host state, as appropriate) should also be concluded by the Union alone. This corresponds to current practice. The same is true of agreements for the exchange of classified information with third states and organisations.

However, it is more common for agreements to deal with a number of matters, including CFSP. In such cases, and depending on the precise scope of the CFSP provisions, the choice between the two options may be a matter of political discretion. However, given that one of the aims of the Lisbon Treaty is to enable more unified external representation of the Union, the first option should always be considered before any decision is taken, particularly where the agreement does not relate principally to the CFSP, or where mixity is not otherwise required (e.g. a trade agreement or other agreement in an area of exclusive competence where the inclusion of the standard human rights clause is envisaged). The advantage in avoiding the delays involved in national ratification processes may also be an important consideration.

Article 218(3) TFEU provides that the Commission submits recommendations to the Council, unless “the agreement envisaged relates exclusively or principally to the [CFSP]”, in which case this task falls to the High Representative. The Council authorises the opening of negotiations and nominates “the Union negotiator or the head of the Union’s negotiating team”. In practice this means that:

- (a) The HR will negotiate agreements which relate exclusively or principally to the CFSP.

²⁶ See above.

- (b) The Commission alone will normally negotiate non-CFSP agreements falling within ex-Community competence.
- (c) For agreements including some CFSP aspects, but where these are not the principal part of the proposed agreement, a representative of the HR will be part of the Commission's negotiating team.
- (d) Where Member State competences in ex-Community matters are also involved, they may choose to confer negotiating authority either on the Commission or on the rotating Presidency in respect of those competences.
- (e) Where a mixed agreement (non-CFSP) predominantly concerns matters falling within national competence, the Member States may also continue to choose to confer negotiating authority on the rotating Presidency in respect of the whole agreement.

Where Member States treat the foreign affairs aspects of an agreement (e.g. political dialogue, human rights, non-proliferation, fight against terrorism, a clause on ICC cooperation) as a matter of national competence, the question arises as to who should negotiate on their behalf. It is suggested that, where Member States choose this option, it is possible for them to charge the High Representative with this task. Such a solution would have the advantage of facilitating consistency between different agreements concerning CFSP/foreign affairs matters, whether or not the Union formally concludes agreements in respect of those matters. This corresponds to one of the tasks of the HR (see above) and is not excluded by Article 218 TFEU. Alternatively, it would still be possible for the Member States to nominate the rotating Presidency to negotiate on their behalf, as has been the practice until recently.

Where the rotating Presidency has a negotiating role (but is not the sole negotiator), it is possible for it to form part of the Union's negotiating "team" pursuant to Article 218(3) TFEU.

Traditional mixed agreements usually provide that the representatives on the EU side in an Association/Cooperation Council are the members of the Council of the EU and members of the European Commission, while Association/Cooperation Committees²⁷ consist of representatives of (the) members of the Council of the EU and of the European Commission. The Rules of Procedure for such joint councils generally provide that the Association/Cooperation Council will be presided over (on the EU side) by the "President of the Council". Traditionally this role has been played by the President of the General Affairs and External Relations Council. On the other hand, the committees in question have generally been presided over (on the EU side) by a representative of the Commission. As a result of the entry into force of the Treaty of Lisbon, it will generally be the Presidency of the Foreign Affairs Council which will chair such Association/Cooperation Councils (in practice meetings are usually held in the margin of the Foreign Affairs Council in any event). However, such Councils sometimes meet in other configurations, for example to discuss matters relat-

²⁷ Other bodies may also be established by such Committees; the representation in such bodies may be different.

ing to the EU area of freedom, security and justice, and there the role of the Presidency should be assumed by the appropriate Minister from the rotating Presidency. It follows that the High Representative will, in most cases, represent the EU side at Council level as President of the Foreign Affairs Council. There may be exceptions to this in sectoral cases. There is no obstacle to the continuation of current practice in respect of the committees in question, whereby the Commission chairs the EU side.

Pursuant to Article 218(9) TFEU, the Council shall adopt a decision establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, on a proposal from the Commission or the High Representative. The same procedure applies for the adoption of a decision suspending application of an agreement. This wording does not appear to exclude the presentation of a proposal by the HR on a CFSP matter within the agreement, even where the agreement itself does not relate exclusively or principally to the CFSP (given that this qualification only appears in Article 218(3) concerning recommendations for negotiations and not in Article 218(9)). For decisions of a horizontal nature (e.g. adoption of an Association Council's Rules of Procedure, or a proposed decision suspending application of an agreement), it should be possible for the Commission and the HR to make a joint proposal, even if the text does not specifically provide for this.

7. EXTERNAL REPRESENTATION

In particular, the Union may only be represented externally where competence is conferred on the Union by the Treaties. A number of provisions in the Treaties empower certain actors to represent externally the Union.²⁸ These provisions on external representation are laid down in general terms and must be read in the light of the principle of conferral of powers and of the principle of distribution of powers. By virtue of the principle of conferral of powers, Article 5(1), first sentence TEU provides that "The limits of Union competences are governed by the principle of conferral" and Article 5(2) provides that "Under the principle of conferral, the Union shall act only within the limits of the competences con-

²⁸ Article 15(6) TEU states: "The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy." Article 17 TEU concerning the Commission states: "With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation." The expression 'other cases' refers to Article 138(2) TFEU on the EMU. In this area, "The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. [...]" Article 27(2) TEU states: "The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences." Article 221(1) TFEU states: "Union delegations in third countries and at international organisations shall represent the Union."

ferred upon it by the Member States in the Treaties (...), competences not conferred upon the Union in the Treaties remain with the Member States.”. In addition, by virtue of the principle of distribution of powers between institutions, Article 13(2) TEU provides that “Each institution shall act within the limits and the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them [...]”.²⁹ Therefore, the question of who represents the Union in specific cases depends on the competences attributed by the Treaties to the Union and the question of who, according to the Treaties, is entitled to exercise such competence (e.g. Article 218 TFEU).³⁰

- (i) With regard to the CFSP, Articles 15(6) TEU and 27(2) TEU confer rights of representation of the Union in the CFSP on the President of the European Council and on the High Representative. Article 17 TEU excludes the possibility for the Commission to represent the Union in the CFSP, and Article 33 TEU provides for the appointment of the Special Representatives.
- (ii) With regard to non-CFSP EU competences, Article 17 TEU provides that the external representation of the Union is ensured by the Commission. This empowerment must be read in the light of the principle of conferral of powers. The Treaty cannot confer upon the Commission the power to represent the Union in areas in which the Union itself has no competence. Therefore, the answer to the question of the circumstances in which the Commission represents the Union, for instance in international conferences and international negotiations or the signature of international agreements, is exclusively determined by the scope of the Union’s competences as follows:
 - The Commission represents the Union in the areas of exclusive Union competence listed in Article 3 TFEU (customs union, competition, monetary policy for Member States whose currency is the euro, the conservation of marine biological resources under the fisheries policy, the common commercial policy).
 - In the areas of shared competence of the Union with the Member States listed in Article 4 TFEU (see above), both the Commission and the Member States have powers of representation in respect of the respective competences of the Union and the Member States.³¹

²⁹ Similarly, Article 1(1) TFEU provides that “This Treaty organises the functioning of the Union and determines the areas of, delimitation of and arrangements for exercising its competences.”

³⁰ According to Article 218(2) TFEU, the Council is competent to conclude Agreements. According to Article 218(3) TFEU, the High Representative submits recommendations to the Council where the agreement envisaged relates exclusively or principally to the CFSP. The Commission submits recommendations in other cases.

³¹ The delimitation between the competence of the Union and that of the Member States in areas of shared competence is governed by the “AETR-effect”. According to the Court of Justice in Case 22/70, *Commission v Council (AETR)* [1971] ECR 26, para. 17: “Each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which

- In areas in which the Union supports the actions of the Member States listed in Article 6 TFEU (see above), the Commission’s empowerment to represent the Union is limited to specific EU programmes and initiatives.
- The Lisbon Treaty and the case law of the Court make clear that Member States’ competences continue to exist.³² In areas of Member State competence, the Member States can choose either to represent themselves individually, or to be represented collectively. In the latter instance, they can designate in particular the Presidency of the Council or the Commission.
- With regard to the representation of the Member States whose currency is the euro, the Council, after consulting the European Central Bank, may adopt measures to ensure unified representation within the international financial institutions and conferences (Article 138(2) TFEU). Although the Council has not adopted such measures yet, in practice representation has been carried out by the President of the Euro Group.

Article 221(1) TFEU dealing with Union delegations should also be read in this light. The delegation represents the Union in areas where the Union possesses a competence. Nor does this provision affect the powers of representation of the President of the European Council, of the High Representative or of the Commission. Irrespective of their location, the Union can be represented within international organisations or at international conferences by these actors, depending upon the subject matter discussed and the level of attendance. Therefore, the empowerment laid down in Article 221(1) does not confer upon Union delegations an exclusive power to represent the Union at local level but rather a concurrent one. As has been suggested, the power to represent the Union is conditioned by the principle of the distribution of powers between the institutions.³³

Furthermore, a distinction must be made between representation, on the one hand, and defining EU positions, on the other hand. Pursuant to Article 218(9) TFEU, “The Council, on a proposal from the Commission or the High Representative [...], shall adopt a decision [...] establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement” (see also Article 29 TEU for the CFSP). This is also applied to positions of the Union on matters falling within EU competence which do not have legal effects,

affect those rules [...]” The AETR effect has now been codified in the last phrase of Article 3(2) TFEU in relation to the conclusion of international agreements.

³² Article 4(1) TEU, Article 5(2) TEU. As far as the case law of the Court is concerned, see for instance Opinion 1/03, *Lugano* [2006] ECR I-1145, in particular para. 124.

³³ Article 13(2) TEU.

which are established in the Council and its preparatory bodies (Coreper, working groups), normally meeting in Brussels.³⁴

Establishing EU positions and external representation should also be distinguished from coordination. With regard to the coordination of EU external action, a long-standing practice exists of organising, in a single forum and under a single chairmanship, local coordination on EU matters between delegations accredited to international organisations or to the government of a third country. Such local coordination also allows for the mutual exchange of information between Member States on matters falling under national responsibility. Before the Treaty of Lisbon, the “local Presidency” (the diplomatic delegation of the Member State exercising the function of representation of the Council Presidency in a third country) organised and chaired such meetings in which EU matters were discussed, and, when Member States agreed to do so, information was exchanged on their respective positions, with a view, when felt appropriate, to try to approximate their positions. The Treaty of Lisbon is silent as to who should be responsible for such local coordination after its entry into force. It does, however, empower Union delegations to represent the Union in certain cases. If the Union delegation is to represent the Union, it may be necessary for that delegation to coordinate the discussion of the strategy to be followed in order to implement an EU position. In this narrowly defined sense, Union delegations play an important role in local coordination which would cover the following three elements:

- the provision of facilities in the material sense and the organisational aspects of coordination;
- the provision of knowledge and expertise related to the procedures of the international organisation to which the delegation is accredited; and
- the verification of the global approach followed by the EU in the various fora of the organisation in question and of its compatibility with the objectives of the EU in the local context.

While, a contrario, such coordination does not include the definition of the EU position itself, or indeed the adaptation of an EU position to local or changing circumstances, the distinction between the two is not always easy to make and pragmatic solutions are sometimes found which imply limited refinements or minor adaptations agreed by Member States’ local representatives under the coordination of the Presidency, in a configuration closely resembling that of a Council working group.

On CFSP matters, the coordination of Member States’ action in international organisations and at international conferences is organised by the High Representative and as laid down in Article 34(1) TEU.

³⁴ Subject to Article 1(3) of the Council’s Rules of Procedure, which provides that “In exceptional circumstances and for duly substantiated reasons, the Council or the Committee of Permanent Representatives of the governments of the Member States (hereinafter referred to as Coreper), acting unanimously, may decide that a Council meeting will be held elsewhere” (than in Brussels or Luxembourg).

Coordination on matters within Member State competences and the exchange of information with a view to approximating national positions take place on a case-by-case basis.

8. CONCLUSION

The Treaty of Lisbon has introduced very important and potentially far-reaching changes in the area of EU external relations with the aim of reinforcing the coherence and effectiveness of the European Union as a global actor and of contributing to the objectives of the Union in its relations with the wider world: democracy, the rule of law, the protection of human rights, strict observance of international law, respect for the principles of the United Nations Charter, free and fair trade, sustainable development, and eradication of poverty. For that purpose, the Treaty creates new institutions, reinforces the powers of other bodies, establishes new policies and offers potential synergies through the mutual involvement and enrichment of the EU's diplomacy and the diplomacy of the Member States for the purpose of the external representation of the Union. It is up to the Member States and the institutions of the Union to give substance to the new provisions and ensure their successful implementation.

THE EU'S EXTERNAL REPRESENTATION AFTER LISBON: NEW RULES, A NEW ERA?

Esa Paasivirta*

1. INTRODUCTION

The Lisbon Treaty seeks to reform the Union especially in the area of external relations by introducing some important institutional changes to improve the management of the EU's foreign policy and external relations. This has led to a re-organization of the Treaty foundations so as to permit the EU to play its role on the global scene in a more effective and coherent manner. It has entailed the establishment of the European External Action Service to assist the newly appointed High Representative for Foreign Affairs and Security Policy, Baroness Ashton, in her tasks. In a Union of 27 Member States, and counting, many of the central issues are related to its external representation in one way or another.

This paper gives an overview of the main elements of the Union's external representation following from the Lisbon Treaty.¹ The Treaty addresses specifically the following issues:

- the role of the Commission as the representative of the Union,
- the role of the High Representative and, at his level, the President of the European Council as the representative of the Union in the area of Common Foreign and Security Policy (CFSP)
- the European External Action Service (EEAS), which assists, inter alia, the High Representative, and
- the EU Delegations in third countries.

There are, however, some consequential issues which may be raised in this context, but which are not expressly addressed in the Lisbon Treaty. Some comments will thus be made on the role of the Member States and on the future of Mixed Agreements.

2. THE ROLE OF THE COMMISSION AS THE REPRESENTATIVE OF THE UNION IN EXTERNAL RELATIONS

It has been taken for granted that the European Commission plays an important external representation role in the practice of the Union. This has been

* Legal Service, European Commission. The views expressed are purely personal.

¹ See also the analysis in this volume in Gosalbo Bono, 'The organization of the external relations of the European Union in the Treaty of Lisbon'.

the case in particular as regards the negotiations of international agreements. From the start, the founding Treaties have laid down the conditions and modalities of how such negotiations should be carried out. The European Commission has had a wide network of Delegations across the world to ensure representational and information tasks, to guard the EU interests in trade and to implement development cooperation in particular. However, the founding Treaties, as they existed until Lisbon, did not contain a provision defining the Commission tasks in external relations, apart from the specific case of negotiations of international agreements. Beyond this aspect, the Commission's external role has been based on practice and it has evolved over the years. This situation has now changed. The Lisbon Treaty seeks to define in a comprehensive manner the different tasks of all EU institutions, including the Commission, and has thus clarified the institutional balance amongst the institutions.

The new Article 17 TEU sets out the tasks of the Commission and states *inter alia* that:

“With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation.”

The Commission's role is thus very broadly formulated, and delineated only by the tasks belonging to the High Representative and, at his level, the President of the European Council, in the area of foreign and security policy and other cases provided for in the Treaties.² One may therefore ask whether the new provision adds anything to the Commission external relations powers, and what “representation” actually entails?

Article 17 TEU is phrased in terms of responsibilities rather than powers: the Commission “shall ensure” Union's external representation, in the same vein as it “shall ensure” the application of the Treaties, in its role as the “Guardian of the Treaty”. The Treaty does not in this context, however, set any particular procedure or modalities as to how this representation should be carried out. It is something that will be shaped in practice. This is inevitable as it would not be possible, nor wise, to set out in a treaty of a constitutional nature all the details that action in the rather infinite variety of external representation situations may require.

While the above quoted provision in Article 17 TEU can potentially cover a very broad spectrum of activities, it should, of course, be read in the context of the other provisions of the Treaties, in order to respect the institutional balance. In fact, the Treaties introduce some further detail in this context, which bear on the Commission's external representation role. In this regard, Article 218 TFEU is of special importance as it addresses certain actions and certain situations in the context of external relations in more specific terms. Thereby,

² In fact, the only, or in any event the major, “other cases” are the representation of the euro zone in international financial institutions and the negotiation of monetary agreements (see Articles 138(2) and 219 TFEU which empower the Council to decide upon the representation and on the arrangements for negotiation and conclusion of such agreements)

Article 218 TFEU also limits and conditions the Commission's external representation role, and complements the general provision given in Article 17 TEU.

Article 218 TFEU addresses the specific cases of negotiation of international agreements and expression of the EU's position in international bodies in certain circumstances. As to the former, it is for the Council to authorise the opening of negotiations and to adopt negotiation directives. It also authorises the signing of agreements and concludes them, with the consent or consultation of the European Parliament.³ Negotiations are conducted by the Commission or in certain cases by the High Representative. However, the Council exercises a certain control of the negotiations by addressing directives to the negotiator and designating a special committee which is to be consulted during the negotiations. Moreover, the European Parliament should be immediately and fully informed at all stages.⁴

Apart from negotiations, another specific case concerns the adoption of the Union's positions. Article 218(9) TFEU provides as follows:

"The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision (...) establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects (...)."

Accordingly, although it will be for the Commission to represent the Union position in the international body, it is for the Council, when this body is to take decisions which have legal effects, to decide beforehand upon the position that will be expressed.

The above provisions condition the exercise of Commission representation tasks in the situations addressed therein. Moreover, in the case of signature of international agreements, the practice seems to be to confer this task to the Presidency rather than the Commission, though the Treaty is open on this point. In other words, the pre-Lisbon practice has been continued in this regard.

Article 218 TFEU thus carves out certain situations which relate essentially to the adoption of legal commitments. But the representational tasks are broader than this. In a multilateral context, situations vary and can include the making of political commitments or statements, and the reporting of EU practices or international meetings which may be of a brainstorming nature. Such situations are not addressed in Article 218 TFEU.

In this respect one may distinguish two different situations bearing on the Commission's representational role. The first is where the Union's position is

³ On the role of the European Parliament under the new arrangements, see the analysis in this volume in Passos, 'The European Union's External Relations – A Year after Lisbon: A first evaluation from the European Parliament'.

⁴ In addition, the Framework Agreement on relations between the European Parliament and the European Commission contains rather detailed procedures and provisions on the participation of members of Parliament as observers in international conferences and bodies set up by multilateral agreements. See *OJ* 2010 L 304/47, paras. 23-29 and Annex III.

well-known. This may be due to EU legislation, it may follow from earlier EU statements or Council conclusions. In these situations, the Commission can express the EU position without necessarily having to resort to further internal procedures or on-the-spot coordination. Another situation is when the Union's position is not known, i.e. when the EU does not have a position (or only an insufficiently developed position). In this case, the Commission would not have a position to represent on the international scene (it is quite another matter if the Commission has expressed its view in internal EU discussion, which may not have become an EU position). In this situation one has to fall back on Article 16(1) TEU, which provides *inter alia* that it is for the Council to carry out policy-making functions. In other words, when there is not yet a (fully developed) EU position, it would require the Council in some format to endorse (or amend) the position the Commission would have proposed to it, before it can be expressed as an EU position for external purposes. As this situation does not fall within legislative or treaty-making activities of the Union, a resolution of the European Parliament for instance would not do as an EU position: Article 16(1) TEU entrusts the function of making the EU policy to the Council.

In short, Article 17 TEU sends a clear message as to how the Treaty makers designed the EU's external representation. It is for the Commission to represent the Union save the area of Common Foreign and Security Policy and some other instances addressed in the Treaty. It should be kept in mind, however, that representation does not mean the same as decision-making, as indeed the provisions of Article 218 TFEU show. These provisions condition the exercise of the Commission's representational tasks in the situations addressed therein. On the whole, it can be said that Article 17 TEU has added institutional clarity to the EU's external representation, and has consolidated the Commission's role in this regard.

3. THE HIGH REPRESENTATIVE, THE EEAS AND THE EU DELEGATIONS

The Lisbon Treaty also institutes the new office of the High Representative of the Union for Foreign Affairs and Security Policy (Article 18(1) TEU). The Treaty provides that the High Representative shall "conduct" the Union's common foreign and security policy and in that context contribute by his/her proposals to the development of that policy and carry it out as mandated by the Council (Article 18(2) TEU). In this capacity, the High Representative shall represent the Union in matters falling within the Common Foreign and Security Policy, conduct political dialogues with representatives of third countries and express the Union's position in international organizations and at international conferences (Article 27(2) TEU). The High Representative also presides over the Foreign Affairs Council (Article 18(3) TEU). As the High Representative is also one of the Vice-Presidents of the Commission, s/he is also responsible for coordinating other aspects of Union's external action than those of foreign and security policy (Article 18(4) TEU). The Treaty still provides for CFSP specific rules and procedures (Article 24(1), 2nd subparagraph TEU); however,

the consequences of this circumstance for the well functioning of the Union should be reduced by this dual role that the High Representative has in order to ensure overall consistency of EU's international relations.

The Lisbon Treaty has repealed the provision of ex-Article 18 TEU, which set it for the rotating Presidency to represent the Union in matters falling within Common Foreign and Security Policy. This was in fact the only provision of the old Treaty which gave the Presidency tasks of external representation.

While these tasks of the Presidency have been removed, the rotating Presidency maintains functions in the internal sphere, thus presiding over Council meetings, with the exception of the Foreign Affairs Council, which is chaired by the High Representative. Most of the preparatory bodies of the Foreign Affairs Council are also chaired by a representative of the High Representative, coming from the new European External Action Service (EEAS), while some of the preparatory bodies remain to be chaired by a representative of the six-monthly rotating Presidency.⁵

In order to fulfil his/her mandate, the High Representative is "assisted" by the EEAS (Article 27(3) TEU). The organization of the EEAS was created in July 2010 as a functionally autonomous body, which shall consist of officials of the Commission and the Council Secretariat as well as from the diplomatic services of the Member States.⁶ The building up of the service is ongoing, including the recruitment of its staff.

Drawing on the dual functions of the High Representative, the EEAS is thus situated amidst the Commission and the Council. It will assist the High Representative in her task to conduct the CFSP (as well as to preside over the Foreign Affairs Council). In addition, it assists him/her in his/her functions as Vice-President of the Commission, responsible for external relations. In this latter respect, the EEAS has to respect the Commission procedures and consult and cooperate with the Commission services. In order to ensure consistency, the EEAS shall in particular contribute to programming and management cycle of external assistance instruments. In this regard, the EEAS, for instance, prepares decisions submitted for Commission approval such as country allocations of financial aid or country and regional strategic papers and indicative programmes. The programming tasks relating to external aid involves in many instances joint preparation with Commission services, as in the case of European Development Fund and the new European Neighbourhood Instrument, and under the responsibility of respective Commissioners, and ultimately submitted for Commission approval. On the Commission side, work is ongoing to make necessary adaptations to ensure that the EEAS can work smoothly within the Commission's administrative framework in those tasks where the final decisions are taken by the Commission.

⁵ Council Decision 2009/908/EU of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, *OJ* 2009 L 322/28.

⁶ Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ* 2010 L 201/30. On the first year of the EEAS, see the analysis in this volume in Duke, 'A Difficult Birth: the early days of the European External Action Service'.

It is the task of the Union delegations in third countries and at international organizations to represent the Union (Article 221 TFEU). The Union delegations represent the Union in the entirety of its activities, and thus cover both CFSP and non-CFSP matters, unlike the Commission Delegations that they have replaced. The Union delegations have taken over representational tasks which in the past were exercised by the embassies and representations of the Member State holding the Presidency. This includes chairing and organizing internal coordination meetings. However, as Union delegations, in particular at multilateral organisations, are at this stage understaffed, transitional arrangements have been agreed locally with the rotating presidencies while the EEAS is being built up. In terms of organization, the Delegations form part of the EEAS and they act under the authority of the High Representative

The above outline gives rise to a number of general observations. The most significant development seems the central position given the High Representative in the conduct of foreign relations. This central position is seen in particular in the fact that s/he chairs the Foreign Relations Council meetings. This means that the High Representative is put in a position where s/he can prepare the agenda, plan and sequence how the relevant items are taken up, and conduct the meetings.

Equally important is that the High Representative has been provided with human resources at his/her disposal. The creation of the EEAS puts the High Representative in a position where s/he can, in practical terms, take initiatives and ensure implementation and representation. Though the EEAS has for political reasons been kept distinct from the Commission services, the way it acts will probably be similar to that of the Commission: making initiatives and bringing items to the Council's attention.

Given that the High Representative also exercises authority over the Union Delegations, as part of the EEAS, this gives control over significant information resources, as s/he would otherwise be wholly dependent on the Member States.

The High Representative is thus put in a position where s/he can call the shots. The necessary tools are there to ensure coherent foreign policy and to make initiatives that serve European interests.

4. THE ROLE OF THE MEMBER STATES, SHARED COMPETENCES AND MIXED AGREEMENTS

The Lisbon Treaty has brought significant improvements to the management of the EU's external relations. It sets out a single institutional framework for the activities of the entire Union. This is expressed in providing the EU with a single legal personality, covering both what used to be the Community as well as the CFSP aspects. The CFSP is thus inside, not outside, of the common institutional framework. Also, it has also entailed removing the functions of the Presidency in external (CFSP) representation, as the Lisbon Treaty assigns the representational functions, on the one hand, to the Commission, and on

the other hand, to the High Representative or, at his level, the President of the European Council.

Under the Lisbon Treaty system, the Member States are left without a formal function in the representation of the EU external relations. Subject to the Treaty rules, the EU Member States retain their sovereignty to conduct their own foreign relations. Furthermore, in seeking to clarify the system of EU competences, the Lisbon Treaty leaves room for Member States in the areas of shared competences (Article 4(2) TFEU). They fall outside the CFSP, and include areas such as the environment, energy and internal market, where Member States retain competence, unless the Union has already exercised its own. In other areas, such as research, development cooperation or humanitarian aid, the fact that the Union has exercised its competence does not prevent the Member States from exercising theirs (Article 4(3)-(4) TFEU).

The areas that remain within the sole competence of the Member States would not automatically fall within the system of external representation set out in the Treaty. The Member States remain, in principle, free to determine their own representation, provided however that they comply with the principle of loyal cooperation and unity of the EU as established in the case law of the Court of Justice.⁷

Many of the areas falling within shared competences can have significant external relations aspects, others less so. They are also areas where drawing a line between the Union and the Member State competences can be difficult in practice, either because it requires detailed examination of EU legislation, or because in view of particular international instruments, the competences are so intertwined that the separation of competences is not possible in practical terms.

It seems that the notion of shared competences has gained particular interest now that the Lisbon Treaty has otherwise set clear rules for the Union representation, either by the Commission or the High Representative in their respective fields. It is relevant in different practical contexts on the international scene, in particular for the EU interventions in international organizations or conferences, and in the negotiation or conclusion of international agreements. The agenda in international meetings often covers a wide variety of issues. Internally, they may involve CFSP issues, and such non-CFSP issues where the Union has exclusive competence. In addition, they regularly involve (non-CFSP) issues which fall within the competences which are shared between the EU and its Member States. In this latter case, the loyal cooperation between the EU and its Member States is necessary in order to maintain the unity in international representation of the Union. This requires practical arrangements to permit the EU to address the issues at stake in a manner which is both fitting and efficient for the external context and respectful of the internal competences.

⁷ Recently in the Case C-246/07, *Commission v Sweden (PFOS)* [2010] ECR I-0000, paras. 69-105. See also the analysis in this volume in De Baere, 'International Negotiations Post Lisbon: a Case Study of the Union's External Environmental Policy'.

The EU has to project its unity in meetings taking place in international organizations and conferences. Concretely speaking, all EU interventions are therefore made behind the “EU nameplate”. Regarding issues falling within shared competences, the Commission or the EU Delegation would normally speak for the EU aspects, while the Presidency would act for the sole national competences. This would, however, require that the other Member States have authorized it to do so, as the Presidency does not have such representational tasks automatically under the Treaty rules. On other occasions, these latter aspects too are taken care of by the Commission.

In the case of international agreements, the notion of shared competences often leads to its signature and conclusion as a mixed agreement, but it is not necessarily so. Much depends on the significance of the shared competence part of the agreement, and the extent to which the commitments it entails are detailed and far-reaching.

The Lisbon Treaty has advanced the unity of the EU and enhanced the efficiency of its external representation. It is now possible to conclude CFSP related international agreements as a Union-only agreement, without national ratifications in the Member States. However, the Lisbon Treaty does not address the issue of mixed agreements, which are still possible in the areas of (non-CFSP) shared competences. Indeed, there are few signs in post-Lisbon practice that mixed agreements would disappear any time soon. The well-known disadvantage with mixed agreements is that their entry into force takes often several years, given the national ratification procedures in all 27 Member States. They may also blur the lines of responsibility between the Union and its Member States.

The adoption of the form of mixed agreement combines different interests at stake. On the one hand, the *general EU interest of unity and effective external action*, and the interests that the Member States may have as individual contracting parties. In respect of the latter, one could perhaps distinguish between the *legal interest* of Member States in guarding that their national competences are not in any way eroded and their more general *participation interest* as there may be political or diplomatic benefits of participating as a formal contracting party. In bilateral relations with a partner country, for instance, this may be a useful common reference point, especially in the case of big partner countries like Russia.

If the practice of mixed agreements is there to stay in the foreseeable future, as some predict,⁸ then perhaps the “Lisbon spirit”, if not its letter, would nevertheless serve as inspiration to address the issue of long national ratification periods. This could lead to the setting of timeframes for the completion of the ratifications. Accordingly, it could be envisaged that, unless ratified by some jointly set time-limit, the EU and those Member States that have already ratified could go ahead and deposit their ratification instruments and thus permit the entry into force of the agreement. In that case, the agreement would enter into force for the EU and those Member States that have already

⁸ See for instance A. Rosas, ‘The Future of Mixity’, in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited* (Oxford, Hart Publishing 2010), 367-374.

ratified. As for the Member States which have not yet completed their national ratification procedure, the agreement would not enter into force in their capacity as independent contracting parties, while as EU members, they would be covered as far as the EU competences extend. This situation would not be wholly unknown in practice. For instance, in the context of EU enlargements there have always been separate protocols or other treaty arrangements to carry out necessary adjustments, in the WTO or other international contexts, regarding EU participation in international agreements with third parties. The disadvantage would be that the EU unity would perhaps suffer to some degree. The differences in entry into force could probably be taken care of by appropriate drafting of the relevant clauses in the agreement. This could accelerate the entry into force of the agreements, while at the same time maintain the EU Member States as formal contracting parties. The setting of timetables could also be an incentive for ensuring that national ratifications proceed more rapidly.

THE EUROPEAN UNION'S EXTERNAL RELATIONS A YEAR AFTER LISBON: A FIRST EVALUATION FROM THE EUROPEAN PARLIAMENT

Ricardo Passos*

1. INTRODUCTION

As far as the European Parliament (hereafter: EP) is concerned, the main changes brought about by the Treaty of Lisbon on the EU's external relations are the following:

- (a) Under the Treaty of Nice, the rule was that the EP was consulted before the conclusion of international agreements. The consent procedure applied only in four exceptional instances (association agreements, and three other specific instances laid down in Article 300 (3), second subparagraph TEC). With the Treaty of Lisbon, the exception became the rule and now for basically all international agreements, Parliament is required to give consent before the agreement can be concluded by the Council (Art. 218 (6) (a) TFEU).
- (b) The second change concerns the budgetary procedure (Art. 314 TFEU) and the fact that now the TFEU foresees a Multiannual Financial Framework for at least a period of 5 years (Art. 312 TFEU), which is adopted by the Council but following consent of the EP. The latter has now a say, as the Council, on expenses related to the EU external relations, in particular concerning the Common Foreign and Security Policy (hereafter: CFSP).
- (c) The third change concerns the High Representative/Vice-President of the Commission and the political accountability agreed with the EP.
- (d) The fourth change is linked with the third and concerns the establishment of the European External Action Service (hereafter, EEAS) and the fact that a specific section of the EU budget (Section X) relates to it, which implies that the EP has to agree with this part of the budget. It also has competence to decide on the discharge of the EEAS, which provides a degree of political control on how the EEAS is organised.¹ The EP Committee on budgetary control is particularly concerned in verifying how the EU budget is spent on external relations, in particular regarding CFSP.

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¹ On the first year of EEAS, see the analysis in this volume in Duke, 'A Difficult Birth: the early days of the European External Action Service'.

From the above-mentioned changes, there is no doubt that the one with the highest impact is the fact that for almost all international agreements (except those related exclusively to CFSP), Parliament's consent is required.² I will therefore focus in this paper on the impact of the consent procedure for the European Parliament. I will develop this subject in the following three parts: the scope of the consent procedure (section 2); the question how to apply the consent procedure in practice: difficulties of interpretation of Article 218 (10) TFEU (section 3); and the concrete impact of the consent procedure in EU external relations: is the European Parliament playing an active role in EU external policy shaping? (section 4).

2. THE SCOPE OF THE CONSENT PROCEDURE

The first question to be considered is whether the power of the institution which is required to give consent is limited to say "yes" or "no", or whether it has some margin in exercising an influence over the content of the final text to be adopted.

As we know, this procedure exists since the Single European Act (1987) for association agreements and accession of new Member States. The Treaty of Maastricht (1993) subsequently introduced this procedure also for legislative acts (e.g. in relation to the Statute of MEPs, and the Statute of the Ombudsman which require the consent of the Council; the act adopting electoral procedure which requires the consent of EP; or the organisation of Structural Funds ex Art 161 TEC).

Concerning the "consent procedure" for the conclusion of international agreements, as for the accession treaties and association agreements, the Court of Justice used the words "joint decision" in a Judgment of 27 September 1988. The exact words used by the Court read as follows: "The prerogatives of the European Parliament have been augmented by the Single European Act, which has vested in it a power of joint decision with respect to accession and association agreements".³ It is interesting to note that the words "joint decision" correspond to the translation of the words "co-decision" in French, the original language of the Judgment. In legal literature, it is mentioned that, despite the word "consent" it is in reality a "co-decision" procedure because one institution, generally the Council, cannot adopt the act without the consent of the other (generally the EP).⁴ When an institution's consent is required for the adoption of an act, the requesting institution generally enters into negotiations with the institution giving consent *prior* to establishing a text. The European Parliament acted in this way with the Council on two occasions relating to (i) the adoption of the Statute of Members of the European Parliament; and

² This is mainly the result of the inclusion of Article 218(6)(a)(v) TFEU which holds that the consent of the European Parliament is required for the conclusion of "agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required".

³ Case C-302/87, *European Parliament v Council* [1988] ECR 5615, para. 27.

⁴ G. Isaac, *Droit communautaire général* (Paris, Colin 1999), at 70.

(ii) the regulations and general conditions concerning the European Ombudsman (the Council is required to give consent).

This approach, which has been applied to the legislative procedure, should also apply to international agreements. In other words, Parliament must not merely passively take note of the actions of the other institutions, but it may also bring some influence to bear on the Commission and the Council, in order to facilitate its consent on the final text. In some cases, the Parliament conveys its concerns to the Commission and to the Council through resolutions adopted in plenary.⁵ This interpretation is corroborated by the very terms of Article 218 (10) TFEU, which reads as follows: "The EP shall be immediately and fully informed at all stages of the procedure". Why should the EP be immediately and fully informed throughout the whole procedure from the opening of the negotiations, the decision adopting the negotiating directives until the signature of the draft international agreement, if it is to remain passive? Definitely, this provision means that Parliament is called upon to play a role during the negotiations of the international agreements, even if it is obviously not for the Parliament to negotiate them. This role is comparable to the role of the Council. This is clear for trade agreements. Article 207 (3), third subparagraph TFEU holds that "The Commission shall report regularly to the special committee *and to the European Parliament* [emphasis added] on the progress of negotiations". In other words, the EP and the Committee appointed by the Council, the Trade Policy Committee, should receive the same level of information from the Commission.⁶ Yet, at the present moment, the implementation of the consent procedure raises some difficulties.

3. HOW SHOULD THE CONSENT PROCEDURE BE APPLIED IN PRACTICE? DIFFICULTIES OF INTERPRETATION OF ARTICLE 218 (10) TFEU

The situation concerning the procedure for the conclusion of international agreements is surely complex and raises important and sensitive issues. It does not only concern the interaction between the Parliament, the Council and the Commission, but also Member States and third states or international organisations. According to Article 218 (2) TFEU, the Council adopts the negotiating directives and the Commission negotiates. The Council may also address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted (Article 218 (3) TFEU). It is only after the Council has given authorisation for the signature of the agreement

⁵ See, for example, European Parliament resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada, P7_TA(2010)0144.

⁶ On the Lisbon amendments in the area of CCP, see the analysis in this volume in Hoffmeister, 'The European Union's common commercial policy a year after Lisbon— Sea change or business as usual?'.

that the Parliament is requested to give its consent. Only if Parliament gives its consent, can the Council, then, conclude the agreement.

Now, it is obvious that Parliament can only give its consent if it agrees with the text, but it would be extremely risky if the Parliament was faced with a *fait accompli* and was required merely to give or refuse its consent. International relations must be based on stability, and a negative vote from the Parliament can have very negative consequences, not least on how the EU is perceived by its partners. Therefore, this must be avoided by all means. We all saw what happened with the rejection by the EP of the Swift draft agreement between the EU and the USA in February 2010. Such a negative outcome can only be avoided if the EP is involved from the very beginning of the negotiations. Perhaps the best way would be for the Parliament and the Council to agree on the negotiating directives from the outset. From there on, the Parliament should be in a position to be regularly informed by the Commission on the evolution of the negotiations.

This right to be informed stems from the very wording of Article 218 (10) TFEU, but for the moment there are some difficulties about the implementation of this provision. Actually, the Parliament is still not yet systematically “immediately” and “fully” informed. In particular, there are difficulties concerning classified information. The situation is different with regard to documents of the Council (in particular, the negotiating directives, or mandate) and those which fall under the Commission’s responsibility (such as draft negotiating texts). Surely, Article 218 (10) TFEU applies also to classified information. There is no exception laid down in this provision, so the EP is entitled also to be informed about the classified or confidential parts of international agreements under negotiation. Moreover, this right exists not only for international agreements on which Parliament is required to give its consent but for all international agreements foreseen in Article 218 TFEU, that is to say also CFSP agreements.

As far as the Council is concerned, what the Parliament wants is basically to have access to the negotiating directives (the mandate), which the Council adopts. The latter does not dispute the fact that the Parliament is entitled to actually have access to the text of the mandate. But, for the moment, each time a Chairman of a Committee asks the Council to transmit to the EP the negotiating directives, the Council argues that the mandates are classified as “*EU restraint*” and therefore, if MEPs wish to have access to them, they must go to the Council’s premises. This is, of course, unacceptable to the MEPs. Can you imagine how MEPs sitting in Strasbourg for a plenary session should take the plain or the train to go to the Council’s premises to read the mandates? Apparently, what the Council is doing is applying the current inter-institutional agreement (hereafter, IIA) which the Council concluded with the EP in 2002 concerning access by the EP to sensitive information of the Council in the field of security and defence policy (that is to say classified information relating to CSDP and CFSP).⁷ But this is manifestly not proportionate when one considers

⁷ Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, OJ 2002 C 298/1.

that these documents do not relate to defence or CFSP but relate to agreements which require Parliament's consent for their conclusion, in conformity with Article 218(6)(a) TFEU.

Following the rejection by the Parliament of the Swift agreement, the Council committed itself to negotiating an inter-institutional agreement with the Parliament in order to allow the latter to have easier access to the classified parts of documents related to international agreements on which it has a right of consent. On 16 November 2010, the Council submitted a proposal for an IIA to the EP. The negotiations have just started. Surely, the arrangements to be concluded should not be modelled on the current arrangements for access to sensitive information in the area of security and defence policy, which are particularly restrictive. Indeed, here we are considering classified information concerning EU agreements on which the EP gives consent (trade, transport, environment, etc). So we will see how an inter-institutional agreement can be reached. Such an agreement is necessary for the proper application of Article 218 (10) TFEU. However, it is not a *conditio sine qua non*. The institutions have to respect the obligation to inform the Parliament which stems directly from the Treaty. An inter-institutional agreement would facilitate the access to confidential documents and would be the expression of sincere cooperation between institutions. Yet, as long as there is no agreement, the institutions have to act on a case-by-case basis and respect the Treaties. It would be appropriate to find a practical arrangement acceptable for both parties. It is difficult to maintain the current situation of deadlock with the risk of Parliament eventually withholding its consent for lack of sufficient information.

The situation with the Commission is different because there is an inter-institutional agreement between the EP and the Commission concluded on 20 October 2010, which is the Framework Agreement on relations between the EP and the Commission.⁸ This Framework Agreement stipulates that the "Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives" (point 23). It further holds that "the information (...) shall be provided to Parliament in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament's views as far as possible into account" (point 24). Annex III of the Framework Agreement establishes specific provisions for the negotiation and conclusion of international agreements. It stipulates that:

"In the case of international agreements the conclusion of which requires Parliament's consent, the Commission shall provide to Parliament during the negotiation process all relevant information that it also provides to the Council (or to the special committee appointed by the Council). This shall include draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled. The Commis-

⁸ Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304, 20.11.2010, at 47. This Framework Agreement is inserted in Annex XIV of the EP Rules of Procedure.

sion shall also transmit to Parliament, as it does to the Council (or to the special committee appointed by the Council), any relevant documents received from third parties, subject to the originator's consent. The Commission shall keep the responsible parliamentary committee informed about developments in the negotiations and in particular explain how Parliament's views have been taken into account" (point 4).

Annex II of the Framework Agreement contains specific provisions governing the forwarding of confidential information to Parliament. These arrangements function relatively well, but some parliamentary committees are not fully satisfied with the level of information provided by the Commission during the negotiation process. The question on how to handle confidential information provided to the Parliament remains an issue, even if some Commissioners seem to be genuinely motivated to find ways and means to improve the level of information available to the Parliament.

4. CONCRETE IMPACT OF THE CONSENT PROCEDURE IN EU EXTERNAL RELATIONS: IS THE EUROPEAN PARLIAMENT PLAYING AN ACTIVE ROLE IN POLICY SHAPING?

It is still too early to have a clear view of Parliament's role. One thing is certain: as mentioned before, "consent" means "joint decision" and joint decision means "co-decision". So, the Parliament has definitely an important role to play, and not only when it refuses to give consent. The refusal to give consent concerning the Swift draft agreement with the USA is a good example. But rejecting an agreement by refusing to give consent should be and *remain* exceptional. Ultimately, it would be the EU external policy that stands to loose. Moreover, what matters for the Parliament is not to reject an agreement but rather to influence the very content of the agreement. That is why it is important to build the concept of consent in terms of political dialogue between Parliament, Council and the Commission. Political constructive dialogue implies trust among the institutions and not suspicion or distrust. The three institutions, in particular the EP and the Council, should bring to the external relations area the spirit of cooperation they exercise when they adopt legislative acts jointly, when they apply the ordinary legislative procedure. The worse is to put before the Parliament a draft agreement as a *fait accompli* on a take-it-or-leave-it position. This is, in my view, contrary to the wording and spirit of the Treaties, in particular Article 218 TFEU.

In concrete terms, how has Parliament influenced positively the content of international agreements in the months following the entry into force of the Treaty of Lisbon? Until now the Parliament has developed a constant practice of adopting political resolutions indicating its priorities for the negotiations. It continues to do so, after the Treaty of Lisbon. The difference is that, before the Treaty of Lisbon, there were like declarations without much effect; now with the Treaty of Lisbon, these resolutions may actually contain the "conditions" for consent. It is a way of putting pressure on the Commission and on the Council

and of saying publicly: “we can only give consent if you insert this or this paragraph in the agreement”. Some members and Committees believe this is a good political strategy. The inconvenience, in my view, is that it could also place the Commission and the Council in a take-it-or-leave-it situation, and moreover, it brings to the public domain and in particular to the third states concerned with which the Union negotiates the conditions of the Parliament, a sort of a second mandate for negotiations. But it is also true that with the threat of veto, the Parliament resolutions can be politically effective. Examples are: (i) the current negotiations with the USA on the Swift agreement; (ii) the current negotiations on PNR with USA, Australia and Canada; (iii) the Free Trade Agreement with Korea and the inclusion of chapters on environment and social/labour issues (ILO labour standards)⁹; and (iv) the Free Trade Agreement (FTA) with India, in which the Parliament set up conditions - such as the requirement that human rights and democracy clauses constitute essential elements of the FTA, concern about persecution of religion minorities and human rights defenders.¹⁰

In most cases, the Parliament insists on the insertion of clauses linked with the political situation of the country in question (negotiation of a Cooperation agreement with Libya,¹¹ Partnership Agreement with Russia¹²), but also human rights, social and environment clauses. Whilst this is true as a rule, in the case of consent, the Parliament is also defending some more concrete economic concerns. For example, the resolution on the negotiations for a free trade agreement with India includes sections on investment and public procurement.¹³ The Parliament has also recently adopted a resolution outlining its position on how the EU should develop its relations with third countries in relation to foreign direct investment (FDI) and how elements on FDI should be incorporated into free trade agreements negotiated by the EU.¹⁴

In this context, it is also important to note that, in some areas, consent is completely new and the Committees concerned wish to have an enhanced influence. One example is the modification of the Association Agreement with Morocco and the expressed reluctance from the Committee of Agriculture to this agreement. This reluctance is substantially motivated by economic concerns

⁹ See European Parliament resolution of 13 December 2007 on the trade and economic relations with Korea, P6_TA(2007)0629, which in paragraphs 7-16 called for the Korea free trade agreement to include social and environmental clauses. The signed agreement does, in fact, include chapter 13 on trade and sustainable development and calls for recognition of international standards and enhancing cooperation between the parties in this regard.

¹⁰ The European Parliament adopted a resolution on 26 March 2009 on an EU-India Free Trade Agreement (P6_TA(2009)0189), before the entry into force of the Treaty of Lisbon. The negotiations on the agreement are not yet concluded, but the Commission has explained its efforts to incorporate a sustainability Chapter in the agreement.

¹¹ European Parliament recommendation of 20 January 2011 to the Council on the negotiations on the EU-Libya Framework Agreement, P7_TA-PROV(2011)0020, issued prior to the recent upheavals in the country.

¹² European Parliament recommendation to the Council of 2 April 2009 on the new EU-Russia agreement, P6_TA(2009)0215.

¹³ European Parliament resolution of 26 March 2009 on an EU-India Free Trade Agreement, P6_TA(2009)0189, paragraphs 26-31.

¹⁴ European Parliament Resolution of 6 April 2011 on the future European international investment policy, T7-0141/2011.

from farmers and producers from France, Spain, Italy and Greece, in particular relating to the tomato and strawberry imports. The Committee on Agriculture, which never had to give consent to any international agreement, is now considering rejecting this envisaged agreement in an opinion it will give to the lead committee, the Committee on International Trade. But it is also concerned with Trade Agreements with MERCOSUR and Canada as far as agricultural products are concerned. Members of the Committee on Agriculture played a very active role in a hearing organised by the Committee on International Trade about the re-launch of negotiations for an association agreement with MERCOSUR, highlighting concerns about the need to maintain a balance between trade liberalisation and food security. A similar approach is taken by the Committee on Fisheries, which had never before had to give consent. For example, the committee is airing serious concerns about prolonging the fisheries agreements with Morocco because EU vessels fish in the waters of Western Sahara. This illustrates that one year after the entry into force of the Treaty of Lisbon, the Committees dealing with international agreements are becoming more aware of the important role they are called upon to play, due to their responsibilities in giving their consent to the conclusion of the agreements.

5. CONCLUDING REMARKS

A first evaluation of such a short period is possibly premature, but it can nonetheless be said that the EP has acted with awareness, but also with a sense of political responsibility. Those who feared that the Parliament could upset the stability of EU external relations misconceived the role of the EP. As with the first experiences of the co-decision procedure in the area of internal market legislation, the Parliament has shown in the area of external relations maturity in the way it prepares the consent of international agreements. Indeed, in more than one year, only one rejection was voted, and this concerns the Swift draft agreement with the USA, which as it was presented to the Parliament (as a pure *fait accompli* in such a sensitive area for the citizens) could hardly have gained a favourable vote.

This maturity is certainly a good sign for the future, but the Parliament will exercise its rights and prerogatives fully and the Commission and the Council need to take that into account, in particular concerning the forwarding to the Parliament of all the information it needs to vote its consent. This is particularly true as far as confidential information is concerned. By demanding the transmission of this information, the Parliament is merely exercising its rights, as they stem from the Treaties.

PART II
A national perspective

EU EXTERNAL ACTION AFTER THE ENTRY INTO FORCE OF THE LISBON TREATY: COHERENCE AT LAST?

Ivan Smyth*

1. INTRODUCTION

The Lisbon Treaty, which entered into force on the 1st December 2009, heralds a new era in the conduct of the external relations of the European Union. The significant changes Lisbon introduced, such as the identification and classification of the competences conferred on the EU, the conferral of legal personality on the EU, the creation of the office of the High Representative (HR) and the European External Action Service (EEAS), and the consolidation of the procedures for the negotiation and conclusion of agreements into one treaty provision can, at least in theory, assist the EU to operate more effectively on the international stage. Perhaps inevitably, however, the reality has been less satisfactory to date. The outcome of the negotiations has also created some uncertainty, most notably in respect of the roles to be played by key EU actors, which has the potential to undermine the EU's ability to pursue a more effective and coherent external relations policy. This paper draws attention to a number of issues in relation to the negotiation and conclusion of agreements by the EU and in the conduct of its external relations post Lisbon.

2. CLASSIFICATION OF COMPETENCES, SINGLE LEGAL PERSONALITY AND COMMON OBJECTIVES FOR EU EXTERNAL ACTION

The most significant changes introduced by the Lisbon Treaty are the reordering of the Treaties, the clear identification of the nature and extent of the EU's competences and the conferring of legal personality on the European Union. The identification and classification of the competences of the EU set out in Articles 2-6 TFEU for the first time provides an indication of the extent of the competences conferred on the EU and useful guidance in determining whether and to what extent the EU has competence in relation to matters to be addressed in either negotiations in international organisations or of international agreements.

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Similarly, the conferral of legal personality on the EU and the dismantling of the former pillar structure removes the previous difficult segmentation of responsibilities under the pre-Lisbon Treaties. No longer are we faced with, as Professor Alan Dashwood so aptly describes it, “the troubling metaphysics of an EU acting directly for some purposes, and through its Community persona for other purposes”.¹ Following the entry into force of Lisbon, the EU has explicit legal personality² and has replaced and succeeded the European Community. It possesses the power to act across the whole range of external matters covered by the TEU and the TFEU. This is reflected in Article 205 TFEU which explicitly links the Union’s external action on the international scene pursuant to Part Five TFEU back to the principles, objectives and general provisions laid down in Chapter 1 of Title V TEU, thus in principle recognizing the seamless interaction of action under the TEU and TFEU.

Lisbon has also removed an anomaly that previously existed in relation to the territorial scope of application of the Treaty of European Union. Prior to the entry into force of the Lisbon Treaty, the TEU was silent as to its territorial scope. This defect is now remedied, as Article 52(2) TEU confirms that the TEU and the TFEU have the same territorial scope which is in turn specified in Article 355 TFEU.

3. THE NEGOTIATION AND CONCLUSION OF AGREEMENTS POST LISBON

Pre-Lisbon, the procedures for the negotiation and conclusion of external agreements were addressed in three separate provisions in the Treaties - Articles 24 and 37 TEU related to agreements under the Second (Common Foreign and Security Policy (CFSP)) and Third (Justice and Home Affairs (JHA)) Pillars under the TEU and Article 300 EC which governed the negotiation and conclusion of agreements under the EC Treaty. The Lisbon Treaty replaces these three legal bases with one over-arching clause that sets out the modalities for the negotiation and conclusion of all international agreements to be entered into by the EU.³ Article 218 TFEU governs both agreements relating to the CFSP (which otherwise remains largely detached from other EU policies and subject to special rules) and agreements covering the more traditional sectoral policies such as trade, environment and transport falling within the scope of the TFEU. This rationalisation is to be welcomed. It reflects a desire to enable the EU to conclude comprehensive EU-only agreements in place of the pre-Lisbon bias in favour of mixed agreements. However, experience since the entry into force of Lisbon demonstrates that there are still significant issues to be resolved.

¹ Lecture at the University of Ghent entitled ‘Is the legal and institutional framework of EU external action post-Lisbon fit for purpose?’, given on 3 May 2011.

² Article 47 TEU.

³ Article 37 TEU does provide that the EU can enter into agreements in relation to the CFSP but does not set out any modalities for this. The procedures for negotiating CFSP agreements are to be found in Article 218 TFEU.

Although Lisbon opens up the possibility for there to be EU-only level agreements straddling both the TEU and the TFEU, there remains some reticence to move in this direction. The evidence to date is that some continue to be wedded to the principle of mixity and are reluctant to contemplate moving towards wide-ranging EU-only agreements. The likelihood is that, at least for the foreseeable future, some will persist in arguing for mixed agreements where the subject matter of the proposed negotiations touch on issues such as non-proliferation, the international criminal court, etc. Indeed, even in sectoral areas such as the environment where competence is shared between the EU and Member States, there is little evidence of significant movement towards the negotiation of EU-only agreements which include matters where the EU has not as yet exercised its internal competence. If this continues, then the potential advantages offered by Lisbon for faster conclusion and implementation of international agreements by the EU may prove illusory. The EU will, as before, be forced to await ratification by all Member States of a mixed agreement before the agreement will be able to enter force.

The European Parliament emerges from Lisbon as a significant player in terms of the negotiation and conclusion of international agreements at the EU level.⁴ Although still excluded from any role in relation to agreements relating exclusively to the CFSP, in other areas the European Parliament will be able to exercise considerable influence on the conduct and ultimate outcome of negotiations. The reasons for this are twofold. Firstly, the increase in the European Parliament's co-legislator role for matters covered under the TFEU means that its consent will be needed for a much wider variety of agreements than previously. This is particularly significant in respect of future agreements in key areas of EU external policy such as trade and fisheries where hitherto the European Parliament has played a marginal role. Secondly, Article 218(10) TFEU places an obligation on the Council and the Commission to keep the European Parliament immediately and fully informed at 'all stages of the procedure', thus providing the European Parliament with much more information than previously. This, when combined with the requirement for it to consent to the final agreement before it can be concluded by the Council, enables the European Parliament to exert its influence over the course of the negotiations.

The precise parameters of the obligation in Article 218 (10) TFEU are open to debate. Unsurprisingly, this has already given rise to some tensions between the European Parliament and the Council particularly as regards the extent to which the obligation applies when the Council is determining the nature and scope of a negotiating mandate. The European Parliament has attempted to pre-empt the determination of this issue in its favour by recently entering into a Framework Agreement with the Commission which purports to provide it with draft mandates and requires the Commission to take into account any views expressed by it on the text. The Council, which did not participate in the negotiations of the Framework Agreement, expressed some concern about this at the time. Furthermore, it has indicated that it will monitor carefully the operation

⁴ See the analysis in this volume in Passos, 'The European Union's External Relations – A Year after Lisbon: A first evaluation from the European Parliament'.

of the Framework Agreement by the parties to ensure that they continue to act within the limits set by the Treaties. This is just one example of the potential for tensions to arise between the different EU institutional actors as a result of the ambiguous terms of the Lisbon Treaty.

Several other issues arise from the terms of Article 218 TFEU. These concern:

- (a) the form in which the Council must authorise the EU negotiator to commence negotiations, i.e. a formal decision only or other forms of instrument such as Council Conclusions;
- (b) whether it is still possible to have one decision which covers both the authorisation from the Council and the authorisation from the Member States to commence negotiations on a mixed agreement or whether the EU and Member State competence elements must be separated out into two different decisions; and
- (c) what role, if any, can be assigned to the rotating Presidency to negotiate elements of a proposed mixed agreement falling within Member State competence.

It is only to be expected that a variety of issues such as these would arise given the significant changes made by Lisbon. Some jockeying for position will inevitably arise between the different EU players as they strive to take the measure of each other in light of the Lisbon changes and grope their way to an appropriate *modus vivendi*. It is to be hoped, however, that in the meantime the ability of the EU to negotiate effectively on a range of ongoing negotiations will not be undermined by internal squabbles.

It is perhaps worth looking specifically at the changes made to the Common Commercial Policy (CCP) under Lisbon and how these impact on EU level trade negotiations.⁵ Some issues arise which are linked to the interpretation of Article 218 TFEU and its relationship to Article 207 TFEU. For example, do the procedures which govern the authorisation and the conduct of negotiations relating to trade agreements differ from other international agreements due to the specificities of Article 207(3) TFEU?

Perhaps more interesting, however, is to look at some broader issues. Overall, Lisbon should make it easier for the EU to enter into comprehensive trade agreements with third countries. On their face, the changes made to the CCP would seem to offer the EU considerable benefits. The removal of the requirement for mixity in relation to certain agreements relating to trade in services is a sensible rationalisation of the overly complicated provisions introduced under the Nice Treaty. Now at least it is clear that comprehensive trade agreements fall within the EU's exclusive competence and can be concluded by the EU alone. It is, however, notable that international agreements in the field of transport remain excluded from the scope of the CCP by virtue of the carve-out carried over into Article 207(5) TFEU.

⁵ See also the analysis in this volume in Hoffmeister, 'The European Union's common commercial policy a year after Lisbon – Sea change or business as usual?'

The requirements for unanimity in respect of the conclusion of certain trade agreements are obscure and may prove difficult to apply in practice. For example, who will decide whether an agreement in the cultural and audiovisual services field risks prejudicing the Union's cultural and linguistic diversity so as to require unanimity? Clearly, it will be in the interests of some who are opposed to the EU negotiating in these areas to argue that this is the case in respect of any proposed provisions touching on these areas in a trade agreement. Disputes on these points are inevitable in the future. No doubt it will fall to the EU Courts to act as the final arbiter. In the meantime, this may still serve to hamper the EU's ability to achieve the level of ambition it might otherwise attain in trade negotiations.

A further significant change in the trade field is the addition of foreign direct investment (FDI) to the scope of the CCP. Alas, however, this is not without difficulties. Although FDI has been brought within the ambit of the CCP as set down in Articles 206 and 207 TFEU, the term itself is not defined. This has already given rise to debate within the Union as to the precise scope of the EU's competence to act in this area. For example, some question whether FDI can cover indirect forms of investment through portfolio investments. It is perhaps unfortunate that more thought was not given to the need to define this term. Amongst the myriad of other issues that remain to be resolved in this area are questions such as:

- (a) how best to preserve the protections accorded to Member States' investors under their national bilateral investment protection agreements pending the negotiation and entry into force of EU level agreements;
- (b) the extent to which EU level agreements can address not only State to State/ regional international organisation disputes but also claims brought against the EU or a Member State by individual investors linked to which are difficult questions about how to apportion responsibility and liability between the EU and its Member States; and
- (c) whether EU participation in international investment arbitration fora such as ICSID is necessary in order for the EU to exercise its new competence effectively.

All of these matters will take time to resolve.

4. EXTERNAL REPRESENTATION OF THE EU POST LISBON

Much has been written about the changes made under Lisbon in regard to the future conduct of the EU's external relations arising from the creation of the office of the High Representative and the European External Action Service (EEAS) to assist him/her.⁶ Without doubt, this new configuration of EU external actors, coupled with the creation of a new specific Council configuration, the

⁶ See the analysis in this volume in Duke, 'A Difficult Birth: the early days of the European External Action Service'.

Foreign Affairs Council, marks a totemic change in the EU's organisational arrangements for the conduct of the EU's external relations.

The consolidation of the external relations functions previously carried out by the former High Representative for the CFSP, the Secretary-General of the Council and the Commissioner for External Affairs under one umbrella should, in theory, inject more visibility and stability into the external representation of the EU and assist in ensuring consistency between different sectors of the EU's external actions. This should be further assisted by conferring responsibility for chairing the Foreign Affairs Council on the High Representative. Similarly, tasking the High Representative with fulfilling the functions previously assigned to the rotating Presidency in relation to the CFSP, in particular the conduct of political dialogue, allows the EU to present a more consistent and coherent line over time. Dispensing with separate Council and Commission representations in third countries and attached to international bodies in favour of unified EU delegations should allow for an optimal deployment of resources and avoid wasteful duplication whilst ensuring that a unified approach is being presented by the EU.

However, both the provisions of Lisbon itself and the attitudes of all the key players within the EU may, if care is not taken to avoid doing so, serve to undermine the ability of the EU to reap the rewards and to bolster its influence and effectiveness on the world stage. Firstly, although Article 27(2) TEU tasks the High Representative with representing the Union on CFSP issues, the conduct of political dialogue and with expressing the Union's position in international organisations and conferences, Article 15(5) TEU ascribes the role to the President of the European Council to ensure the external representation of the Union on issues concerning the CFSP at Head of State level gatherings. Whilst the President of the European Council is to undertake this role without prejudice to the powers of the High Representative, nevertheless the possibility for tensions to surface between the two offices and their respective staff is real. The problem may be further compounded by the fact that the President of the Commission will also be in attendance at international gatherings at Head of State level. Under Article 17 TEU, the Commission is tasked with ensuring the EU's external representation in areas outside of the CFSP. Frankly, it is difficult to say that the arrangements under Lisbon provide a satisfactory answer to Henry Kissinger's oft quoted concern: "When I want to speak to Europe who do I call?" There is still considerable potential for confusion to arise in the minds or the EU's interlocutors as to whom they should speak to on any particular issue.

In principle, drawing staff in roughly the same proportions from the Commission, the Council Secretariat and Member States to staff the new EEAS does offer the possibility to create a real pool of external relations expertise. However, the challenges in blending these different elements into a cohesive force with a unified philosophy, outlook and *esprit de corps* whilst maintaining budget neutrality should not be underestimated. Time must be allowed to achieve this and it should be recognized that mistakes will be made along the way.

Concerns have also been expressed that the High Representative's potential effectiveness may be undermined by the fact that key foreign policy portfolios are not within the ambit of his/her role. Responsibility for matters such as trade, development and enlargement remain under the authority of other Commissioners. In my view this is overstated. If one takes the analogy of a Member State administration, issues such as development and trade often are separate from the mandate of the foreign service and fall to other Departments to conduct. Whilst undoubtedly there is a risk that the different services may become protective of their areas of influence and pursue competing or diverse objectives, the mechanisms are in place to limit this. Firstly, the High Representative also holds the office of Vice-President of the Commission. This allows him/her to attend meetings of the Commission where s/he will be able to exert influence over his/her colleagues given his/her over-arching responsibility for coordinating EU external action. It also ensures that s/he is kept informed of the full range of Commission activities in the external sphere. Furthermore, s/he is specifically tasked by the Treaties with chairing the Foreign Affairs Council and, with the Council, of ensuring the unity, consistency and effectiveness of action by the Union. Thus, in the event of difficulties arising between the High Representative and his/her colleagues in the Commission, s/he has the means to bring the matter directly to the attention of the Council and for the Council to determine how matters should proceed.

Perhaps the greatest challenge presented by the new post-Lisbon arrangements on EU representation will be striking the right balance between the interests of the EU and the Member States in the conduct of foreign policy. The displacement by the High Representative of the role previously played by the rotating Presidency in representing the EU in relation to the CFSP should enable a more consistent and medium to long-term approach to be taken by the EU on CFSP-related issues. However, indications are that there is still some confusion in the minds of the Member States and indeed the High Representative as to the extent of her role. Differences may arise on issues such as the degree to which the High Representative must seek authorisation from the Council before conducting political dialogue with third countries or making statements on CFSP issues on behalf of the EU. Inevitably, this can sometimes lead to friction in certain circumstances but these initial growing pains will undoubtedly be resolved over time.

Similar teething problems may arise in relation to the respective roles of EU delegations and the Member States' embassies and consulates in relation to coordination of action in international bodies and organisations and responsibility for presentation of EU/EU and Member State positions. A surprising amount of time and resource has been taken up to date discussing rather esoteric issues. These include matters such as what nameplate should be used by the EU Delegation in international bodies and who should present a position agreed by the Member States and the EU Delegation in coordination in international bodies. Clearly, concerns about potential displacement of Member States' role and influence by the EU Delegation in international body remain in some quarters.

5. THE VIEWS OF EXTERNAL ACTORS

When considering the EU's external relations it is perhaps all too easy to focus only on the internal EU dynamics and to overlook the significant impact that other external actors can play in this regard. In order for the EU to harness the full potential of Lisbon, it needs not just to streamline its internal decision making procedures but also to win the acceptance of the wider international community of its enhanced role particularly in international bodies.

In practical terms it is unlikely that the EU will encounter difficulties in this regard in respect of the negotiation and conclusion of bilateral agreements. Indeed, one would expect many third countries to favour a move away from mixed agreements towards the negotiation of comprehensive EU-only agreements. From a third country's perspective, such agreements would avoid the considerable delays that currently arise due to the need for ratification by twenty seven Member States. Similarly, EU-only agreements would avoid the complexities for negotiating partners of trying to determine where competence, and by extension responsibility, lies between the EU and its Member States for particular provisions of a mixed agreement.

However, the position may be more nuanced in respect of EU participation in international organisations. Although Lisbon paves the way for more cohesive EU presence and action in international organisations, other international actors may harbor suspicions about the ambitions of the EU or may for a variety of motives not wish to see the EU enhance its position or influence in international bodies. The recent experience of the EU in seeking to negotiate enhanced observer rights in the UN General Assembly provided a demonstration of this. Non-EU Member States' concerns and resistance to a more active EU cannot be underestimated or ignored. Attempts must be made to understand and address their concerns. Otherwise, this risks becoming a very real obstacle for the EU to surmount before it can pursue its comprehensive external policy aspirations.

6. CONCLUSION

There is much to welcome in the Lisbon Treaty in terms of its attempt both to simplify and centralise the conduct of EU external relations and to rationalise the procedures applicable thereto. The means to allow the EU to play a key role on the global stage are in place. However, much work remains to be done if the EU is to realise the full potential this offers. That said, arguably the experience to date is no different from what we have seen in the past with previous significant Treaty changes such as occurred at Maastricht and Nice. As we witnessed with those Treaties, there is an inevitable transitional phase where some seek to push for an expansive interpretation of what constitutes the boundaries of EU external action whilst others attempt to limit Lisbon's impact in the external sphere. It will take time for a new equilibrium to be established. In the meantime, we must remain both optimistic and patient. Rome was not built in a day; nor will be a fully effective and coherent EU external policy!

PART III
Policies and actors

A DIFFICULT BIRTH: THE EARLY DAYS OF THE EUROPEAN EXTERNAL ACTION SERVICE

Simon Duke*

1. INTRODUCTION

One of the obvious dilemmas when thinking about the EU's external relations a year after the Lisbon Treaty is what might fittingly be attributed to change because of the Treaty and what have occurred in spite of the Treaty. There are most probably significant areas of overlap whereby, for instance, the top positions in EU external action and the European External Action Service (EEAS) are a consequence of the Lisbon Treaty but whose roles have been shaped by choices made by the EU members and changing international politics. In the case of the EEAS, it is very much in its early days and the details of how it functions and who does what are beyond the Treaty. An interim report on the Service's progress is due this year while the first major review of the working of the Service is not due until 2013. A year is thus a relatively short time in which to reach any firm conclusions. For this reason, hard and fast indicators are best resisted in favour of efforts to understand emerging trends and capacities and what they might suggest for the future.

The simple litmus test for the EU's external action generally, established in the Convention on the Future of Europe, the European Security Strategy and other key documents, is that the Union should endeavour to be more coherent, efficient and visible. These, I would suggest, are the measures by which the EU's progress in external relations should eventually be measured. The EEAS is a key player, or facilitator, when it comes to all three of these benchmarks. The potential is there to ensure more coherence by linking together policy and instruments to a greater extent than has been possible in the past. In particular, this could be attained by the centralisation of most geographical desks in the EEAS as well as a role for the Service in the first three stages of the programming of instruments and, where relevant, with the responsible Commissioner and Directorate-General. For closely related reasons, the EEAS also holds the promise for more efficiency since, among other factors, the Service is the common support structure for not only the High Representative for Foreign Affairs and Security Policy and Vice-President of the Commission (HR/VP), but also the President of the European Council, the President of the Commission and, more generally, the Commission as a whole. The Service also carries similar potential for greater visibility, most notably through delegations that will now be able to represent all of the EU's external action and may thus become more political and engage more directly on foreign and security policy issues.

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The potential for positive synergies is therefore present, but there is also the possibility that the EEAS will fail to coalesce as a coherent 'institution' and that its development will be stymied by the transferral of existing institutional (possibly intra-institutional as well) and political rivalries into the new Service. It is obviously difficult to predict what will happen but this brief overview adopts a more optimistic outlook since the three main constituents of the Service have already invested heavily in the Service. It will reflect very poorly upon the European Commission, the Council Secretariat and the Member States if the EEAS is perceived to be a failure in due course.

The EEAS is though only just getting off the ground with many inevitable teething problems. Although to those outside the EU, or even outside Brussels, the EEAS often appears to be another case of rearranging the institutional deckchairs, it is tantamount to an institutional revolution and, with it, come high stakes. Purists may argue that the EEAS is not an institution *per se*, which is formally correct, but from the staff and financial perspectives it enjoys considerable autonomy and will over time come to be seen as an institution in its own right.

2. THE EEAS AND COHERENCE

Although the theme of coherence is well-trodden in the legal and political science literature, it is worth revisiting since the Lisbon Treaty makes a number of general stipulations regarding coherence that apply to the EEAS. Article 21 (3) of the Treaty on European Union (TEU) provides that the 'Union shall ensure consistency between the different areas of its external action and between these and its other policies'. This is subsequently reinforced by Article 7 of the Treaty on the Functioning of the European Union (TFEU) which notes that, 'the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. The use of the emphatic 'shall' implies that 'consistency' (as *per* the English version of the Treaty) is an obligation. The Treaty, therefore, establishes a clear obligation regarding horizontal coherence but also extends this to the vertical aspects by stating in Article 4(3) TEU that, 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.

In the political science literature coherence is often referred through a number of typologies, such as its horizontal aspects (between the EU institutions) and its vertical aspects (between the Member States and the EU institutions). There are though many more aspects to the term as Lisbeth Aggestam *et al* have argued.¹ The idea of coherence is often applied to the way in which institutions and structures work in a decision-making context. This is a perfectly accept-

¹ L. Aggestam, F. Anesi, G. Edwards, C. Hill and D. Rijks, 'Institutional Competences in the EU External Action: Actors and Boundaries in CFSP and ESDP', *SIEPS Publications*, May 2008, Report No. 6-7, at 12-13, available at <<http://www.sieps.se/sites/default/files/70-20086-7.pdf>>.

able measure of coherence (the 'end product' approach) but it often overlooks the role that support structures can play in attaining coherence in terms of decisions and their implementation. It was therefore refreshing that the Working Group on External Action in the Convention on the Future of Europe specifically observed that there should be *coherence and efficiency at the level of services*. It was in this context that 'one joint service' (the EEAS) was referred to, along with a European Diplomatic Academy and the EU delegations/embassies.² The report noted that, '[i]n the hypothesis of the creation of a new post of European External Representative [the original term for the HR/VP], this service would work under his/her authority'. The clear implication of the Working Group's reflections was that the EEAS should assist the HR/VP in fulfilling her responsibilities, which include those for coherence and efficiency. The EU delegations/embassies, also mentioned, fall under the EEAS and they play an important role regarding not only coherence but also visibility of the EU and its external action.

Coherence and efficiency at the level of services is thus a sub-field of a far wider stipulation applying to the EU's external action as well as to the Member States. A comprehensive examination is beyond the confines of this particular contribution and, within this in mind, a few key issues will be highlighted.³

At the macro level, the EU as a whole has a coherence problem in its external relations. The obvious question is what should the EU be coherent (or consistent, to use the English language version of the Treaty) with? At the most general level, it should be coherent with the aims and objectives of the EU, as laid out in the Lisbon Treaty (notably Articles 3 and 21 TEU). In the former Article, the EU is instructed in 'its relations with the wider world' to 'uphold and promote its values and interests'. The EU is drowning in strategies and boasts no less than 15 strategic partnerships, but there is no real sense of priorities or strong sense of distinctiveness (as Solana claimed in 2008) in EU foreign and security policy.⁴ Although there is frequent reference to the EU's interests in official documents, it is not entirely clear what exactly these are. The EU's values and principles are clearer, but in the absence of a clear picture of how these relate to or complement interests, charges of double-standards or hollow pronouncements are perpetual risks. Suffice it to say, the recent chaos in North Africa and the Middle East will put the question of the balance between values and interests into sharp relief. The EU's standing in world affairs may well be determined by how it reacts to the unfolding events in its southern neighbourhood. A Union that is drowning in strategies, but appears to lack a compelling vision of its purpose in the world, will obviously stand less chance of being coherent, effective or visible (in the positive sense of the word).

² The European Convention, 'Enhancing coherence and efficiency between institutions and actors', *Final Report of Working Group VII on External Action*, Section 5, CONV 459/02, 16 December 2002.

³ For a comprehensive treatment of this theme, readers are referred to P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham, Edward Elgar 2011).

⁴ *Report on the Implementation of the European Security Strategy: Providing Security in a Changing World*, Brussels, S407/08, 11 December 2008.

The strategic debates that will shape the Union's external action have already been promulgated (largely by the President of the European Council, Herman van Rompuy) but remain inconclusive.⁵ The EEAS will play a crucial role in the following stages when it comes to mainstreaming priorities and making sure that the main thrust of the EU's global aspirations as an actor are related to policies and, subsequently, instruments. The lack of any macro-level conception of the EU's role on the international stage may account for the current under-development of strategic planning, strategic communications and public diplomacy in the EEAS.

Putting the significant strategic-level issues aside, the general Treaty-based stipulations regarding coherence are strengthened by more specific obligations arising from the 26 July 2010 Council decision on the organisation and functioning of the EEAS (hereafter: 'Council decision').⁶ The recitals build upon Articles 18 and 27 TEU by specifying that:

The EEAS will support the High Representative in his/her capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council. The EEAS will also support the High Representative in his/her capacity as Vice-President of the Commission, in respect of his/her responsibilities within the Commission for responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union's external action, without prejudice to the normal tasks of the Commission services.⁷

The Council decision makes it clear that the EEAS will support the HR/VP in her 'triple-hatted' capacity (by specifically mentioning the Foreign Affairs Council) which, from a coherence perspective, is desirable. The Council decision then extends this even further when it states, in Article 2(2), that '[t]he EEAS shall assist the President of the European Council, the President of the Commission, and the Commission in the exercise of their respective functions in the area of external relations'. Article 3(1) of the same decision then extends the coherence principle to its logical limits by charging the EEAS to work with the General Secretariat of the Council and the Commission to 'ensure consistency between the different areas of the Union's external action and between those areas and its other policies.'

The obvious question that arises from such a broad and general mandate is *how* the EEAS is supposed to ensure consistency/coherence, whilst respecting institutional competences (and sensitivities). In general terms the Council decision specifies that:

The EEAS and the services of the Commission shall consult each other on *all matters* relating to the external action of the Union in the exercise of their respective

⁵ See Address by Herman van Rompuy, President of the European Council, to the Collège d'Europe, Bruges, 'The Challenges for Europe in a Changing World', PCE 34/10, 25 February 2010.

⁶ Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010 L 201/30.

⁷ *Ibid*, para 3 (emphasis added).

functions, except on matters covered by the CSDP. The EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the Commission in this area.⁸

The decision appears to establish a rather open-ended obligation for *mutual* consultation between the Commission and the EEAS with the important exception of CSDP (discussed below). Consultation is obviously necessary for coherence and efficiency but may lead to debates about how extensive these rights of consultation are, especially since most of the directorates-general of the Commission could, arguably, be construed to have some external relations competence. Nor does the decision make it clear whether any such consultation should apply to those areas, like the Common Commercial Policy or the external aspects of monetary policy, that fall within the exclusive competences of the Union under Article 3(1) TEU.⁹

The Council decision is not particularly clear on this matter but does, however, suggest that the role of the EEAS will apparently be defined by what falls beyond the scope of the 'normal tasks' of the Commission services and those of the Council Secretariat. The delineation of the EEAS in the Council decision as 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', also presupposes a clear understanding of the normal tasks of the respective bodies.¹⁰ The impression that the EEAS is transgressing the 'normal tasks' of the Commission (or Council Secretariat) in its quest for coherence and efficiency, whether wilfully or accidentally, risks undermining the legitimacy of the EEAS from the perspective of the EU institutions.

Any such legal determination of 'normal tasks' will have to accept the failure of the Lisbon Treaty to 'suppress the intrinsic dualism of the EU's external action', thus leaving CFSP subject to specific rules and procedures; a pillar in everything but name. The potential for another ECOWAS-type case should therefore not be discounted.¹¹ The full details of the case are beyond the remit of this contribution, but the questions of competences that arose under the old Treaties were not resolved by the Lisbon Treaty.¹² Suffice it to say that pre-Lisbon external relations revealed numerous issues, such as human rights, conflict prevention, energy security, climate change, civilian crisis management or some defence industrial issues, where competences were ill-defined in terms of Community and CFSP responsibilities. The continued pillarisation of the EU

⁸ *Ibid.*, Article 3(2) (emphasis added).

⁹ On the Lisbon amendments in the area of CCP, see the analysis in this volume in Hoffmeister, 'The European Union's common commercial policy a year after Lisbon – Sea change or business as usual?'

¹⁰ *Ibid.*, Article 1(2).

¹¹ C. Cellierino, 'The New European External Action Service and the Lisbon Call for Coherence of European External Action: Issues of Accountability and Scope', 17 *Columbia Journal of European Law Online* (2010), 22-26, at 25

¹² Case C-91/05, *Commission v Council* [2008] ECR I-3651. For a cogent analysis of this, see C. Hillion and R. Wessel, 'Competence Distribution in EU External Relations After ECOWAS: clarification or continued fuzziness?', 46 *CML Rev.* (2009), 551-586.

under the Lisbon Treaty (albeit with one less pillar) means that a number of key Articles reflecting on competence issues between the Union and CFSP were retained. Article 40 TEU (formerly Article 47) is one example whereby, '[t]he implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences (...)'. In a similar vein, when it comes to international agreements, the question of whether the High Representative or the Commission should take the lead in the negotiations depends upon whether the agreement relates 'exclusively or principally to the common foreign and security policy' (Article 218 (3) TFEU).

Should questions of competence arise, it will be up to the legal services of the Commission and the Council Secretariat to deliberate and, ultimately, the European Courts. The question of coordination between the legal services may be complicated by the presence of the EEAS's own legal affairs department; the latter being a curious addition to a nominally *sui generis* creation but whose presence may be justified by the Service's status as a functionally autonomous body of the Union.

In the context of the Commission, the 'normal tasks' are subject to a distinction between 'responsibilities' incumbent on it in external relations on the one hand, and on the other hand those 'aspects of the Union's external action' which are subject to coordination. This raises the question of whether coherence is then a shared task with the Commission when specific Commission responsibilities are concerned, and assumed by the EEAS when coordination is involved. The distinction was only made somewhat clearer when Jose Manuel Barroso announced his new Commission in November 2009. He singled out the roles of three Commissioners who, in effect, flank the HR/VP:¹³ Štefan Füle, Enlargement and European Neighbourhood Policy; Kristalina Georgieva, International Cooperation, Humanitarian Aid and Crisis Response; and Andris Piebalgs, Development, who were all instructed to operate 'in close cooperation with the High Representative/Vice-President in accordance with the treaties'.¹⁴

The creation of groups of Commissioners for coordination purposes across various policy fields has been a feature of the early stages of successive Colleges of Commissioners. Under the most recent Barroso Commission, a Group of Commissioners in external relations was created in April 2010, chaired by Ashton (as Vice-President) but also involving Piebalgs, Füle, Georgieva as well as Karel De Gucht and Olli Rehn (Commissioners for Trade and Economic and Monetary Affairs respectively).¹⁵ Other Commissioners may be added to this list at a later date, as required. Within the Commission general policy coordina-

¹³ The new Commission though did not in fact take office until February 2010, due to the ratification delays surrounding the Lisbon Treaty and the parliamentary hearings for the Commission nominees.

¹⁴ European Commission, 'President Barroso unveils his new team', IP/09/1837, Brussels, 27 November 2009.

¹⁵ European Commission, Minutes of the 1914th meeting of the Commission held in Strasbourg on Tuesday 20 April 2010, PV(2010)1914 final, Brussels, 4 May 2010, Section 11.2, SEC (2010) 475.

tion on the main themes and lines will therefore take place within the relevant Group of Commissioners.

The experience of a number of the current Commissioners as members of Barroso's first Commission (like Ashton, Rehn, Piebalgs and De Gucht) is presumably an asset when it comes to understanding the character and ways of the Commission. The Treaty, though, appears to establish Ashton as *primus inter pares* in the sense that she chairs the group and bears more general responsibilities for coherence on the CFSP side as well. This poses the legitimate question whether or not this will change the character and feel of the Commission as a college of nominal equals under a President.

The Lisbon Treaty left the *modus operandi* of any more detailed coordination within the EEAS and between the Service and the EU institutions open. It was, therefore, that task of the Council to elaborate upon how any such responsibilities and cooperation should be implemented in practical terms within the EEAS. The issue of how coherence might be ensured below the level of Commissioners was addressed in the Council's July 2010 decision where it states:

The High Representative shall ensure overall political coordination of the Union's external action, ensuring the unity, consistency and effectiveness of the Union's external action, *in particular* through (...) external assistance instruments.¹⁶

One of the specific tasks entrusted to the EEAS in the Council's decision is to help prepare 'decisions of the Commission regarding the strategic, multiannual steps within the programming cycle'.¹⁷ The programming cycle refers to the 'external assistance instruments' which consists of five stages in the typical cycle, of which the EEAS and/or the Commission will assume responsibility for the first three stages. The overall management of the instruments remains under the Commission and decisions are also taken by them.

The relevant parts of the Council's decision on programming suggest that coherence can be introduced by ensuring the necessary connection between policy (goals) and instruments (outcomes). The assumption by the EEAS of responsibility for the first three stages of the programming cycle risked leaving the Commission with a rather technocratic role, unable to influence decisively the direction of EU external action. But, due to the EU's continuing dualism when it comes to external action, separate programming procedures apply – in the case of the European Development Fund (and monetarily the largest) group of instruments mentioned the first three stages of the programming cycle are undertaken by the EEAS and the relevant part of the Commission while, in the case of the latter group mentioned, the EEAS assumes specific responsibilities. The Commission was successful in building specific safeguards into the preparations pertaining to the largest funds (EDF and the Development Cooperation Instrument) protecting the Commission's traditional role. The retention of senior programming capacity in DG EuropeAid Development and Coopera-

¹⁶ Council Decision 2010/427/EU of 26 July 2010, Article 9(2) (emphasis added).

¹⁷ *Ibid*, Article 9(3) (emphasis added).

tion is symptomatic of the desire to safeguard the Commission's role, in spite of the fact that the relevant supporting desks are now in the EEAS.

The case of development is especially sensitive due to concerns that the fundamental objective of the EU's development-related activities, which is the eradication of global poverty, will be diluted by more political and strategic elements (i.e. CFSP) being introduced into the process.¹⁸ Pre-Lisbon friction over the use of nominally development tagged funds for the African Peace Facility serve as potent reminder of the sensitivities surrounding this issue. The extensive promotion of Policy Coherence for Development (PCD) in the Commission since April 2005¹⁹ has led to pressure to not only safeguard development-related interests but to promote PCD as a fundamental of coherence in EU external action. As it stands, PCD already applies to twelve policy areas with the combined objective of reinforcing progress towards the millennium development goals.²⁰ The fear that the development-related aspects of the EEAS may not be sufficiently visible and safeguarded led to an open letter from a number of development NGOs with the revealing title 'Development-proofing the EEAS'.²¹ The first of the four demands made in the open-letter was to equip the EEAS to support the High Representative and the Development Commissioner in 'promoting coherence of all EU policies with development objectives'. The clear implication was that the EU's external action should be value-driven, following the objectives of the EU in its external relations as expressed in Article 21 TEU (of which, the eradication of global poverty was added to those incorporated from previous versions of the treaty).

The question of whether the EEAS is in fact 'development-proofed' is beyond the scope of this specific discussion, but it does illustrate that the criteria for coherence depend upon the perspective of the viewer. A development-driven perspective may therefore lead to a different set of assumptions and criteria being applied to coherence compared to, for example, a security-oriented one. As it stands, PCD is currently the best established platform for coherence within the EEAS.

¹⁸ For example, a consortium of European Development NGOs tried to challenge the legality of the HR/VP's plans for the EEAS, at <<http://www.eurostep.org/wcm/archive-eurostep-weekly/1018-lawyers-say-ashtons-eeas-proposal-is-contrary-to-lisbon-treaty.html>>. For a rebuttal see 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', *EIPA Working Paper* 2010/W/01, available at <http://www.eipa.eu/files/.../20100504120827_RiposteEurostep3May2010.pdf>.

¹⁹ See Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Policy Coherence for Development – Establishing the policy framework for a whole-of-the-Union approach*, Brussels, COM (2009) 458 final, 15 September 2009.

²⁰ These are trade, environment, climate change, security, agriculture, fisheries, social dimension of globalisation, employment and decent work, migration, research and innovation, information society, transport and energy.

²¹ European Think Tanks Open Letter, Development-Proofing the EEAS, 5 May 2010, available at <<http://internationaldevelopmenteu.files.wordpress.com/2010/05/development-proofing-the-eeas-final1.pdf>>.

3. THE EFFICIENCY OF THE EEAS

Efficiency is difficult to define since it hints at being productive of effects but it is clearly framed by the above discussion on coherence and for this reason the terms are often linked. In day-to-day terms efficiency, in the broadest sense, within the EEAS is ensured by the Corporate Board (headed by Ashton, but also including the Executive Secretary-General, Pierre Vimont; the Chief Operating Officer, David O'Sullivan; and the two Deputy Secretaries-General, Helga Schmid and Maciej Popowski). They are responsible for the smooth functioning of the Service, while a wider Policy Board will ensure general coherence (under the HR/VP) and make sure that the global and multilateral issues are reflected in the geographical and regional concerns and *vice versa*.²² The Corporate Board offers 'guidance' to the Policy Board, most notably the Deputy Secretary-General for Political Affairs (Schmid).

Although relatively little is in the public domain regarding the Policy Board, it is apparent that in terms of efficiency it is likely to play a central role *vis-à-vis* structural coherence and coordination. In institutional terms the Policy Board is likely to become the essential bridge between the EEAS and the Foreign Affairs Council and the General Affairs Council and the Council Secretariat and, at senior level, with the relevant Commission Directorates-General via Deputy Secretary-General Popowski. It is also the logical point where those responsible for relations with the European and national parliaments could ensure that they are appropriately informed -- again through Popowski's office. Importantly, if the Policy Board is to be pro-active, and not merely reactive, it is also the point at which the Joint Situation Centre, the Special Representatives and the PSC chair could inform the Corporate Board secretariat of potential agenda items. The linkage between the Managing Director Crisis Response and Operational Coordination, Agostino Miozzo, and the Corporate Board (on request) and the Policy Board is of particular importance since, aside from the HR/VP herself, this is the only obvious link with the CSDP bodies.

Aside from the efforts of the Corporate and Policy Boards, the extent to which the HR/VP is able to fulfil her mandate to ensure coherence and efficiency will depend in part on how she is perceived within the Service. Since she was for a relatively brief period of time Commissioner for Trade, this may play in her favour in what is after all a Commission-dominated Service in terms of design, initial staffing and (so far) organizational culture.²³ It will obviously

²² The precise composition of the Policy Board is, however, not clear. In some specific cases, such as the Chair of the PSC, membership of the board was specified in the vacancy announcement. Other cases were specified in the appointment announcements; these include the Managing Directors of the five geographical entities, the Managing Director of the Global and Multilateral Issues and the EEAS Counsellor. Others, such as the Managing Director Crisis Response and Operational Coordination, the heads of strategic planning and communication, policy coordination, and Special Representatives could presumably be called upon as required. In the case of the Managing Director Crisis Response and Operational Coordination, he may also be invited to attend the Corporate Board as necessary.

²³ The July 2010 Council decision lists in an annex those department and functions to be transferred to the EEAS which, in numerical terms means that for AD posts 585 will be transferred from the Commission (DG Relex), 93 from DG Development, and 436 posts transferred from DG

take a while before the EEAS is fully staffed but the initial transfer of 3,645 (1,611 in headquarters and 2,034 in delegations) suggests that the organizational *ethos* will be based mainly on routines inherited from the Commission.²⁴ Most of the Commission staff transferred (and in the pipeline) to the EEAS at AD level emanate from the Directorate-General External Relations (DG RELEX). For the most part, these were staff serving the geographical desks as well as in the External Service (the delegation staff). In the case of (former) DG Development (DG DEV), the geographical directorates-general (D, E) will move to the EEAS which is consistent with the desire to create central geographical desks for all countries and regions with the sole exception of the enlargement countries (where the relevant desks will be retained in DG Enlargement).²⁵

In some areas, most notably crisis management, the prevalence of Council Secretariat routines can be anticipated. Many of the bodies being transferred from the Council Secretariat are involved in various aspects of crisis management. Since most of them developed as private offices of the former High Representative and they are now under the 'operational command' of the new High Representative, it is reasonable to anticipate that they will retain their current *modus operandi* and character. Their colleagues being transferred from DG-E (in other words the geographical and global and multilateral elements) will have to adapt to the predominant administrative routines of the Commission.

Of particular interest are the temporarily assigned national diplomats who, nominally, are linked through a common 'profession'. They are though also marked by considerable diversity. The Council decision nevertheless stipulates that national diplomats shall constitute no more than one-third of the positions at senior level (which means around 350 diplomats in total). It remains to be seen how the national diplomats will integrate and whose organizational culture will be predominant among the Member States. Thus far 26 of 31 of the senior positions in the headquarters have been filled with six (23%) being British, while France secured one position (the Executive Secretary-General, Pierre Vimont), and Germany less than 12%. The situation in the delegations is a different story where Britain and France are less well represented and Spain was the obvious winner in the first round of senior appointments at the end of 2010. The balance between appointees coming from the Commission and those from the national diplomatic services is in accordance with the agreement between the EU institutions (with 8 of 11 at director level coming from the Commission

Relex's External Service (i.e. the delegations). In addition 411 were transferred from the Council Secretariat. 118 new posts will be created in the period 2011-2013 at AD level. The total is number of positions created in the EEAS at AD level is therefore 1,643.

²⁴ D. O'Sullivan, 'Setting up the EEAS', Speech at the IIEA, Dublin, 14 January 2011, at 3, podcast available at <<http://www.iiea.com>> .

²⁵ What was left of the DG Development and the EuropeAid Cooperation Office was re-launched on 1 January 2011 as the EuropeAid Development and Cooperation Office (DevCo). This reorganisation was prompted by the transfer of just over 100 from the country desks to the EEAS. The Commission also created a Foreign Policy Instruments Service, staffed by the Commission but housed alongside the EEAS, to manage programmes like the Instrument for Stability (IfS).

and 4 of 6 managing directors come from the Member States). Only three of the 26 appointees so far are women.²⁶ The question of whether British (male) diplomatic culture will inculcate the required qualities for coherence in the headquarters has yet to be seen.

The question of which organizational culture prevails will have a bearing upon the efficiency of the Service. The likelihood of a prevalent Relex organizational model is obvious given the numerical superiority of former Relex-officials entering the Service. It may also pose challenges. DG Relex and DG Dev had remarkably different organizational cultures, even if they worked closely together. As has also been suggested, the Council Secretariat will retain its specific culture, structures and routines when it comes to crisis management. It is too soon to speculate about which organizational culture will eventually prevail, or what amalgam might emerge, but it will require vigilance on the part of the Corporate Board since they are inheriting staff from different and, on occasion, antagonistic bureaucratic cultures. The evident shakiness of the EEAS in its early days should not be a reason to resort to default behaviour.

4. VISIBILITY

The increase in the EU's visibility should be *positive* – after all, visibility comes in different forms. Although the 'dynamic duo' (van Rompuy and Barroso) may still annoy some, it is at least an improvement upon the pre-Lisbon representation of the EU at the highest level. The virtual disappearance of the rotating Council Presidency is, on balance, positive from the coherence perspective, but may still be subject to rearguard actions by Member States who lament the lack of prestige connected with holding the Presidency.

Aside from the summit levels, the more important changes in the EU's visibility will be at the level of the delegations. With the attribution of legal personality to the EU the delegations may now represent all of the EU's external interests, which will most probably make them a far more interesting interlocutor for third parties. The addition of senior national diplomats to the delegations will also help contribute to the heightened profile of the delegations; but, whether their presence will improve linkages between the delegations and the local EU Member State diplomatic representation remains to be seen. Indeed, how the temporarily assigned national diplomats relate to their local (national) diplomatic representation will be one of the most interesting aspects of the new look delegations.

The potential for heightened visibility may be countered by two trends. First, the heads of delegation have substantial managerial duties (most notably the distribution of 'operational credits' for which they must be able to account and are personally liable for) which threatens to prevent them from getting out. The pre-Lisbon decentralisation exercise, which moved substantial autonomy away from the HQ to the delegations, may also mean that other key staff are not able

²⁶ T. Vogel, 'The battle for influence in the EU's diplomatic service', *European Voice*, 20 January 2011.

to get out and be 'diplomats'. The presence of staff from 'line directorates-general' in the Commission (such as trade or environment) means that these staff will receive their instructions directly from the relevant part of the Commission, thus risking turning the head of delegation into an administrative cipher.

The second risk to the EU's general external visibility is that its public diplomacy is virtually nil. Public diplomacy is *not* just the provision of information, websites or the ubiquitous yellow stickers proclaiming that EU funds were used for a given project. According to the Commission, it 'seeks to promote EU interests by understanding, informing and influencing. It means clearly explaining the EU's goals, policies and activities and fostering understanding of these goals through dialogue with individual citizens, groups, institutions and the media'.²⁷ It is thus about dialogue and establishing long-term relationships with non-governmental actors. In the EU context, more than in the national context, public diplomacy also has an important identity-creation role for the Union as a whole. The EU likes to project what it is to the outside world, while it reflects what it stands for into the Member States to build the Union's identity.

There is a small and tantalizing box on the EEAS organigram devoted to public diplomacy and election observation, under the Foreign Policy Instruments Service which is a service of the European Commission reporting directly to the HR/VP, but any serious effort in this regard should be reflected at the level of the Policy Board, involving Strategic Planning and Strategic Communication. A sustained investment in public diplomacy will be essential for longer-term visibility and acceptance of the EU. The influx of national diplomats into the EU holds potential in this regard since many of the Member States have significant experience to offer.

5. RECOMMENDATIONS

Any hard and fast conclusions are perhaps unwise, given that the EEAS remains in its early formative stages. In lieu of conclusions, a set of suggestions to enhance coherence, efficiency and visibility will be offered:

- (i) *Training*: a training strategy is currently being formulated for the Service and this should be given priority since a common training experience for all newcomers to the Service (an induction course) would build a valuable *esprit de corps*. Training thereafter should be specifically tailored to the relevant needs of officials since they will differ;
- (ii) *Strategic planning*: the events in North Africa and the Middle East are likely to move this up the agenda item. The EEAS should reinforce this dimension and to play an appropriate part in the ongoing strategic discussions at senior levels. At the same time, the relevant multilateral desks (like human rights, global issues, conflict prevention etc.) should be more

²⁷ European Commission, 'A glance at EU public diplomacy at work, The EU's 50th Anniversary Celebrations Around the World', 2007, at 12.

actively involved in ensuring that the normative elements are routinely taken into account;

- (iii) *Public diplomacy*: this should be given far more thought and prominence. It is not merely a matter of informing. The delegations should consider systematically having a senior appointment in a public diplomacy role, who is trained to this end (the delegation in Washington DC being an example) and who has the necessary back-up and support;
- (iv) *Integrating the security elements*: the CSDP parts of the Service remain somewhat remote from the multilateral aspects (conflict prevention, peace-building and mediation). Further efforts should be made to integrate the crisis management elements and this could be accompanied by the adoption of a policy coherence for security approach (using the same approach as PCD). The particular role of the Joint Situation Centre (SitCen) should be safeguarded since this is of wider relevance to coherence with counter-terrorism efforts across the EU and not only in external relations;
- (v) *Get out of the delegations*: the senior delegation staff should be given more latitude to get out of the delegations and to mix with the local communities. The tendency to become 'managers' in the field may be good for efficiency, but may be counter-productive in terms of public diplomacy and promoting the role of the EU as an indispensable interlocutor;
- (vi) *Budget neutrality*: the insistence by the Member States and the European Parliament that the EEAS should maintain an eye to 'budget neutrality' by 2013 should not become a mantra that quashes innovation and investment, where necessary. Although cost efficiencies can be anticipated, it is by no means certain that more can be done with the same.²⁸

²⁸ On this point see M. Emerson et al., *Upgrading the EU's role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy* (Brussels, CEPS 2011).

THE EUROPEAN UNION'S COMMON COMMERCIAL POLICY A YEAR AFTER LISBON – SEA CHANGE OR BUSINESS AS USUAL?

Frank Hoffmeister*

1. INTRODUCTION

Since the inception of the European Community, the Common Commercial Policy (CCP) played a crucial role in its external relations. The Treaty dedicated a separate chapter to it, and the European Court of Justice found early on that the Community's trade competence was exclusive in nature.¹ As it was thus firmly established at European level already, one could expect that trade policy would not be affected very much from the Lisbon Treaty.

A closer look reveals, however, that even slight changes in the scope and objectives of the CCP can make a difference. Moreover, the institutional balance in CCP has been shifted considerably with the new powers of the European Parliament in the field. This paper will describe and assess those changes in view of the first practical experiences with the Treaty.

2. SCOPE OF THE COMMON COMMERCIAL POLICY

2.1. Services and Trade-related aspects of intellectual property

Originally, the CCP focused on the liberalisation of trade in goods.² Over the decades, trade in services became important as well. Moreover, trade-related aspects of intellectual property rights were included in the Uruguay Round, which led to the establishment of the WTO in 1994. However, the Treaty provisions existing at the time did not cover these new issues. The Court of Justice opined back in 1994 that the EU could conclude the General Agreement on Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) only together with its Member States.³ In order to remedy this situation, the Treaty revisions at Amsterdam (1997) and Nice (2000) broadened the scope of EU powers, but fixed at the same time a number of

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¹ Opinion 1/75, *Understanding on a Local Cost Standard* [1975] ECR 1355, part B(2).

² Article 113 of the Treaty establishing the European Economic Community.

³ Opinion 1/94, *WTO Agreements* [1994] ECR I-5267.

exceptions. These were hard to understand in theory⁴ and even harder to handle in practice.⁵

Fortunately, the Member States finally agreed at Lisbon to entrust the EU with full powers in the services and intellectual property rights field under the new Article 207 (1) TFEU. The interpretation of these areas now covers “most, if not all” matters by the GATS and the TRIPS.⁶ Agreements in this field, including probably the “Doha” agreement in the WTO, can now be negotiated as “EU-only” agreements. Sensitivities of the Member States are protected in so far as Article 207 (4) 1st subparagraph TFEU subjects voting in the Council to unanimity, where an agreement in the field includes provisions for which unanimity is required for the adoption of internal rules. Moreover, agreements on cultural and audiovisual services fall always under unanimity voting where they risk prejudicing the Union’s cultural and linguistic diversity. The same is true for agreements in the field of social, education and health services, where these risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

The first practical test to move away from “mixed agreements” in the trade field will come with the Anti-Counterfeiting Trade Agreement (ACTA). The EU backed this US-Japanese initiative in 2006 and official negotiations started in 2008 together with Switzerland, Mexico, Singapore, Australia, New Zealand and Korea. The participants promised to step up enforcement action against counterfeit goods, generic medicines and copyright infringements on the internet. Negotiations were successfully concluded in November 2010.⁷

On the EU side, the European Commission was the lead negotiator, but the chapter on “criminal enforcement” was negotiated by the Presidency on behalf of the Member States, who reserved for themselves the power to address the type and level of criminal penalties, penal procedural law and cooperation between enforcement authorities. This reflected the case-law of the Court of Justice according to which the Community was competent for criminal offences when this was necessary to ensure effective compliance with the *acquis*, but could not determine the type and level of criminal sanctions or regulate criminal procedure.⁸ With the entry into force of the Lisbon Treaty in late 2009, the legal situation changed significantly. Next to the power to conclude agreements on “commercial aspects” of intellectual property rights in Article 207 TFEU came the power of the Union to establish minimum rules with regard to the definition of criminal offences and sanctions where this proves essential to

⁴ For a discussion of the situation under the Amsterdam Treaty see M. Cremona, ‘EC External Commercial Policy after Amsterdam: Authority and Interpretation with Interconnected Legal Orders’, in J.H.H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (Oxford, Oxford University Press 2000), 5-24. For a discussion of the situation under the Nice Treaty see C. Herrmann, ‘Trade Policy after Nice – Sisyphus would have done a better job?’, 39 *CML Rev.* (2002), 7-29.

⁵ Opinion 1/08, *GATS Schedules* [2009] ECR I-11129.

⁶ J.-C. Piris, *The Treaty of Lisbon: a legal and political analysis* (Cambridge, Cambridge University Press 2010), at 281.

⁷ The text has been published on several websites. See e.g. <<http://commondatabase.googleapis.com/leaks/Anti-Counterfeiting%20Trade%20Agreement.pdf>>

⁸ Case C-440/05, *Commission v Council* [2007] ECR I-9097, para 70.

ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures (Article 83 (2) TFEU). Viewed together with Article 216 TFEU, this new competence could cover the relevant draft Articles 23-26 ACTA, which do not touch upon criminal procedure. On the other hand, if this provision would be used as a legal basis for the conclusion of the agreement, the EU might be seen as harmonising criminal law “through the backdoor” of an international agreement, which might be of concern to the European Parliament.⁹ Hence, it is unclear at the time of writing whether ACTA will be concluded as a mixed agreement or not.

2.2. Foreign Direct Investment

The second big Lisbon innovation relates to foreign direct investment (FDI). These tiny three new words have been circulated in the run-up of Amsterdam by the Irish Presidency¹⁰ and before Nice by the European Commission,¹¹ but did not find many friends back then. However, now as they are shining in Article 207 (1) and (4) TFEU, they have already sent some “shockwaves” to the economic ministries of a number of Member States. While the EU’s free trade agreements already included a market access agenda on investments, the Treaty has now established the exclusive competence on FDI as part of the CCP. According to the Commission’s view, this is complemented by an implied competence on portfolio investments derived from the internal market chapter on free movement of capital.¹² The European Parliament also wishes that European investment policy includes both FDI and portfolio investments.¹³ Accordingly, the entire range of investment protection has become a European issue nowadays. This raises at least two important follow-up questions.

First, what will be the fate of the bilateral investment protection treaties of Member States with third states? As the Treaty itself does not contain a transitional regime, the Commission has proposed a regulation which would tackle this question.¹⁴ Under the draft, the validity of such BITs under European law would be confirmed. If, exceptionally, such BITs would be incompatible with substantive *acquis*, stand in the way of negotiating EU investment

⁹ On the role of the European Parliament following the Lisbon amendments, see the analysis in this volume in Passos, ‘The European Union’s External Relations – A Year after Lisbon: A first evaluation from the European Parliament’.

¹⁰ Conference of the Representatives of Governments of the Member States, The European Union Today and Tomorrow, Adapting the European Union for the benefit of its Peoples and Preparing it for the Future, A General Outline for a Draft Revision of the Treaties, Presidency Draft, CONF 2500/96, 5 December 1996, at 80.

¹¹ European Commission, Adapting the institutions to make a success of enlargement, COM (2000) 34 final, 26.1.2000, at 26.

¹² Commission Communication, *Towards a comprehensive European international investment policy*, COM (2010) 343 final, 7.7.2010, at 8.

¹³ European Parliament resolution of 6 April 2011 on European international investment policy, para 11.

¹⁴ Commission Proposal for a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries COM (2010) 344 final, 7.7.2010.

treaties, or where the Council would not issue within a year proposed negotiating directives for EU agreements to the Commission, the Commission could withdraw such authorisation. For future BIT negotiations between a Member State and a third country, the Member State in question and the Commission would coordinate closely to ensure that such negotiations respect the EU interest. This draft regulation is currently pending, and it is uncertain whether it can be adopted in first reading, as the positions of the European Parliament and the Council on the matter seem to be quite far apart.¹⁵

Second, how will the EU investment policy be designed? Experience has led the Commission to believe that the best way forward to integrated investment into the CCP lies in broader trade negotiations. Therefore, the Commission has recommended in January 2011 to broaden the scope of ongoing negotiations with Canada, Singapore and India by including investment protection. In doing so, it has proposed standard protection clauses that are regularly included in Member States BITs with the countries concerned – a sort of “gold standard”. So far, the Council has not authorised the Commission to enter into such negotiations. Where negotiations within a broader framework do not seem advisable, the EU might also negotiate stand-alone investment protection agreements. In its June 2010 Communication, the Commission identified China and Russia as potential candidates. Moreover, the most recent Communication on a partnership with northern Africa the idea is mooted to “develop an investment protection framework for European companies interested in investment in the southern Mediterranean.”¹⁶

2.3. No impact on delimitation of competences and exclusion of harmonisation

Finally, Article 207 (6) TFEU contains the somewhat mysterious two safeguards that the exercise of competence in the field of CCP shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislation or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

The first safeguard seems to be self-evident. As the competences of the Union are established by the Treaty according to the principle of conferral, how can the exercise of such competencies affect the delimitation of powers? Hence, rather than adding a new rule, the provision seems to recall that the interpretation of EU powers in the CCP field should not be taken too lightly. An example can be drawn from the investment protection field. Here, the argument was made that the EU could not negotiate clauses on expropriation, as such clauses would change the delimitation of competences, according to which the Treaty does not affect the ownership systems in Member States under Article

¹⁵ See for a first assessment of the proposal and the reaction of the Member States P.J. Kuijper, ‘Foreign Direct Investment: The First Test of the Lisbon Improvements in the Domain of Trade Policy’, 37 *Legal Issues of Economic Integration* (2010), 261-272.

¹⁶ Joint Communication from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, COM (2011) 200 final, 8.3.2011, at 12.

345 TFEU. However, on a closer reading of the situation, it appears that Article 345 TFEU itself does not rule out that the EU's internal market rules of non-discrimination and proportionality apply when a Member State expropriates or takes measures tantamount to expropriation against another EU company.¹⁷ Hence, there would be no impact on the delimitation of competences between the Union and the member States either, were the Union to conclude investment protection treaties under which it promises such disciplines also towards third States investors.

The second safeguard seems to respond to an old French fear (already reflected by ex Article 133 (6), 1st subparagraph EC that trade agreements in services might lead to a harmonisation “through the backdoor”).¹⁸ It may thus envisage the exceptional scenario that the EU would be negotiating commitments in areas where harmonisation is excluded internally, e.g. in the health services sector. Here, the EU's powers to harmonise in the internal market are limited to specific enumerated policy fields (Article 168 (4) TFEU) and exclude harmonisation of laws and regulations in other fields (Article 168 (5) TFEU). Those “protected” fields could not be touched by an EU services agreement with a third state according to Article 207 (6) 2nd indent TFEU either. In practice, however, this safeguard clause has not played any role whatsoever so far.

3. OBJECTIVES OF THE COMMON COMMERCIAL POLICY

Another innovation of the Lisbon Treaty is the introduction of common objectives for the entire range of the EU's external action. For sure, the traditional economic objectives to foster liberalisation and open markets remain in place for trade policy (Article 207 (1) 1st sentence TFEU). However, they are supplemented by a number of political and more general objectives (Articles 206 and 207 (1) 2nd sentence TFEU) which are enshrined in Article 21 TEU. Of course, trade policy was never “apolitical”, as can be seen from the integration of human rights considerations as an additional incentive for trade concessions in the EU's system of generalized preferences for developing countries (so called “GSP plus” system¹⁹). But granting those political objectives a constitutional rank provides them with greater weight in the political process. Four examples may serve as an illustration, namely the Pakistan waiver, the wine concessions for Moldova, the sanctions against Côte d'Ivoire and the initialling of the free trade agreement with Colombia.

¹⁷ C-452/01, *Ospelt* [2003] ECR I-9743, para. 24 and C-182/93, *Fearon* [1984] ECR 3677.

¹⁸ J.-C. Piris, *The Treaty of Lisbon: a legal and political analysis* (Cambridge, Cambridge University Press 2010), at 283.

¹⁹ Compare Council Regulation 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, *OJ* 2008 L 334. In the application of the theme, 14 countries received additional trade benefits because of their proven human rights record. However, for three of them (Myanmar, Belarus and Sri Lanka) the Council decided to withdraw those benefits because the practical implementation of the international commitments had become unsatisfactory.

3.1. The Pakistan waiver

In view of the devastating floods in Pakistan in summer 2010, the Foreign Affairs Council of the European Union decided on 16 September “to grant exclusively to Pakistan increased market access to the EU through the immediate and time-limited reduction of duties on key imports from Pakistan,” to be implemented “as soon as possible.” This call responded well to Article 21 (2) (g) TEU according to which the EU’s common foreign policy should “assist populations, countries and regions confronting natural or man-made disaster”. What was new, however, was the idea that such objective should be achieved by means of a trade policy instrument. And another peculiarity of the file was that the call came from foreign ministers, rather than trade ministers.

The European Commission translated this political will from the Member States into a proposal of October 2010 introducing an “emergency autonomous trade concession” for Pakistan.²⁰ The proposal foresees the suspension of 75 tariff lines for three years, amounting to an import value of roughly EUR 900 Million annually. The EU would open up its markets for additional imports from Pakistan of a value of roughly EUR 100 Million per year compared to 2009.

Despite its humanitarian objective, the proposal ran into a number of difficulties. First, in the European Parliament and in a number of Member States criticism was voiced that the EU textiles and ethanol industry would suffer, which would lead to an unequal sharing of the burden within the EU. Second, some WTO members were not forthcoming in the discussion about granting the necessary waiver which would allow the EU to deviate from its most-favored nation commitment under Article I GATT. Those Member States argue that solidarity with Pakistan in a humanitarian crisis should be shown by granting humanitarian aid, but not by trade concessions which would disadvantage other trading partners. While the EP’s Trade Committee voted in favor of the Commission proposal on 16 March 2011, the waiver request of the European Union is still pending at the Council for Trade in Goods in Geneva at the time of writing.

3.2. The Moldova wine concessions

In summer 2010, wine exports from Moldova to the Russian Federation were made subject to administrative difficulties. In order to compensate for the breaking-away of this important market for Moldova, the pro-Western government of Prime Minister Filat turned to the European Union. Improved access to the EU market would not only ease hardship for Moldovan wine exporters, but would also be an important sign of political support from the EU ahead of the parliamentary elections in November 2010.

The European Commission examined this request from a technical and political viewpoint. An expert mission confirmed that the quality of the products is in line with European standards and that nothing spoke against increased

²⁰ European Commission proposal, COM 2010 (522) final, 7.10.10.

exports towards the European market. Politically, it was deemed important to encourage the Moldovan government in its democratic and liberal reforms, as outlined in the Eastern Partnership. Against this background, the Commission proposed in early November to increase the existing tariff quota for wine for the year 2011 from 100,000 hl to 150,000 hl, for the year 2012 from 120,000 hl to 180,000 hl, and from the year 2013 onwards to 240,000 hl per year.²¹ In the European Parliament's trade committee the proposal was endorsed in January 2011 with no amendments, paving the way free for an early adoption in the plenary in spring 2011. Again, while this proposal is a pure trade measure based on Article 207 (2) TFEU, its political overtone cannot be denied. It may thus be cited as an example where the new Article 207 (1) 2nd sentence TFEU played a practical role.

3.3. The EU Sanctions against Côte d'Ivoire

After the presidential elections in Côte d'Ivoire in autumn 2010, the UN Security Council adopted sanctions²² against the regime of Laurent Gbagbo, who was unwilling to accept his electoral defeat. The Council established an arms embargo and a ban on diamond exports as well as a centralised list of sanctioned persons and entities, to be monitored by a UN Sanctions Committee. The EU enlarged the circle of targeted persons and entities, thereby putting additional pressure on the entourage of Gbagbo.²³ In this context, the Council also designated "the autonomous port of Abidjan" and "Autonomous Port of San Pedro", as those ports which help funding the illegitimate government.²⁴ As a consequence, trade interests of vessels carrying the flags of some EU Member states were touched, as those vessels were unable to conduct financial transactions with the listed ports, in practice requiring them to seek alternative docking and other port-related facilities, and impacting the transport of goods for trade. However, in view of the overarching foreign policy goal to exercise effective pressure against a ruler who is openly defying an electoral process, such consequences had to be accepted. While the Council sanctions regulation is adopted under Article 29 TEU (and thus not a trade measure), the example nevertheless shows how foreign policy and trade considerations may be closely intertwined under the Treaty of Lisbon.

²¹ Commission proposal of 10 November 2001 to amend Council Regulation (EC) No 55/2008 introducing autonomous trade preferences for the Republic of Moldova, COM (2010) 649 final.

²² UN Security Council Resolution 1946 (2010) of 15 October 2010.

²³ Council Decision 2010/656/CFSP of 29 October 2010 renewing the restrictive measures against Côte d'Ivoire, *OJ* 2010 L 285/28, amended by Decision 2011/18/CFSP of 14 January 2011, *OJ* 2011 L 11/34.

²⁴ Council Regulation (EU) No 25/2011 of 14 January 2011 amending Regulation (EC) No 560/2005 imposing certain specific restrictive measures directed against certain persons and entities in view of the situation in Côte d'Ivoire, Annex I A, B. "Legal persons, entities and bodies", No. 3 and 4, *OJ* 2011 L 11/1.

3.4. The initialling of the free trade agreement with Colombia

Already before the entry into force of the Lisbon Treaty, free trade negotiations between the EU and Colombia (and Peru) were underway. During the hearing of the Trade Commissioner *in spe* at the European Parliament in January 2010, questions were put whether the European Commission was willing to conclude the negotiations despite serious concerns about the human rights situation in the country, in particular with respect to the killing of trade unionists. Mr. De Gucht committed to discuss the way forward with the relevant Committee before concluding the negotiations, which indeed happened in March 2010. As a deep and comprehensive agreement, the draft agreement liberalises trade in goods and services, protects intellectual property rights including geographical indications, and contains disciplines on public procurement and trade defence issues. But it also contains a human rights clause and a chapter on sustainable development. In the Commission's view these provisions provide the basis for an intensive human rights dialogue, aimed at strengthening the rule of law in the country. Roughly a year later, the agreement was then initialled in Brussels between the chief negotiators. While the issue of human rights clauses was already a constant feature in EU cooperation or association agreements with third states since 1995,²⁵ the Colombia agreement is the first example in which it will play out in a classical free trade agreement. This may partially also be due to the Lisbon Treaty and the important role the Parliament attaches to this point.

4. THE INSTITUTIONAL BALANCE IN THE COMMON COMMERCIAL POLICY

This brings us to the final point, namely the institutional balance in commercial policy. Under the Lisbon Treaty it has considerably shifted. Hence, nothing in decision-making is as it was before, and the consequences can already be witnessed.

4.1. The Parliament

While the European Parliament was largely kept away from the EU's trade policy for decades,²⁶ the Treaty of Lisbon has provided it with significant new powers.²⁷

²⁵ F. Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (Berlin, Springer 1998).

²⁶ For an instructive analysis of the institutional practice pre-Lisbon see A. Dür and H. Zimmermann, 'Introduction: The EU in International Trade Negotiations', 45 *Journal of Common Market Studies* (2007), 771-787.

²⁷ See the analysis in this volume in Passos, 'The European Union's External Relations – A Year after Lisbon: A first evaluation from the European Parliament'.

Under Article 207 (2) TFEU, the ordinary legislative procedure applies for internal law-making. This means, for example, that the investment regulation on the future of Member State BITs does not only have to pass the (self-interested) Member States, but also needs the support of a majority in the EP. Intensive intra-institutional negotiations might also become necessary in the reform of the Union's GSP system, where the Commission proposal is due for May 2011.

Another remarkable change concerns the parliamentary scrutiny over trade negotiations. Under the Treaty, the Parliament is to be fully and immediately kept informed about the negotiations of all international agreements (Article 218 (10) TFEU). In the field of trade policy, this is underlined a second time in Article 207 (3) 3rd subparagraph TFEU, according to which the Commission shall report "regularly" on the progress of trade negotiations to the European Parliament.

The Framework Agreement between the Commission and the Parliament of 20 October 2010²⁸ (FA), which regulates the relations between these two institutions in general, further specifies that such information also covers the Commission's recommendation for negotiating directives (para. 23). The information is to be channelled through the relevant committee, where confidentiality is safeguarded through special procedures (para. 24). One important file, in which the information duty impacted on practice, was the above-mentioned ACTA negotiation. From the start, the negotiators had agreed on a "confidentiality clause" according to which they would not share drafts with third parties. Because of this commitment also the Commission only gave general explanations to the Parliament and civil society, which the latter criticised as not being transparent. Having assumed office under the Lisbon rules, EU Trade Commissioner De Gucht changed this practice. After having convinced the negotiation partners to lift the clause,²⁹ he shared draft texts with the trade committee of the European Parliament, which allowed the latter to form their views on contentious issues on the basis of the texts rather than on sometimes inaccurate hearsay.

Under para. 25 FA, the Commission promises to facilitate the inclusion of a delegation of Members of Parliament in Union delegations. The parliamentarians may not participate directly in these negotiations, but may be granted observer status, "subject to the legal, technical and diplomatic possibilities". In addition, the Commission will facilitate the participation of Members of the Parliament as observers in all relevant meetings under its responsibility before and after the negotiation sessions. This new paragraph has raised questions in particular in the Council. Member State governments make the point that the meetings "before and after" negotiation sessions may be Council configurations, where the MEPs have no place. However, as such meetings are not "under the responsibility of the Commission", but under the responsibility of the rotating

²⁸ Framework Agreement on relations between the European Parliament and the European Commission, OJ 2010 L 304/47.

²⁹ K. De Gucht, European Commissioner for Trade, 'Speaking Points: Update on Anti-Counterfeiting Trade Agreement (ACTA)', 13 July 2010.

Presidency or the High Representative, this paragraph does not apply to this scenario. Nevertheless, it cannot be excluded that MEPs would request their participation in such meetings by reference to the spirit of the Framework Agreement. This might partially explain why the Council expressed concerns over the wording of the FA paragraph on international agreements and is ready to take legal action if in the application of the framework Council interests are negatively affected.³⁰

Finally, the Lisbon Treaty confers on the European Parliament the power to give or withhold consent to trade agreements (Article 218 (6) (a) TFEU). This stands in stark contrast to previous practice, where the Parliament was only consulted on trade deals. However, when it comes to provisional application, the Parliament does not play the same role. Council decisions to authorise the provisional application of an agreement can still be taken on a proposal from the Commission alone without the need to ask for prior parliamentary consent (Article 218 (3) TFEU). The latter rule responds to the need to act quickly in some situations and is an accepted international practice under Article 25 of the Vienna Convention on the Law of Treaties. A good practical example is the “Banana-Agreement” between the EU and a number of Latin-American States which effectively ended a long-trade dispute. The EU was only able to conclude this deal with the possibility to put it into early provisional application in late 2009. The Latin American countries dropped their WTO cases against the EU in return for easier access to the EU market (import duties cut from EUR 176 to EUR 114 per tonne from 2017). On 3 February 2011, the European Parliament then gave its consent to the text. In parallel, the EU is about to adopt additional help (up to EUR 200 Million) to the ACP countries to adapt to tougher competition from the Latin-American countries.

On the other hand, there may be important trade agreements which fundamentally define the EU’s relationship with a third country for a long time. In this situation, EU Trade Commissioner De Gucht committed already during his hearing to involve the Parliament even before provisional application.³¹ A case in point is the EU-Korea Free Trade Agreement. The Commission proposed that provisional application should only start after having heard the European Parliament. Thus the Council’s decision on signature and provisional application of 16 September 2010 made a formal link: a positive vote of the European Parliament on conclusion was set as a pre-condition for provisional application to start as of 1 July 2011.³² Moreover, the Council also wished to see the adoption of the implementing regulation before that date. Against that backdrop,

³⁰ Statement of the Council of 25 October 2010, OJ 2010 C 287/1.

³¹ See K. De Gucht, ‘The implications of the Lisbon Treaty for EU Trade policy’, speech of 8 October 2010 at Oporto, available at <http://ec.europa.eu/commission_2010-2014/degucht/headlines/speeches>, at 4.

³² See Council of the European Union, Press Release of 16 September 2010, ‘Council approves agreement with South Korea on free trade’, ST 13670/10, PRESSE 242, at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/116545.pdf>. The Council agreed that provisional application of the agreement will start on 1 July 2011, “provided that the European Parliament has given its consent to the agreement and that a regulation implementing an EU-South Korea safeguard clause is in force.”

discussions between the Council and the Parliament on the Commission proposal from February 2010³³ intensified and the EP's Committee for Trade voted on 26 January 2011 a remarkable political compromise. While the Parliament did not insist anymore on a right to initiate a safeguard procedure itself and on a regional application of a possible safeguard measure, many of its demands applying to duty drawback and social and environmental issues found their way into the preamble of the regulation. In return, the Council and the Commission accepted a number of monitoring, reporting and surveillance duties.³⁴ The INTA vote paved the way for an adoption of both the regulation and consent of the Parliament to the agreement in the plenary session of 17 February 2010 with a broad majority.

4.2. The Council

Whilst the relative increase of EP powers is certainly impressive, the main actor in the EU's decision-making on trade policy remains the Council. This is not only reflected by the Council's powers to decide on the signature, provisional application and conclusion of trade agreements, but also by the fact that the Member States have an extensive, frequent and in-depth discussions of all trade matters in the Trade Policy Committee (hitherto the "133-Committee"). Moreover, as of the second part of 2010, upon suggestion from the Commission, the Council Presidencies have revived the "Trade" formation of the Council of Ministers, which allows bringing particularly important dossiers formally to ministerial level.

Legally, qualified majority has been the rule since the beginning of the Common Commercial Policy. This was an important leverage for the Commission even if, in practice, the Council has practically always acted by consensus. Under the Lisbon Treaty, qualified majority remains as a rule. However, and despite an explicit recommendation of the Working Group on External Relations of the European Convention to use QMV in all areas of CCP,³⁵ the new issues mentioned above (services, IPR, investment) fall under unanimity in particular cases. That shows again that every Member State in the Council is needed to advance EU trade policy, in particular in the services sector, which is so important for economic growth.³⁶

³³ European Commission, Proposal for a Regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement, 2010/0032 (COD), C7-0025/10, COM (2010) 49 final, 9.2.2010.

³⁴ For a detailed analysis of the discussion on the Korea safeguard regulation see D. Kleimann, 'Taking Stock: EU Common Commercial Policy in the Lisbon Era', *CEPS Working Document* No. 346, April 2011, at 21-25.

³⁵ European Convention, *Final Report of the Working Group VII on External Action*, CONV 459/02, 16 December 2002, at 7 and 26.

³⁶ See K. De Gucht, 'The implications of the Lisbon Treaty for EU Trade policy', speech of 8 October 2010 at Oporto, available at <http://ec.europa.eu/commission_2010-2014/degucht/headlines/speeches>, at 4.

4.3. The Commission

The Commission's powers remain largely untouched by the Lisbon Treaty. Most importantly, it is the negotiator of trade agreements and executes trade policy. The latter function will be considerably strengthened under the new comitology system. Once the 18-months transitional period expires, the Commission will take final trade defence measures (and not the Council anymore) in the fields of anti-dumping, anti-subsidy and safeguards.³⁷

As guardian of the Treaty, the Commission may also bring cases against Member States if they infringe EU law. While jurisprudence in the trade field has traditionally been made through preliminary references from national courts and by opinions of the Court, infringement procedures are more exceptional. They may, however, not be excluded if issues of horizontal significance are at stake. One recent example concerns EU discipline in international organisations.³⁸ The ECJ has already affirmed in a case relating to the International Maritime Organisation (IMO) that EU member States are under duty to follow an agreed EU position within a particular organisation, even if the EU itself is not a member thereof.³⁹ Moreover, unilateral proposals from Member States in treaty bodies which can lead to legally binding obligations of the entire EU need to be avoided.⁴⁰

A similar point can be made in the field of trade and environment as the EU is not a member of the Convention on Trade in Endangered Species (CITES), although it has become competent in that area under the Treaty. Hence, Member States are supposed to act jointly in the interest of the Union, and in fact, the Council determines EU positions for the Conference of the Parties. Unfortunately, at a meeting in March 2010 in Doha, two member States did not follow the agreed EU line, as laid down in Council Decision 7380/2010. Rather than abstaining in the vote on Monaco's proposal to put Atlantic bluefin tuna on the list of Appendix I (which prohibits international trade with this species), the UK and Dutch delegates voted in favour of the proposal. As this was in clear breach of the Council Decision and the duty of sincere cooperation set out in Article 4 (3) TEU, the Commission started an infringement procedure against these two member states by sending a letter of formal notice on 28 June 2010.⁴¹ The Member States apologised and gave the Commission formal reassurances not to repeat such action. In particular they recalled to all relevant departments the

³⁷ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011 L 55/13.

³⁸ On the role of the Commission in the Union's external representation following the Lisbon amendments, see the analysis in this volume in Paasivirta, 'The EU's External Representation After Lisbon: New Rules, A New Era?'.

³⁹ Case C-45/07, *Commission v Greece* [2009] ECR I-701.

⁴⁰ Case C-246/07, *Commission v Sweden* [2010] ECR I-0000. On the negotiation of environmental agreements following the Lisbon amendments, see the analysis in this volume in De Baere, 'International Negotiations Post Lisbon: a Case Study of the Union's External Environmental Policy'.

⁴¹ Infringement Cases 2010/2084 (UK) and 2010/2085 (The Netherlands).

duty of loyal cooperation as being particularly important in the field of external relations.

5. CONCLUSION

In conclusion, there is some business as usual under the Lisbon Treaty, but also considerable changes. Experience from the first Lisbon year may lead to three provisional conclusions.

First, we witness a clear modernisation of the EU's trade policy. The enlarged scope and the new institutional set-up on trade-defence measures will allow the EU to be more effective in pursuing its interests. After all, as the Community method had been particularly successful in the commercial field, it was high time to keep up with international developments. Being invested with clear competences on services, intellectual property rights and investment, the EU got stronger, and giving the Commission the power to decide on trade-defence measures both at provisional and at final stage, makes the EU more resilient against foreign pressure previously exercised on Member States in sensitive anti-dumping or anti-subsidy cases.

Second, there are signs of an increased politicisation of trade policy. The formal link to broader foreign policy goals and the institutional task of the High-Representative of the Union to ensure consistence of the EU's external action, including trade, may lead to a situation where non-trade considerations may play a bigger role in the decision-making. A number of examples have already been identified in the first year.

Third, and probably most importantly, trade policy has been democratised. The role of the European Parliament in both internal legislation and in exercising scrutiny over trade agreements adds greatly to the legitimacy of this policy. And the Parliament has exercised its new powers in a measured manner, both working hard on domestic legislation and having approved the first major trade deal for years, i.e. the EU-Korea FTA with a large majority. Whether these aspects of modernisation, politicisation and democratisation amount to a sea change is, however, hard to assess after only one year.

INTERNATIONAL NEGOTIATIONS POST LISBON: A CASE STUDY OF THE UNION'S EXTERNAL ENVIRONMENTAL POLICY

Geert De Baere*

1. INTRODUCTION

The present paper examines the Union's¹ post-Lisbon constitutional framework to engage in international negotiations through the prism of its external environmental policy. It is argued that the latter policy provides an excellent testing ground for how the Lisbon Treaty's attempts to bring about a more unified external representation have worked out in practice. The paper first analyzes the competence structure of external environmental policy, which is rather more complex than can be gathered from a first glance at the Treaty provisions.² Second, the post-Lisbon legal framework for international representation and international negotiations is briefly examined. That is followed, third, by an assessment of its practical application by exploring to what extent the Union's representation in international negotiations regarding external environmental policy can be said to be more unified now than it was before Lisbon. In particular, the paper will examine the example of the negotiations on a legally binding instrument on mercury within the framework of the United Nations Environment Programme (UNEP).

2. THE NATURE OF EU EXTERNAL ENVIRONMENTAL COMPETENCE

One of the Laeken Declaration's aspirations was to bring about 'a better division and definition of competence in the European Union'.³ As a result, Title I of Part One of the Treaty on the Functioning of the European Union (TFEU) now lists the categories and areas of Union competence. 'Environment' is listed as a shared competence under Art. 4(2)(e) TFEU, which implies, pursuant to Art. 2(2) TFEU, that the Union and the Member States may legislate and

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¹ The present paper uses the term "Community" when specifically referring to either pre-Treaty of Lisbon sources or situations, while using "Union" in all other instances.

² See, also, the analyses in this volume in Gosalbo Bono, 'The organization of the external relations of the European Union in the Treaty of Lisbon', and Paasivirta, 'The EU's External Representation After Lisbon: New Rules, A New Era?'.
³ Annex 1 to the Presidency Conclusions of the European Council meeting in Laeken, 14-15 December 2001, available at <<http://european-convention.eu.int/pdf/lknen.pdf>>, at 3.

adopt legally binding acts in that area. The Member States are to exercise their competence to the extent that the Union has not exercised its competence. The Member States are again to exercise their competence to the extent that the Union has decided to cease exercising its competence. Does the Union's external environmental competence fit that description?

The Union framework for external environmental law is based on Arts. 191-193 in Title XX of Part Three TFEU (ex Arts. 174 to 176 EC in Title XIX of Part Three of the EC Treaty). The second subparagraph of Art. 191(4) TFEU provides that the first subparagraph of that provision, granting the Union competence to conclude agreements with third parties, is to be 'without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements'. This appears to create an external competence in environmental matters akin to the external competences in the fields of development cooperation and humanitarian aid,⁴ which amounts to what is sometimes referred to as 'parallel competences' for the Union and the Member States. After Lisbon, these competences are listed in Arts. 4(3) and (4) TFEU (research, technological development and space, development cooperation and humanitarian aid – a list that notably does not include environmental protection) which provide that the exercise of those competences by the Union is not to 'result in Member States being prevented from exercising theirs'.

Does that qualification also apply to external competence in environmental matters? Art. 191(4) TFEU guarantees the Member States' continued competence with essentially the same phrase (the relevant (sub)paragraph granting competence "shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements") as in the second subparagraph of Art. 209(2) TFEU on development cooperation and in the second subparagraph of Art. 212(3) TFEU on economic, financial and technical cooperation with third countries, and now also in the second subparagraph of Art. 214(4) TFEU on humanitarian aid. Measures based on Art. 191(4) TFEU therefore leave the Member States' competence to act internationally intact, which implies a parallel competence. However, in Opinion 2/00, the Court severely limited the applicability of Art. 191(4) TFEU as a legal basis. There, the Court held that Art. 191 TFEU defines the objectives to be pursued in the context of environmental policy (which since Lisbon include "combating climate change"),⁵ while Art. 192 TFEU constitutes the legal basis on which Union measures are adopted.⁶ The Court thus takes there to be two different potential legal bases for external Union environmental action: Art. 191(4) TFEU when the agreement establishes simple cooperation, and Art.

⁴ The parallel is noted in the Opinion of Advocate General Kokott in Case C-13/07, *Commission v Council*, removed from the register, para. 68, fn 34.

⁵ Article 191(1) TFEU. See further J. Scott, 'The Multi-Level Governance of Climate Change', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011), 805-835; K. Kulovesi, E. Morgera and M. Muñoz, 'Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package', 48 *CML Rev.* (2011), 829-889.

⁶ Opinion 2/00, *Cartagena Protocol on Biosafety* [2001] ECR I-9713, para. 44.

192(1) TFEU in case the agreement provides for substantive cooperation.⁷ After Opinion 2/00, the Commission abandoned Art. 174(4) EC as the default legal basis for external environmental agreements.⁸ Most substantive measures were based on Art. 175 EC and will now presumably be based on Art. 192 TFEU. As the Court appears to have held in Opinion 2/00, the *ERTA* principle⁹ does apply to such measures.¹⁰ That would seem to be confirmed by Art. 4(2) (e) TFEU, which lists environment as one of the regular shared competences, which implies that the Union's exercise of its competence will gradually occupy the field and prevent the Member States from exercising their competence.

Nonetheless, Art. 193 TFEU (ex Art. 176 EC) provides that the environmental measures taken under Art. 192 TFEU are not to "prevent any Member State from maintaining or introducing more stringent protective measures". The Court held in Opinion 2/91 that such minimum requirements could not form the basis of exclusive Union competences.¹¹ However, the mere fact that the internal

⁷ See A. Dashwood, 'Opinion 2/00, Cartagena Protocol on Biosafety, 6 December 2001, not yet reported', 39 *CML Rev.* (2002), 353-368, at 368, describing this distinction as making "little practical or legal sense".

⁸ See L. Krämer, *EC Environmental Law* (London, Sweet & Maxwell 2007), at 93. The Commission had still proposed Article 174(4) EC as the legal basis for the conclusion of the Kyoto Protocol (see Proposal for a Council Decision concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (COM (2001) 579 final), *OJ* 2002 75E/17, but this was changed to Article 175(1) EC in the eventual Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, *OJ* 2002 L 130/1. Compare also the Proposal for a Council Decision concerning the signing of a new Protocol to the Barcelona Convention concerning cooperation in preventing pollution from ships and in combating pollution of the Mediterranean Sea by oil and hazardous and noxious substances in cases of emergency (COM (2002) 11 final), which had Article 174(4) EC as its legal basis, with the Proposal for a Council Decision on the conclusion of the Protocol to the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, concerning cooperation to prevent pollution by ships and, in cases of emergency, to combat pollution of the Mediterranean (COM (2003) 588 final), which had Article 175(1) EC as a legal basis, a choice followed in Council Decision 2004/575/EC of 29 April 2004 on the conclusion, on behalf of the European Community, of the Protocol to the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, concerning cooperation in preventing pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea, *OJ* 2004 L 261/40.

⁹ Which originates from Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263. *ERTA* is authority for the acquisition of implied external competences through the exercise of Union rules, and for their exclusive nature on the same basis. The former aspect is now codified in Article 216(1) TFEU: "The Union may conclude an agreement with one or more third countries or international organisations [...] where the conclusion of an agreement [...] is likely to affect common rules or alter their scope"; the latter in Article 3(2) TFEU, which provides for the Union to have exclusive competence for the conclusion of an international agreement "in so far as its conclusion may affect common rules or alter their scope".

¹⁰ Opinion 2/00, *Cartagena Protocol on Biosafety* [2001] ECR I-9713, paras. 44-46.

¹¹ Opinion 2/91, *ILO Convention No 170* [1993] ECR I-1061, para. 21. On the policy reasons behind this approach, designed to spark a 'race to the top', rather than a 'race to the bottom', see G. De Baere, *Constitutional Principles of EU External Relations* (Oxford, Oxford University Press 2008), at 66, and the references cited there. See, however, specifically as regards environmental policy, the negative assessment by P. Pagh, 'The Battle on Environmental Policy Competences; Challenging the Stricter Approach: Stricter Might Lead to Weaker Protection', in R. Macrory (ed.),

Union rules in question are minimum requirements does not necessarily justify the conclusion that the competence in question is non-exclusive. As the Court held in Opinion 1/03, “the fact that *both the Community rules and the international agreement* lay down minimum standards may justify the conclusion that the Community rules are not affected, even if the Community rules and the provisions of the agreement cover the same area”.¹²

The Court further clarified the impact of minimum standards in the *PFOS* case.¹³ Sweden had put forward the argument that a proposal to list a substance in the Annex to an international convention which is binding on the Union (in casu the Stockholm Convention)¹⁴ is equivalent to a national measure that is more stringent than a minimum Union measure and is permitted by what is now Art. 193 TFEU. The Court disagreed. The Union could be bound by an amendment to an Annex to such a convention while it is not bound by such a national measure. By drawing that distinction, the Court has clarified and limited the scope of Art. 193 TFEU: the Member States are not free to adopt or propose measures stricter than the Union standard if such measures would be liable to bind the Union. That does *a contrario* seem to mean that, if the Union were not to be bound by a more stringent measure, the Member States would be free to adopt it or propose it in the relevant international fora.

An example of this would be the participation of the Member States in the International Whaling Commission (IWC), the international organisation competent for the conservation and management of whale stocks. It was set up by the International Convention for the Regulation of Whaling (‘the Whaling Convention’).¹⁵ The EU is not a Party, but merely an observer to the Whaling Convention.¹⁶ EU regulatory activity as regards matters pertaining to whaling does not come under the exclusive common fisheries policy (Art. 3(1)(d) TFEU), but under the shared competence on the environment (Art. 4(2)(e) TFEU).¹⁷

Reflections on 30 Years of EU Environmental Law (Groningen, Europa Law Publishing 2006), 3-16.

¹² Opinion 1/03, *New Lugano Convention* [2006] ECR I-1145, para. 127 (emphasis added). See G. De Baere, *op. cit. supra* note 11, at 67.

¹³ Case C-246/07, *Commission v Sweden (PFOS)*, judgment of 20 April 2010, not yet reported, para. 102. See further G. De Baere, “O, Where is Faith? O, Where is Loyalty? Some Thoughts on the Duty of Loyal Co-operation and the Union’s External Environmental Competences in the Light of the PFOS Case”, 36 *EL Rev.* (2011), at 405-419.

¹⁴ The Stockholm Convention on Persistent Organic Pollutants was adopted on 22 May 2001, and entered into force, in accordance with its Article 26(1), on 17 May 2004 (40 ILM 532 (2001)).

¹⁵ Signed in Washington D.C. on 2 December 1946 (62 Stat. 1716; 161 UNTS 72).

¹⁶ Membership of the IWC is only open to governments that adhere to the Whaling Convention. An amendment to the Whaling Convention allowing the EU to become a member would require the ratification of a protocol by all IWC members. The Commission adopted a proposal in 1992 (Draft Council Decision authorizing the Commission to negotiate, on behalf of the Community, a protocol amending the international Convention on the regulation of whaling, Washington, 2 December 1946, COM (92) 316 final) to negotiate the accession of the Community to the Whaling Convention, but the Council has not followed up on this proposal (see Proposal for a Council decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule, COM (2008) 711 final, point 6 of the Explanatory Memorandum).

¹⁷ Annex I to the TFEU lists the products coming under Article 38 TFEU on the common agriculture and fisheries policy. Chapter 3 mentions ‘Fish, crustaceans and molluscs’, but not marine

While Union action on whaling has been taken,¹⁸ it would go too far to say that the Union has exercised its competence to such an extent that it has replaced the Member States within the IWC. Indeed, the Court has put the threshold for that to happen rather high, requiring “a full transfer of the powers previously exercised by the Member States” to the Union.¹⁹ According to settled case-law, the absence of such a full transfer implies that the Union is not as such bound by the Whaling Convention.²⁰ It would therefore seem perfectly legitimate for a Member State to vote in favour of any measure proposed within the IWC that would strengthen the protection of whales beyond and above the protection agreed within the Union institutions. That would quite clearly be the case if no position on such a proposal could be reached within the Council. Would the same count if a position had been reached? Given that the EU is not a Party to the Whaling Convention and cannot be bound by the decisions taken by the IWC, it would seem that it must follow from Art. 193 TFEU that Member States ought to remain free to support measures enhancing the protection of whales, while being prevented from supporting any measure lowering such protection.²¹

3. INTERNATIONAL REPRESENTATION AND INTERNATIONAL NEGOTIATIONS IN EXTERNAL ENVIRONMENTAL MATTERS POST LISBON

The question who is to represent the Union externally continues to confound observers even after Lisbon. The basic rule is spelled out in Art. 17(1) TEU: the Commission is to ensure the Union's external representation. However, this is only the case “with the exception of the common foreign and security policy, and other cases provided for in the Treaties”. Leaving the CFSP to one side²² (given that environmental policy clearly does not fall within its scope), those exceptions include Union delegations in third countries, which are to

mammals. The latter are only mentioned in Chapter 15.04: ‘Fats and oil, of fish and marine mammals, whether or not refined’. At any rate, EU action on whaling has as a rule been taken under environmental competence.

¹⁸ See, for example, Council Regulation (EEC) No 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products, *OJ* 1981 L 39/1, adopted on the basis of then Art. 235 EEC (now Art. 352 TFEU), as no specific legal basis for environmental protection was available at the time; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, *OJ* 1992 L 206/7, adopted on the basis of Article 130s EEC (now Article 192 TFEU); Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, *OJ* 1997 L 61/1, adopted on the basis of Article 130s EEC (now Article 192 TFEU).

¹⁹ Case C-308/06, *Intertanko and Others (Intertanko)* [2008] ECR I-4057, para. 49.

²⁰ *Ibid.*, para. 47-49; and Case C-533/08, *TNT Express Nederland*, judgment of 4 May 2010, not yet reported, para. 62.

²¹ See in that sense also L. Krämer, ‘Negotiating and voting on whale protection within the International Whaling Commission (IWC)’, *International Fund for Animal Welfare* (2010), 6-7, at <<http://www.politics.co.uk/Microsites2/364355/graphics/IFAWlegalpaperIWC.pdf>>.

²² See Articles 15(6) (President of the European Council), 27(2) (High Representative), and 33 TEU (Special Representatives).

represent the Union and are to be placed under the authority of the High Representative,²³ who is of course also a Vice-President of the Commission.²⁴

Art. 218 TFEU provides for a procedure for the conclusion of agreements between the Union and third countries or international organisations. Pursuant to those procedural rules, the Commission will submit recommendations to the Council if an international agreement in the field of environmental law needs to be negotiated, unless the external environmental aspects only form a minor part of an agreement that relates principally to the CFSP (which would appear possible after Lisbon), in which case the High Representative submits these recommendations.²⁵ If it deems the negotiation of the environmental agreement in question to be opportune, the Council adopts a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.²⁶ Thus, Art. 218 TFEU spells out who is to submit recommendations under what circumstances, but does not explicitly determine who is to be the negotiator. While under the first subparagraph of Art. 300(1) EC, the Commission was to "conduct these negotiations", Art. 218(3) TFEU appears to give the Council a choice.²⁷ Nonetheless, by virtue of the rule as regards the Union's external representation spelled out in Art. 17(1) TEU, it could perhaps be assumed that, absent any contrary indication in Art. 218 TFEU, the Commission will continue to act as negotiator for external environmental agreements.²⁸

The Council can also address directives²⁹ to the negotiator and designate a special committee in consultation with which the negotiations must be conducted. On a proposal by the negotiator, the Council adopts a decision authoris-

²³ Article 221 TFEU. As per Article 27(3) TEU, the High Representative is to be assisted by the European External Action Service in fulfilling her/his mandate. See Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010, L 201/30. Further: B. Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service', 48 *CML Rev.* (2011), 829-891.

²⁴ Article 18(4) TEU.

²⁵ Article 218(3) TFEU.

²⁶ Article 218(4) TFEU.

²⁷ However, pursuant to Article 207(3) TFEU, the Commission is the only possible negotiator in the field of the common commercial policy. Conversely, where agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Union with one or more third States or international organisations, Article 219(3) TFEU provides that the Council, on a recommendation from the Commission and after consulting the European Central Bank, is to decide the arrangements for the negotiation and for the conclusion of such agreements. These arrangements are to ensure that the Union expresses a single position. The Commission is to be merely "fully associated with the negotiations".

²⁸ See K. Lenaerts and P. Van Nuffel, *European Union Law* (London, Sweet & Maxwell 2011), at 1027, para. 26-004, who argue that the intention behind Article 218(2)-(3) TFEU would appear to be that, with the exception of CFSP agreements, for which the High Representative should be the negotiator, the Commission ought to be the negotiator for all international agreements to be concluded by the Union. Mixed agreements could be negotiated by a negotiating team consisting of the Commission and representatives of the Member States or the Council.

²⁹ These directives do not constitute delegated powers from the Council to the Commission and the term "mandate" is therefore inapposite: F. Hoffmeister, 'Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited. The EU and its Member States in the World* (Oxford, Hart Publishing 2010), 249-268, at 253.

ing the signing of the agreement and, if necessary, its provisional application before entry into force.³⁰ Unless the agreement covers areas which internally require decision-making by unanimity, which is the case for the limited set of environmental matters listed in Art. 191(2) TFEU,³¹ the Council acts by qualified majority throughout the procedure.³² If the environmental agreement falls under Art. 192(1) TFEU, which prescribes the ordinary legislative procedure for the adoption of internal measures, its conclusion will require the consent of the European Parliament pursuant to Art. 218(6)(a)(v) TFEU. If, however, the agreement falls under Art. 192(2) TFEU, consent of the European Parliament will only be required if the agreement establishes a specific institutional framework by organising cooperation procedures or has important budgetary implications for the Union.³³ In all other cases, the European Parliament will need to be consulted.³⁴

It must be emphasised, however, that these rules govern only the representation of the Union and not of the Member States, which falls outside the scope of the Treaties and remains governed by their own constitutional arrangements, in accordance with Art. 5(2) TEU. The Member States remain free to choose who will represent them internationally. They can request the rotating Presidency of the Council to represent them or the Commission, but they can equally opt to represent themselves. In other words, in case of mixed external action, two sets of rules apply: the rules in the Treaties as regards the Union, and the several constitutional rules of the Member States as regards their own international representation. However, the principle of sincere cooperation pursuant to Art. 4(3) TEU applies even when the Member States are exercising their own competences.³⁵ It obliges the Union and the Member States to cooperate loyally and is therefore of crucial importance in allowing the Union's system of international representation to operate in a more or less coherent manner.

A specific link with Member State competence will often be found in order to justify their participation in the conclusion of the agreement, which will normally imply a substantial role for the Presidency of the Council. The ensuing mixed agreement will have to be ratified by both the Union – which requires going through the normal Art. 218 TFEU procedure and, in a clear majority of the cases, includes the formal involvement of the European Parliament – and by every single Member State which will have to go through its own constitu-

³⁰ Article 218(4)-(5) TFEU.

³¹ "(a) provisions primarily of a fiscal nature; (b) measures affecting: [(i)] town and country planning, [(ii)] quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, [(iii)] land use, with the exception of waste management; (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply."

³² Article 218(8) TFEU.

³³ Article 218(6)(a)(iii)-(iv) TFEU.

³⁴ Article 218(6)(b) TFEU.

³⁵ See, for example, *PFOS*, cited *supra* note 13.

tional procedures, most often also including scrutiny and approval by the Member State parliaments.³⁶

International agreements regularly set up some form of institutional structure, which may be more or less developed. The Council adopts decisions establishing the positions to be adopted on the Union's behalf in a body set up by such an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement. It does so on a proposal from the Commission or the High Representative.³⁷ However, even before the Council has adopted a formal decision, the principle of sincere cooperation requires the Member States to take the interests of the Union into account when acting within bodies set up by international agreements. That was clearly illustrated by the *PFOS* case, in which Sweden proposed the addition of PFOS to the relevant annex of the Stockholm Convention even though a strategy had been agreed within the Council's Working Party on International Environmental Issues temporarily not to propose that addition. The Court held there to be an infringement of ex Art. 10 EC, especially because Sweden's action had an impact on EU decision-making, in as much as the EU could possibly be bound without having been able to cast its vote on the matter.³⁸

The complexity of EU external environmental competences being what it is, whether and, if so, to what extent a specific issue that forms the subject of international negotiations falls within the competence of the Union or of the Member States is often less than clear. That situation will inevitably lead to competence quarrels between the Union and the Member States and between the institutions of the Union. The latter, it should be recalled, are also bound by the duty of sincere cooperation in Art. 4(3) TEU, a specific application of which is now explicitly contained in Art. 13(2) TEU, according to which the institutions are to "practice mutual sincere cooperation".

A particularly unseemly example of how things can go awry regardless is the Mercury saga, which will briefly be examined in the next section.³⁹

4. MERCURY RISING: THE UNION AND THE INTERNATIONAL NEGOTIATIONS FOR A GLOBAL LEGALLY BINDING INSTRUMENT ON MERCURY

By its decision 25/5 III, taken during its twenty-fifth session held in Nairobi between 16 and 20 February 2009, the UNEP Governing Council requested

³⁶ See J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague, Kluwer Law International 2001), at 87–92.

³⁷ Article 218(9) TFEU.

³⁸ *PFOS*, cited *supra* note 13.

³⁹ For a fuller account, see T. Corthaut and D. Van Eeckhoutte, 'Legal aspects of EU participation in global environmental governance under the UN umbrella', in J. Wouters, H. Bruyninckx, S. Basu and S. Schunz (eds.), *The European Union and Multilateral Governance* (Basingstoke, Palgrave Macmillan 2011).

the Executive Director to convene an intergovernmental negotiating committee (INC) with the mandate to prepare a legally binding global instrument on mercury. The INC was to commence its work in 2010 with the goal of completing it prior to the twenty-seventh regular session of the Council in 2013.⁴⁰

On 15 July 2009, the Commission submitted to the Council a recommendation on the participation of the European Community in the negotiations on a legally binding instrument on mercury further to Decision 25/5 of the UNEP Governing Council.⁴¹

The Commission suggested that mercury was a substance already regulated to a large extent by existing legislation at Union level. It requested that the Council authorize it to participate, on behalf of the Union in the INC negotiations, in consultation with the special committee designated by the Council in accordance with the negotiating directives. When the negotiations were to deal with matters falling within the shared competence of the Community and of the Member States, the Commission recommended that there ought to be close cooperation between it and the Member States, with a view to aiming for unity in the international representation of the Union.⁴² In essence, the Commission asked for authorisation to negotiate on the full range of topics to be covered by the mercury negotiations.⁴³

COREPER examined the Commission's recommendation and, at the meeting of 12 May 2010, all delegations could accept the text of the Decision by the Council and the Representatives of the Governments of the Member States, meeting within the Council, as prepared by the Presidency,⁴⁴ in order to give effect to the Commission's recommendation. The Commission however announced that the proposed Decision, which took the Commission's plea for more unified international representation at face value and proposed a negotiating team consisting of the Commission and the Presidency, who were to be collectively responsible,⁴⁵ was not in line with the Treaties and was therefore unacceptable. The Commission decided to withdraw its recommendation and confirmed the withdrawal by a letter addressed to the Council later that same day.⁴⁶

⁴⁰ See UNEP, *Report of the Governing Council, Twenty-fifth session (16-20 February 2009)*, General Assembly, Official Records, Sixty-Fourth Session, Supplement No. 25 (A/64/25), Annex I, Decision 25/5: Chemicals management, including mercury, para. 26.

⁴¹ Recommendation from the Commission to the Council on the participation of the European Community in negotiations on a legally binding instrument on mercury further to Decision 25/5 of the Governing Council of the United Nations Environment Programme (UNEP), SEC (2009) 983 final. This Recommendation replaced the Recommendation from the Commission to the Council on the participation of the European Community in negotiations towards a legally binding instrument on mercury further to Decision 24/3 of the Governing Council of the United Nations Environment Programme (UNEP), COM (2008) 70 final, which was never followed by a Council authorization to participate in the negotiations at issue.

⁴² SEC (2009) 983 final, cited *supra* note 41, at 5.

⁴³ T. Corthaut and D. Van Eeckhoutte, *op. cit. supra* note 39.

⁴⁴ Council Document 9504/10 [LIMITE], referred to in Council Document 10564/10 of 4 June 2010, at 2.

⁴⁵ T. Corthaut and D. Van Eeckhoutte, *op. cit. supra* note 39.

⁴⁶ C (2010) 3243. See Council Document 10564/10 of 4 June 2010, at 2 and Recommendation from the Commission to the Council on the participation of the European Union in negotia-

What were the legal consequences of this withdrawal? Recall that within the context of the ordinary legislative procedure, the Commission may, pursuant to Art. 293(2) TFEU, alter or indeed withdraw its proposal at any time during the procedures leading to the adoption of a Union act as long as the Council has not acted. Does the same count for a recommendation under Art. 218(3) TFEU? That is likely the case. It is true that the Court held in *Fediol* that the Commission was free to amend or withdraw its proposal ‘as long as the Council has not adopted a decision if, as a result of a new assessment of the interests of the Community, it considers the adoption of protective measures superfluous’.⁴⁷ Could that imply that the Commission can only withdraw its proposal when it considers the adoption of the measure in question superfluous? That would seem to be an overly restrictive reading of the Commission’s discretion, which is not supported by the holding of the Court in *Fediol*, confined as it appears to be to the specific circumstances of the case and the measure at hand. That said, there is arguably at least one normative limit to the Commission’s exercise of its right to withdraw: the duty of sincere cooperation pursuant to Arts. 4(3) and 13(2) TEU. Pinpointing the precise legal obligations following from loyalty in the present instance is, however, not a straightforward exercise, inter alia because those consequences would seem to depend at least in part on whether the Commission’s withdrawal affects the Council’s ability to act. Such is arguably not the case. While the withdrawal of a proposal under Arts. 293–294 TFEU implies an immediate end to the ongoing decision-making procedure, the same would not appear to be the case as regards the withdrawal of a recommendation under Art. 218(3) TFEU. Indeed, the text of the latter provision does not establish a necessary substantive connection between the two. Rather, it would appear that, while the Commission’s recommendation sets the process in motion, the Council is not bound by the substantive content of the recommendation, contrary to what is the case as regards a proposal under the ordinary legislative procedure.⁴⁸

That would appear to be in line with what the Court has held as regards the status of a Commission recommendation elsewhere in TFEU, namely in Art. 126(7) TFEU⁴⁹ on the procedure as regards excessive Member State deficits. In a case brought by the Commission against the Council in the context of excessive deficit procedures initiated against Germany and France, the Court held that the Council had a discretion: “Commission recommendations, and not proposals within the meaning of Article [293 TFEU], are placed before it, and it may, in particular on the basis of a different assessment of the relevant economic data, of the measures to be taken and of the timetable to be met by the Member State concerned, modify the measure recommended by the Commission, by the majority required for adoption of that measure”. In other words,

tions on a legally binding instrument on mercury further to Decision 25/5 of the Governing Council of the United Nations Environment Programme (UNEP), SEC (2010) 1145 final, at 3.

⁴⁷ Case 188/85, *Fediol v Commission* [1988] ECR 4193, para. 37.

⁴⁸ G. De Baere, op. cit. *supra* note 11, at 79.

⁴⁹ See also the recommendations in the first subparagraphs of Article 121(2) and (4) TFEU, the second subparagraph of Article 143(1) TFEU, Article 144(2) TFEU, Article 148(4) TFEU, and Article 219(1), (2) and (3) TFEU.

the Council has the power to adopt a decision different from that recommended by the Commission.⁵⁰ It is only when the Council has adopted a measure⁵¹ that it cannot subsequently modify them without a fresh recommendation from the Commission since the latter has a right of initiative in the excessive deficit procedure. Given that the Council had not respected these procedural rules, its conclusions in respect of France and Germany were annulled.⁵² *Mutatis mutandis*, that would appear to imply that, after the Commission has given its recommendation to open negotiations under Art. 218(3) TFEU, the Council could grant the authorisation to open negotiations in a different form than that recommended by the Commission, provided of course that it stays within the bounds of the Treaties. However, the question arises how far these modifications to the original Commission recommendation can go. Surely one common-sense limit would appear to apply, i.e. that the Council could not, say, authorise the opening of negotiations on an international agreement on trade in textiles when the Commission's recommendation pertained to the protection of migratory sharks. Nonetheless, it appears difficult to say anything more definitive.

Nonetheless, in the hypothesis that a withdrawal by the Commission of its recommendation does affect the Council's ability to act, would there be anything the Council could do? The Court has held that the Parliament was not entitled to complain of the Council's failure to await its opinion before adopting a regulation, because the reason why the essential procedural requirement of Parliamentary consultation was not complied with was the Parliament's own failure to discharge its obligation to cooperate sincerely with the Council.⁵³ Therefore, even if it were to be held that the Council normally cannot act if the Commission withdraws its recommendation, it argues that it nonetheless could act if the Commission's withdrawal constituted an infringement of loyal cooperation. The Council could also start infringement proceedings under Art. 258 TFEU against the Commission for violation of the obligation to cooperate loyally. However, the paucity of inter-institutional disputes brought by the Council (only one of which is against the Commission)⁵⁴ appears to indicate its marked reluctance to fight out any inter-institutional disputes in front of the Court, no doubt preferring a more diplomatic behind-the-scenes solution, possibly to avoid a potentially negative judgment.

⁵⁰ Case C-27/04, *Commission v Council (France and Germany Excessive Deficits)* [2004] ECR I-6649, paras. 80 and 91.

⁵¹ In casu recommendations addressed to the Member State concerned with a view to bringing the excessive deficit to an end within a given period.

⁵² *France and Germany Excessive Deficits*, cited *supra* note 50, paras. 92-97.

⁵³ Case C-65/93, *Parliament v Council* [1995] ECR I-643, para. 28.

⁵⁴ See Case 72/82, *Council v Parliament*, removed from the register on 14 July 1982; Case 73/82, *Council v Commission*, removed from the register on 14 July 1982; Case 34/86, *Council v Parliament* [1986] ECR 2155; Case C-284/90, *Council v Parliament* [1992] ECR I-2277; Case C-295/90 REV, *Council v Parliament and Others* [1992] ECR I-5299; Case C-41/95, *Council v Parliament* [1995] ECR I-4411; Case C-230/95, *Council v Parliament*, removed from the register on 19 March 1996.

Following the discussions in the Committee and the opinion of the Council Legal Service on the withdrawal by the Commission of its recommendation,⁵⁵ the Presidency prepared a set of draft conclusions of the Council and the Representatives of the Governments of the Member States, meeting within the Council, in order to set out a common broad political framework for the EU and its Member States for the forthcoming INC-1 meeting. COREPER examined these Conclusions at its meetings on 2 and 4 June 2010. It recommended that the Council and the Representatives of the Governments of the Member States, meeting within the Council adopt the proposed Conclusions as soon as possible as an A item⁵⁶ at one of its next sessions.⁵⁷ Those conclusions *inter alia* urge the Commission to submit, as soon as possible, a new recommendation for a Council Decision pursuant to Art. 218(3) TFEU.⁵⁸ They also explicitly note that the Council and the representatives of the governments of the member states, meeting within the Council, have not retained the option of going ahead, despite the withdrawal of the Commission's recommendation, with the adoption of the decision formally to authorise the opening of negotiations.⁵⁹ That would appear to be the wisest course of action, not least because the Commission would be likely to have to carry out the negotiations at any rate.⁶⁰ The conclusions also note that the Member States agree to designate the Presidency of the Council as their representative in these negotiations on matters falling within their competence, and invite the Commission, on behalf of the EU, and the Presidency, on behalf of the Member States, to work at INC-1 in a coordinated manner and in close and regular consultation with the Representatives of the Member States.⁶¹

What is the legal status of such conclusions? Can they constitute an authorisation to open negotiations in the sense of Art. 218(3) TFEU? While the first subparagraph of Art. 300(1) EC merely required the Council to "authorise the Commission to open the necessary negotiations", Art. 218(3) TFEU requires the Council to "adopt a decision authorising the opening of negotiations", i.e. a formal legal instrument under the fourth paragraph of Art. 288 TFEU. That would seem to rule out the use of Council conclusions as a formal authorisation. However, the Court held in the *PFOS* case that it is not indispensable that an EU common position take a specific form for it to exist and to be taken into

⁵⁵ Council Document 9963/10 [LIMITE], referred to in Council Document 10564/10 of 4 June 2010, at 2.

⁵⁶ The items appearing in each part of the Council's provisional agenda are divided into A items and B items. Items for which approval by the Council is possible without discussion are entered as A items, but this does not exclude the possibility of any member of the Council or of the Commission expressing an opinion at the time of the approval of these items and having statements included in the minutes (Article 3(6) Rules of Procedure of the Council). See Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure, *OJ* 2009, L 325/35.

⁵⁷ Council Document 10564/10 of 4 June 2010, at 2.

⁵⁸ Addressing global mercury challenges- draft conclusions, annexed to Council Document 10564/10 of 4 June 2010, point 8.

⁵⁹ *Ibid.*, point 10.

⁶⁰ T. Corthaut and D. Van Eeckhoutte, *op. cit. supra* note 39.

⁶¹ Addressing global mercury challenges- draft conclusions, cited *supra* note 58, points 11-12.

consideration in an action for failure to fulfil an obligation of cooperation in good faith, provided that the content of that provision can be established to the requisite legal standard.⁶² Council conclusions establishing the position to be taken by the Union in international negotiations can arguably be regarded to fit that description. While such conclusions cannot constitute an authorisation to open negotiations in the sense of Art. 218(3) TFEU, they may constitute an EU common position which triggers the duty to cooperate loyally as described by the Court in *PFOS*.

The first session of the INC took place in Stockholm, 7-11 June 2010. In the absence of a decision authorising the Commission to participate in the negotiations, the EU was unable to negotiate. That gave rise to what must have been for onlookers a rather bewildering spectacle and arguably the nadir of the EU's involvement in the mercury negotiations. In addition to an opening statement by the Commission explaining that it was not in a position to negotiate, statements were made in Stockholm partly by the Commission on behalf of the EU, partly by the Presidency on behalf of the Member States. These statements remained limited to general aspects and experience within the EU, in line with the "common understanding" set out in Council conclusions adopted on 4 June 2010.⁶³ It was perhaps not the most glorious triumph of the post-Lisbon search for a more unified external representation.

In its recommendation of 30 September 2010, the Commission explicitly connected the questions of representation and negotiation to the issue of the post-Lisbon division of competences. It recalled the principles of Art. 3(2) TFEU⁶⁴ and pointed out that the majority of the EU rules covering the subject matter of the negotiation may be affected by the new global instrument on mercury. It further held that, when the EU is competent to negotiate substantial provisions, it should also negotiate provisions which are related or inextricably linked to those provisions, in particular provisions to address compliance. However, the Commission also referred to Arts. 4(3) and 4(4) TFEU, pointing out that this situation of parallel competence was addressed in the negotiating directives by a special obligation on the Commission. Apart from that, each Member State was to decide, individually, on arrangements for dealing with its parallel competences, as such arrangements would fall out of the scope of the recommendation. Nevertheless, the Commission pointed out that considerations of unity of external representation of the EU might make it appropriate to appoint the Commission through an appropriate arrangement. The Commission also argued that Art. 218(3) and (4) TFEU needs to be read together with Art. 17(1) EU, which sets out the basic rule according to which the Commission is to ensure the Union's external representation.⁶⁵ The Commission recommended that the Council authorise it to participate, on behalf of the Union for matters falling

⁶² *PFOS*, cited *supra* note 13, para 48.

⁶³ SEC (2010) 1145 final, cited *supra* note 6, at 3.

⁶⁴ "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

⁶⁵ SEC (2010) 1145 final, cited *supra* note 46, at 3-4.

within Union competence, in the negotiations on a global legally binding instrument on mercury at the next INC. In the context of these negotiations the Commission also wished to negotiate certain matters relating to the EU competence covered by Arts. 4(3) and 4(4) TFEU, namely scientific information exchange and provisions to specify arrangements for capacity building and technical and financial assistance.⁶⁶

After letting the matter rest for a while and having tried various arrangements as regards other international negotiations,⁶⁷ a compromise was finally reached in December 2010. The Commission was authorised to participate, on behalf of the Union, as regards matters falling within the Union's competence and in respect of which the Union has adopted rules, in the negotiations on a legally binding instrument on mercury, further to Decision 25/5 of the Governing Council of UNEP.⁶⁸ The Commission is to conduct these negotiations on behalf of the Union, as regards matters falling within the Union's competence and in respect of which the Union has adopted rules, in consultation with a special committee of representatives of Member States, and in accordance with specific negotiating directives. To the extent that the subject matter of the agreement falls within the shared competence of the Union and the Member States, the Commission and the Member States should cooperate closely during the negotiating process, with a view to aiming for unity in the international representation of the Union and its Member States. The Council may review the content of the negotiating directives at any time. To this end, the Commission is to report in writing to the Council on the outcome of the negotiations at regular intervals.⁶⁹

The determination both of the Commission to assert its newly accentuated primary role in the international representation of the Union and of the Member States to defend their traditional presence on the international scene is clear. The reinforcement of the Union's external apparatus through the Lisbon Treaty appears to have engendered a heightened wariness of the Member States regarding Commission demarches that may further limit their international role. Whichever other conclusions may be drawn from this rather unedifying episode, it would appear that the Member States and the Union institutions are still very much feeling their way through the brave new post-Lisbon world and probably will continue doing so (with the inevitable occasional fall-out) at least for a while.

5. CONCLUDING OBSERVATIONS

Ever since Ruling 1/78, the Court of Justice has reminded the Member States and the EU institutions that where the subject-matter of an agreement or con-

⁶⁶ *Ibid.*, at 7-8.

⁶⁷ See further T. Corthaut and D. Van Eeckhoutte, *op. cit. supra* note 39.

⁶⁸ Article 1 of the Council Decision on the participation of the Union in negotiations on a legally binding instrument on mercury further to Decision 25/5 of the Governing Council of the United Nations Environment Programme (UNEP), Council Document 16632/10.

⁶⁹ *Ibid.*

vention falls partly within the competence of the Union and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the Union institutions “both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into”.⁷⁰ It would appear that the Court may have to keep reminding all actors involved in post-Lisbon international negotiations of that obligation.

Of course, under the Treaty of Lisbon, solidarity has become a more prominent feature of the Union's foreign policy⁷¹ and of the Union in general,⁷² and the principle of loyal cooperation, repackaged as “sincere cooperation”,⁷³ now explicitly requires the Union and the Member States to, “in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”. Moreover, where the loyalty obligation pre-Lisbon was contained in Art. 10 EC and hence was *prima facie* limited to the Community, post-Lisbon sincere cooperation can now be found in Art. 4(3) TEU and therefore applies across the entire Union. The Court had already made clear that “inter-institutional dialogue [...] is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions”,⁷⁴ but the Treaty drafters did find it necessary to spell out that obligation in Art. 13(2) TEU: “The institutions shall practice mutual sincere cooperation”. In the light of post-Lisbon experience as regards international negotiations in environmental matters, that appears to be a useful “aide memoire”.

While it is always hazardous to draw general conclusions from a limited practice, the Member States' desire to remain present on the international scene as autonomous actors appears not to have diminished after the entry into force of the Lisbon Treaty. The dispute in the context of the negotiations on a binding instrument on mercury between the Commission, as defender of a more unified external representation under its aegis, and the Council, as the defender of Member State interests, is telling in this regard. Mixed representation would appear to be here to stay even after Lisbon, especially in areas of shared competence. It is therefore perhaps not a coincidence that the Court has been steadily reinforcing the procedural obligations flowing from the duty of loyal cooperation: from the prohibition of submitting a case that falls within the scope of EU law to a non-EU judicial organ,⁷⁵ to the prohibition for the Member States to negotiate separate treaties after the Commission has been authorized by the Council to negotiate international agreements on the same subject-matter,⁷⁶ to the prohibition for a Member State to distance itself from an agreed Union

⁷⁰ Ruling 1/78, *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978] ECR 2151, para. 34–36. See also *PFOS*, cited *supra* note 13, para. 73 and the case-law cited there.

⁷¹ See Articles 3(5), 21(1), 24(2) and (3), 31(1) and (2), and 32 TEU and Article 222 TFEU.

⁷² See Articles 2 and 3(2) and (3) TEU, Articles 67(2) and 80 TFEU, and Title IV of the Charter of Fundamental Rights of the European Union.

⁷³ Article 4(3) TEU.

⁷⁴ Case C-65/93, *European Parliament v Council* [1995] ECR I-643, para. 23.

⁷⁵ Case C-459/03, *Commission v Ireland (Mox Plant)* [2006] ECR I-4635.

⁷⁶ Case C-266/03, *Commission v Luxembourg* [2005] ECR I-4805 and Case C-433/03, *Commission v Germany* [2005] ECR I-6985.

strategy by taking action within an international organization that could potentially bind the Union.⁷⁷

Both the Mercury Saga as arguably the most flagrant failure yet of post-Lisbon unified international representation and *PFOS* as the most recent judicial reinforcement of the loyalty obligation are to be situated within the external environmental policy of the Union. As a constantly growing policy field with a complex competence structure, it provides an excellent testing ground to see the post-Lisbon framework for EU external relations in action. It is perhaps a sobering thought that neither the explicit categorization of the Union's competences by the FEU Treaty, nor the structures set-up to provide for a more unified international representation, nor indeed the reinforcement of loyalty in the Treaties and in the case-law appear to have been able to prevent the mercury debacle. The jury is therefore still out on whether a more unified international representation, in external environmental policy as in other areas of EU external relations, will remain as elusive a goal in the post-Lisbon era as it has been up to now.

⁷⁷ *PFOS*, cited *supra* note 13.

FRIEND OR FOE? REVIEWING EU RELATIONS WITH ITS NEIGHBOURS POST LISBON

Steven Blockmans*

1. INTRODUCTION

For years, the European Neighbourhood Policy (ENP)¹ has been criticized for its half-hearted promises, weak institutional and legal frameworks, sums for aid and technical assistance too small to affect real transformation, restrictive measures too soft to inspire political change, and competing visions oscillating between a one-size fits all, a south versus east and an 'own merits'-based approach for the common policy.² The weaknesses of the ENP had been recognized by the European Commission itself in several of its annual strategy papers published before the entry into force of the Treaty of Lisbon.³ Efforts to estab-

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¹ The ENP was launched in 2003 with the publication of the Communication from the Commission to the Council and the European Parliament, 'Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM (2003) 104 final. The framework was formalized in 2004 by the Communication from the Commission, 'European Neighbourhood Policy, Strategy Paper', COM (2004) 373 final. For a list of ENP reference documents, including the Action Plans, see <http://ec.europa.eu/world/enp/documents_en.htm>. The ENP includes Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, the Republic of Moldova, Morocco, the Occupied Palestinian Territories, Syria, Tunisia and Ukraine.

² See, e.g., M. Emerson, 'The European Neighbourhood Policy: Strategy or Placebo?', *CEPS Working Document* No. 215 (2004); J. Kelley, 'New Wine in Old Wineskins: Policy Adaptation in the European Neighbourhood Policy', 44 *JCMS* (2006) 29-55; M. Cremona and C. Hillion, 'L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy', *EUI Working Papers, LAW*, No. 39 (2006); S. Blockmans and A. Łazowski, 'Conclusions: Squaring the Ring of Friends', in S. Blockmans and A. Łazowski (eds.), *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration* (The Hague, T.M.C. Asser Press 2006), 613-639; R. Balfour and A. Missiroli, 'Reassessing the European Neighbourhood Policy', *EPC Issue Paper* No.54, June 2007; M. Cremona, 'The European Neighbourhood Policy: More Than a Partnership?', in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford, OUP 2008), 244-299; G. Edwards, 'The Construction of Ambiguity and the Limits of Attraction: Europe and its Neighbourhood Policy', 30 *Journal of European Integration* (2008), 45-62; and B. Van Vooren, 'The European Union as an International Actor and Progressive Experimentation in its Neighbourhood', in P. Koutrakos (ed.), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham, Edward Elgar Publishing 2011), 147-171.

³ See, e.g., Communication from the Commission to the Council and the European Parliament, 'On strengthening the European Neighbourhood Policy', COM (2006) 726 final; Communication from the Commission to the Council and the European Parliament, 'A Strong European Neighbourhood Policy', COM (2007) 774 final, at 2: '(...) a great deal remains to be done.' In May 2010, the Commission published a rather sobering evaluation of ambitions and activities during the first five years of the ENP. See Communication from the Commission to the European

lish closer ties at the sub-regional level have not lived up to expectations either. The Union for the Mediterranean (UfM),⁴ which has been troubled by controversy since it followed on from the Barcelona Process in 2008, was dealt a severe blow by Israel's war on Gaza in December of that year and is virtually dead since the Arab uprisings of early 2011.⁵ The Eastern Partnership (EaP) has fared a little better since its creation in May 2009,⁶ but it has certainly not (yet) led to 'a step change in relations with our Eastern neighbours, with a significant upgrading of political, economic and trade relations.'⁷ In its 2011 strategy paper on the European Neighbourhood Policy, the EU seems intent on seizing a new momentum to reinforce the ENP and to recalibrate relations with each of its neighbours:

The Lisbon Treaty has allowed the EU to strengthen the delivery of its foreign policy: co-operation with neighbouring countries can now be broadened to cover the full range of issues in an integrated and more effective manner. This was a key driver for initiating a review, in consultation with partner countries and other stakeholders, of the European Neighbourhood Policy (ENP) in summer 2010. Recent events throughout the Southern Mediterranean have made the case for this review even more compelling. The EU needs to rise to the historical challenges in our neighbourhood.⁸

The present paper looks at the potential for this 'new response to a changing neighbourhood' through the prism of the Lisbon Treaty. What are the potential and the limits of the new Treaty article on neighbourhood on the definition of relations with countries belonging to Prodi's imaginary 'ring of friends' (section 2)?⁹ And is the impact of the amendments made to the Union's

Parliament and the Council, 'Taking stock of the European Neighbourhood Policy', COM (2010) 207 final.

⁴ See the Joint Declaration of the Paris Summit for the Mediterranean, adopted under the co-presidency of the President of the French Republic and the President of the Arab Republic of Egypt, in the presence of, *inter alia*, the EU, the UN, the Gulf Cooperation Council, the Arab League, the African Union, the Arab Maghreb Union, the Organisation of the Islamic Conference, and the World Bank, Paris, 13 July 2008. The Joint declaration is based on the Communication from the Commission to the European Parliament and the Council, 'Barcelona Process: Union for the Mediterranean', COM (2008) 319 final.

⁵ The resignation of the UfM's Secretary General highlighted the organisation's shaky foundations and apparent inability to tackle key issues in the region. See A. Willis, 'Mediterranean Union chief resigns as Egypt unrest continues', *EUObserver*, 27 January 2011. The latest ENP Review (see *infra* n. 8), as well as the most recent Communication on the southern Mediterranean (see *infra* n. 38) hardly refer to it, other than mentioning that positive elements of the UfM should be integrated in a new approach. The same goes for the European Council conclusions of 23-24 June 2011, EUCO 23/11, CO EUR 14, CONCL 4.

⁶ Communication from the Commission to the European Parliament and the Council, 'Eastern Partnership', COM (2008) 823/4 final and the accompanying Commission Staff Working Document, SEC (2008) 2974/3, Brussels, 3 December 2008.

⁷ See the High Representative's 'Report on the Implementation of the European Security Strategy – Providing Security in a Changing World', doc. 17104/08 (S407/08), 11 December 2008, at 10.

⁸ European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A new response to a changing Neighbourhood', COM (2011) 303 final, Brussels, 25 May 2011.

⁹ The phrase was used in the 2003 Communication from the Commission, see *supra* n. 1

governance of the ENP – most notably the relationship between the European Commission and the High Representative for Foreign Affairs and Security Policy – likely to be positive on efforts to enhance coherence on ENP policy-making (section 3)? Some final remarks will conclude this paper (section 4).

2. SPECIFIC TREATY BASIS

Unlike trade, development or the CFSP, the European Neighbourhood Policy did not have a specific Treaty basis prior to Lisbon. Different policy instruments from across all three Union pillars were brought together in an attempt to develop an integrated structure for broad policy objectives.¹⁰ By recycling Article I-57 of the rejected Treaty establishing a Constitution for Europe,¹¹ the Treaty of Lisbon has now introduced a specific provision on the relations between the EU and its neighbours. Article 8 TEU stipulates the following:

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.¹²

The first striking characteristic of the neighbourhood clause is the prominent place which it occupies in the Treaties: Article 8 stands among the Common Provisions in Title 1 of the Treaty on European Union, so right up there with the values and objectives of the Union. Whereas Article 8 TEU is a specific provision on relations with neighbouring countries, it also reflects a general provision in the TEU which gives the Union a mandate to seek to develop relations and build partnerships with third countries that share its principles and values (Article 21(1)).¹³ I will return to this point below. Arguably though, the neighbourhood clause is in the ‘wrong’ Treaty to make a splash. It is disconnected from

¹⁰ See Cremona, ‘The European Neighbourhood Policy: More Than a Partnership?’, supra n. 2; C. Hillion, ‘The EU’s Neighbourhood Policy towards Eastern Europe’, in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge, CUP 2008), 309-333; and B. Van Vooren, *The European Neighbourhood Policy as a Paradigm for Coherence in EU External Relations Law*, PhD Thesis, European University Institute, May 2010.

¹¹ Article I-57(1) prescribed that ‘[t]he Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.’

¹² In a separate Declaration on Article 8 TEU, the EU makes it clear that it is willing to take into account ‘the particular situation of the small-sized countries which maintain specific relations of proximity with it’. See M. Maresceau, ‘The Relations between the EU and Andorra, San Marino and Monaco’, in Dashwood and Maresceau (eds.), supra n. 10, at 270-308.

¹³ See Cremona, ‘The European Neighbourhood Policy: More Than a Partnership?’, supra n. 2, at 255.

the normal decision-making procedures and instruments that belong to the supranational realm of external action provided by the TFEU. In the TEU, the neighbourhood clause is divorced from the specific procedures and instruments under the CFSP. While this may, in the end, not have huge practical implications for a policy that remains multi-pillar in nature, it does strike as rather odd from the perspective of applying best practices to Treaty drafting, as well as the Member States' ambition to improve coherence in EU external action.

The second peculiarity about the neighbourhood clause is its sketchy wording. The *langue de bois* of political rhetoric and diplomatic speak resonates in the references to the creation of an area of prosperity and good neighbourliness, an amalgam of fuzzy concepts hard to define. A clear definition of the term 'neighbouring countries' is also missing from the clause. It is only by reasoning *a contrario*, i.e. by reading both Article 3(5) TEU on the Union's relations with what is called the 'wider world' and the membership clause of Article 49 TEU, that one can deduce that Article 8 foresees a relationship with countries on or in the vicinity of the European continent that do not wish to or cannot by definition become a member of the Union. In the current geographical situation in wider Europe, that lumps states like Andorra, Switzerland, Norway, Russia, Armenia, Lebanon, Egypt and Tunisia together in the same group, in spite of the differences in contractual relations between the EU and some of these (clusters of) countries (e.g. EEA).

Paragraph 1 of Article 8 TEU prescribes that the Union develop a 'special relationship' with neighbouring countries. Arguably, this Treaty language sets EU relations with neighbouring countries apart from relations between the EU and countries farther afield, however strategic such alliances may be. As such, the Treaty of Lisbon sends a strong signal to countries with which the EU shares its external borders: (i) the Union is obliged to ('shall') develop a relationship with its neighbours.¹⁴ Moreover, (ii) this relationship will be of a 'special' nature. The TEU gives clues as to what is to be understood by the notion of a 'special relationship'. Article 8(1) prescribes (i) the establishment of an area of prosperity and good neighbourliness, (ii) founded on the values of the Union, (iii) characterised by close and peaceful relations based on cooperation.

Like the creation of a 'ring of friends', the establishment of an area of prosperity and good neighbourliness, an area characterised by close and peaceful relations based on cooperation, sounds somewhat utopian. The Union's neighbourhood is littered with actual and potential flash points for conflicts between both (*de jure*) states and secessionist entities c.q. *de facto* states,¹⁵ as well as

¹⁴ The use of the singular 'relationship' in the Treaty provision could – *a contrario* – be implied to mean that the EU is not obliged to develop (special) relations with all its neighbours, for instance not with those that do not share the Union's values (see the body text which n. 13, above, accompanies). A relationship embodied by a comprehensive policy – such as the ENP – seems sufficient to satisfy the Treaty obligation resting on the Union's shoulders. Others have read Article 8 TEU as a stronger basis, if not obligation, for the EU to engage with the neighbours. See C. Hillion, 'Integrating an Outsider: an EU perspective on relations with Norway', available at <<http://www.europautredningen.no/eksterne-utredninger>>.

¹⁵ See S. Blockmans and R.A. Wessel, 'The European Union and Peaceful Settlement of Disputes in its Neighbourhood: The Emergence of A New Regional Security Actor?', in A. Anto-

between large swaths of countries' populations and the undemocratic and repressive regimes that govern them. These and other realities continue to influence bilateral relations among neighbouring countries and between the EU and certain neighbouring states in a negative manner,¹⁶ and to stand in the way of the creation of the single area of peace, love and understanding that the Treaty calls for.

Of more practical relevance is the reference in Article 8(1) TEU to the values of the Union, reflecting Article 2 TEU which states that the Union 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. These are the values listed in the Council Conclusions of June 2003 and underpinning the 2011 – revised – strategy for the ENP.¹⁷ As well as being based on the claim of existing shared values, a noticeable element of the ENP is the EU's encouragement of the partner countries to embrace international norms and standards, notably by signing up to international and regional human rights agreements.¹⁸ This is in line with the Union's own objectives to promote international law in its relations with the wider world (*cf.* Articles 2(5) and 21(1) TEU). In fact, all this attention paid to sharing the Union's values is a sign of the political conditionality that underpins the 'special relationship' with the neighbours. The Commission, in its May 2011 strategy on the ENP, has made explicit the conditionality attached to shared values:

The new approach must be based on mutual accountability and a shared commitment to the universal values of human rights, democracy and the rule of law. It will involve a much higher level of differentiation allowing each partner country to develop its links with the EU as far as its own aspirations, needs and capacities allow. (...) Increased EU support to its neighbours is conditional. It will depend on progress in building and consolidating democracy and respect for the rule of law. The more and the faster a country progresses in its internal reforms, the more support it will get from the EU.¹⁹

niadis, R. Schütze and E. Spaventa (eds.), *The European Union and Global Emergencies: Law and Policy Aspects* (Oxford, Hart Publishing 2011), 73-103.

¹⁶ The recent sanctions imposed by the EU on Belarus and Syria are symptomatic in this respect. See, e.g., Council Implementing Regulation (EU) No 505/2011 of 23 May 2011 implementing Regulation (EC) No 765/2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus, *OJ* 2011 L 136/48; and Council Regulation (EU) No 442/2011 of 9 May 2011 concerning restrictive measures in view of the situation in Syria, *OJ* 2011 L 121/1.

¹⁷ GAER Council Conclusions, 16 June 2003, para. 2. See also GAER Council Conclusions of 14 June 2004, para. 4.

¹⁸ 'A new response to a changing Neighbourhood', COM (2011) 303 final, at 5: 'Commitment to human rights and fundamental freedoms through multilateral treaties and bilateral agreements is essential. But these commitments are not always matched by action. Ratification of all the relevant international and regional instruments and full compliance with their provisions, should underpin our partnership.'

¹⁹ 'A new response to a changing Neighbourhood', COM (2011) 303 final, at 2 and 3. Conversely, '[t]he EU will uphold its policy of curtailing relations with governments engaged in violations of human rights and democracy standards, including by making use of targeted sanctions and other policy measures. Where it takes such measures, it will not only uphold but strengthen further its support to civil society. In applying this more differentiated approach, the EU will keep channels of dialogue open with governments, civil society and other stakeholders. At the same

This approach aims to provide greater support to partners engaged in building ‘deep democracy – the kind that lasts’.²⁰ As such, the EU does not seek to impose a model or a ready-made recipe for political reform, but will insist that each partner country’s reform process reflect a clear commitment to the universal values that form the basis of the ‘special relationship’. And while the two regional dimensions of the ENP, covering respectively the Eastern Partnership and the Southern Mediterranean, will be strengthened ‘so that the EU can work out consistent regional initiatives in areas such as trade, energy, transport or migration and mobility’, the ENP will push – much more than before – towards an ‘own merits’-based approach whereby it is easier to differentiate between friends and foes: the partnership will develop with each neighbour individually, on the basis of its needs, capacities and reform objectives. The initiative thus lies with the partner country and EU support, in the form preferential commitments, will be tailored accordingly.²¹ Some partners may want to move further in their integration effort, which will entail a greater degree of alignment with EU policies and rules leading progressively to economic integration in the EU Internal Market. For countries where reform has not taken place, the EU will reconsider or even reduce funding.

In essence, the European Union is turning the tables by moving from the Brussels-centred development of a one-size-fits-all ENP to the variable geometry of a set of differentiated relationships largely defined by the neighbouring countries themselves. More than before the entry into force of the Treaty of Lisbon, the Union is thereby relying on its power of attraction, which has inspired candidate countries to adhere to the conditions of EU membership. It remains questionable, however, whether the Union’s ‘softer’ power in the neighbourhood – one that is premised on a stake in the internal market but not the institutions – will be enough to inspire the reforms that will one day form the basis for the kind of cooperation on which a single area of prosperity and good neighbourliness can be established.

time and in line with the principle of mutual accountability, the EU will ensure that its resources are used in support of the central objectives of the ENP.’

²⁰ ‘A new response to a changing Neighbourhood’, COM (2011) 303 final, at 2: ‘(...) because the right to vote is accompanied by rights to exercise free speech, form competing political parties, receive impartial justice from independent judges, security from accountable police and army forces, access to a competent and non-corrupt civil service’. Incidentally, the revised ENP, for all the welcome focus on democratic reform, makes life more difficult for the governments of post-revolutionary Tunisia and Egypt. ‘In effect, we are using more conditionality on the transitional governments than on the dictators who preceded them’, according to Rosa Balfour, cited in T. Vogel, ‘A reflection on old, failed neighbourhood policies’, *European Voice*, 26 May 2011. See further K. Raik, ‘Between Conditionality and Engagement: Revisiting the EU’s Democracy Promotion in the Eastern Neighbourhood’, *FIIA Briefing Paper* No. 80, April 2011.

²¹ ‘A new response to a changing Neighbourhood’, COM (2011) 303 final, at 3: ‘This enhanced support will come in various forms, including increased funding for social and economic development, larger programmes for comprehensive institution-building (CIB), greater market access, increased EIB financing in support of investments; and greater facilitation of mobility. These preferential commitments will be tailored to the needs of each country and to the regional context.’ See also page 20: the new European Neighbourhood Instrument ‘should be increasingly policy-driven and provide for increased differentiation, more flexibility, stricter conditionality and incentives for best performers, reflecting the ambition of each partnership’.

One way explicitly prescribed by the Lisbon Treaty to give hands and feet to its grand objective to create that 'special' kind of relationship between the EU and its neighbours is the conclusion of 'specific agreements' (Article 8(2) TEU), another fluffy term, which 'may [must not!] contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly'. The formulation again indicates the possibility of differentiation in bilateral relations with neighbouring countries. While, in itself, that is a good thing, differentiation does undermine the Treaty language of Article 8(1) TEU which implies the creation of a single area of prosperity and good neighbourliness. The neighbourhood clause itself thus also seems to suffer from a structural dichotomy, ingraining the tension between a multilateral and an own merits-based approach.

With respect to Article 8(2) TEU, it should further be noted that the Lisbon Treaty for the first time establishes a specific legal base to develop contractual relations with neighbouring countries. However, this does not do away entirely with the complexities relating to the search of the appropriate legal base for agreements with individual ENP countries prior to Lisbon.²² After all, the 'specific agreements' which the EU seems to envisage for all EaP states and *selected* countries from the Southern Mediterranean are so-called 'Association Agreements', most of them built on the establishment of deep and comprehensive free trade areas (DCFTAs).²³ The agreements are intended to replace the outdated Partnership and Cooperation Agreements of the 1990s which have been automatically prolonged since they expired 10 years after their entry into force,²⁴ and update and upgrade some of the existing EuroMed Agreements.²⁵ Article 217 TFEU provides the specific legal base for concluding *association* agreements, albeit with third countries belonging to a wider group of partners than just the EU's geographical neighbours. The difference between Article 8(2) TEU and Article 217 TFEU is that the latter prescribes, in line with the Court's *Demirel* judgment,²⁶ that associations established by such agreements will involve reciprocal rights and obligations, common action and special procedure (cf. Article 218 TFEU). Meanwhile, *partnership* agreements are concluded on the basis of Article 212 TFEU, which states that such agreements pursue the objectives of economic, financial and technical cooperation mea-

²² See M. Maresceau, 'A Typology of Mixed Bilateral Agreements', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: the EU and its Member States in the World* (Oxford, Hart Publishing 2010), 11-29, at 19-21.

²³ Negotiations with Ukraine were initiated under the pre-Lisbon regime, have been going on for a number of years now, but are expected to be closed by the end of 2011. Negotiation mandates for similar type agreements with Armenia, Azerbaijan, Georgia and Moldova were hammered out when the dust of the Lisbon Treaty was still settling, a difficult exercise altogether. On the agreement with Ukraine, see C. Hillion, 'Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine 'Enhanced Agreement'', in 12 *EFA Rev.*(2007), 169-182; and R. Petrov, 'Legal Basis and Scope of the New EU-Ukraine Enhanced Agreement: is there any room for further speculation?', *EUI Working Papers MWP* 2008/17.

²⁴ Communication from the Commission to the Council and the European Parliament on strengthening the European Neighbourhood Policy, COM (2006) 726 final, at 4-5.

²⁵ See K. Pieters, *The Integration of the Mediterranean Neighbours into the EU Internal Market* (The Hague, TMC Asser Press 2010).

²⁶ Case 12/86 *Demirel* [1987] ECR 1545

tures, including assistance, in particular financial assistance, with third countries other than developing countries (e.g. Russia and, when reforms lag behind the wish to conclude an agreement with former EaP country, Belarus). In short, depending on the interpretation of the scope of objectives, the depth of political and economic cooperation, the possibility of establishing a visa-free regime, and the extent to which national legislation will be harmonized to the EU *acquis*, one may argue over the choice of the legal basis and the procedure of adoption of future generation bilateral agreements between the EU and the ENP countries. Fortunately, the ECJ now has jurisdiction to adjudicate in cases of disputes between the institutions involved in establishing those ‘specific agreements’ with neighbouring countries based on Article 8(2) TEU. Compared to the pre-Lisbon situation, this represents a significant legal leap forward.

3. INSTITUTIONAL CHANGES

As noted at the beginning, the Treaty of Lisbon has a double significance for the future of EU relations with its neighbours. Apart from introducing a specific Treaty base, Lisbon also brings about institutional changes in the area of external relations, with new actors and adapted functions of existing players, thereby impacting on the governance of the ENP.²⁷ Apart from the introduction of a semi-permanent President of the European Council – who, at his level and in that capacity, ensures the external representation of the Union on issues concerning its Common Foreign and Security Policy (Article 15(6) TEU), and who has regularly spoken out on issues pertaining to the neighbourhood²⁸ – there are few other institutional complications that merit attention in the current context. They relate, directly and indirectly, to the task of the High Representative of the Union for Foreign Affairs and Security Policy / Vice-President of the Commission (HR/VP) to assist the Council and the Commission in ensuring coherence between the different areas of the Union’s external action and between these and the EU’s other policies.²⁹

²⁷ See, generally, J. Wouters, D. Coppens and B. De Meester, ‘The European Union’s External Relations after the Lisbon Treaty’, in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU constitutionalism without a Constitutional Treaty?* (Vienna, Springer 2008), 143-203; J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, Cambridge University Press 2010), 238-256; P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford, Oxford University Press 2010), 379-387; P. Van Elswege, ‘EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency’, 47 *CML Rev.* (2010), 987.

²⁸ See, e.g., Statement by Herman Van Rompuy, President of the European Council, on the EU’s Eastern Partnership, PCE 049/11, Prague, 23 February 2011; Statement by Herman Van Rompuy, President of the European Council, on the developments in the EU’s Southern neighbourhood, PCE 048/11, Prague, 23 February 2011; Video message by President of European Council Herman Van Rompuy, ‘We want to turn this Arab Spring into a true new beginning’, PCE 062/11, Brussels, 10 March 2011; Statement by Herman Van Rompuy, President of the European Council, on his meeting with the interim Libyan transitional national council, PCE 066/11, Brussels, 11 March 2011.

²⁹ See Articles 18(4), 21(3) and 26(2) TEU.

To assist the HR/VP in her coordination efforts, the EU is currently being equipped with a brand-new diplomatic service: the European External Action Service (EEAS).³⁰ A close reading of Articles 3(1) and 2(1) of the EEAS Council Decision points out that the Action Service shall support and work in cooperation with, *inter alia*, the services of the Commission, ‘without prejudice to the normal tasks’ of those services.³¹ The inclusion of the latter phrase begs the question what exactly are the normal tasks of DG ELARG/ENP. In the absence of an exhaustive *Kompetenzkatalog* of the EU – and with the very idea of normality in EU external action having shifted dramatically with the entry into force of the Lisbon Treaty – it is not unthinkable that the neutral phrase ‘normal tasks’ will in practice be interpreted differently by persons with different institutional affiliations.

A quick glance at the draft organizational chart of the EEAS reveals that, together, two geographical desks incorporate seven units that deal with aspects of the ENP.³² This implies that strategic planning and programming on issues pertaining to the ENP are now a shared responsibility of the Commission and the EEAS. The hitch, of course, is that as the Action Service will be composed of Commission and Council staff, along with seconded national experts from the Member States, the planning and programming aspects of the ENP and the new European Neighbourhood Instrument have become the domain of experts whose visions risk to be coloured by their different professional backgrounds:

Indeed, the functioning of the Service will probably remain determined by an invisible yet genuine distinction between two cultures: a Communitarian-like culture inherited from DG Relex (which will be numerically dominant in the EEAS, and which will most likely have the greatest influence on the geograph-

³⁰ Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010 L 201/30. See the analysis in this volume in Duke, ‘A Difficult Birth: the early days of the European External Action Service’.

³¹ With respect to the coordination and cooperation between the EEAS and the services of the Commission, the EEAS Council Decision specifically obliges the parties to consult each other on *all* matters relating to the external action of the Union in the exercise of their respective functions, except on matters of CSDP. See Article 3(2) EEAS Council Decision, a paragraph that will be implemented in accordance with Chapter 1 of Title V of the TEU and with Article 205 TFEU. This far-reaching obligation stems from, *inter alia*, the quasi-blanket competence attributed to the Commission in Article 17(1), sixth sentence TEU to represent the Union externally ‘with the exception of the common foreign and security policy, and other cases provided for in the Treaties’. As the Heads of the EU Delegations receive direct instructions from the HR, the EEAS and the Commission are effectively and legally bound to cooperate in the external representation of the Union. See Article 5(3) EEAS Council Decision. See further, S. Blockmans, ‘Beyond Conferral: the role of the European External Action Service in decision-shaping’, in M. Moraru and J. Larik (eds.), *Ever-Closer in Brussels, Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper LAW*, forthcoming.

³² Under the geographical directorates ‘Europe and Central Asia’, the following units have been created: ‘Eastern Partnership, regional cooperation and OSCE’ and ‘Eastern Partnership, bilateral’. Under the geographical directorates ‘North Africa, Middle East, Arabian Peninsula, Iraq, Iran’ exist the following units: ‘Middle East’, ‘Maghreb’ and ‘Regional policies: EuroMed, UfM’. Connecting the two geographical directorates are two units: ‘ENP Coordination I’ and ‘ENP Coordination II’. Having said this, many questions surrounding the set-up and functioning of the EEAS are still unclear. It will take years before the new Service will be running at full steam.

ic and thematic DGs, and on delegations); and a political culture inherited from the Council policy unit and crisis management structures, deemed to retain a certain autonomy within the Service. In this respect, the Council Decision suggests that the EEAS might well internalise past bureaucratic conflicts, rather than do away with them.³³

In a pre-Lisbon move by then Commission President-designate, who in November 2009 unveiled his new team of Commissioners, Jose Manuel Barroso tried to prevent the hitherto Commission-steered enlargement policy and ENP from being (too much) contaminated by the intergovernmental method of the Council. By way of a simple asterisk behind the names of three Commissioners-designate, Barroso not only curtailed the HR/VP's responsibilities as entrusted to him/her by the Treaty ex Articles 18(4), 21(3) and 26(2) TEU in the fields of 'International Cooperation, Humanitarian Aid and Crisis response', 'Development' and 'Enlargement and European Neighbourhood Policy';³⁴ he also indicated that the three new Commissioners would exercise their functions 'in close cooperation with the High Representative/Vice-President in accordance with the Treaties'.³⁵ The requirement of close cooperation with the HR/VP and the condition to work closely with the EEAS (as provided in the Mission Letters) was later formalised in a Note from the President of the Commission in which he established clusters of Commissioners responsible for certain themes, including external relations.³⁶ Barroso assigned himself the final responsibility to ensure coherence of external policies within the Commission, while the day-to-day coordination was entrusted to the VP (Catherine Ashton). Barroso's pre-Lisbon manoeuvring could therefore be seen as a snide to the future HR/VP not to get too excited about the scope of his/her own competences in external relations.

In the course of his hearing in the European Parliament on 12 January 2010, Commissioner-designate Štefan Füle paid lip service to the idea that his actions would significantly assist the HR/VP, by declaring that the two of them would work together for the common good of EU-neighbours relations.³⁷ In a formal sense, this cooperation is now reflected in the references to both the Euro-

³³ See M. Lefebvre and C. Hillion, 'The European External Action Service: towards a common diplomacy?', *SIEPS European Analysis* 2010/6, at 7.

³⁴ It should be noted that, under Barroso II, ENP was extracted from the portfolio of DG Relex and thus not transferred in its entirety to the EEAS.

³⁵ Press release IP/09/1837 of 27 November 2009. The requirement of close cooperation was repeated in the Mission Letters of the same date from Barroso (II) to Andris Piebalgs and Stefan Füle, and of 27 January 2010 to Kristalina Georgieva. See <http://ec.europa.eu/commission_2010-2014/mission_letters/index_en.htm>.

³⁶ See Article 17(6)(b) TEU, which states that the President of the Commission shall 'decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body'; and the Information Note from the President, 'Commissioners groups', SEC (2010) 475 final, in which the VP is tasked to chair the group of Commissioners responsible for 'External relations', a group further composed of Olli Rehn (economic and monetary affairs), Karel De Gucht (trade) and the three aforementioned Commissioners. The Note also says that 'the President can decide to attend any meeting, which he will then chair'.

³⁷ Opening statement of Mr Štefan Füle, Commissioner-Designate for Enlargement and European Neighbourhood Policy, European Parliament, 12 January 2010, at 3: 'I will cooperate closely with High Representative Ashton in coordinating our political and policy responses towards our

pean Commission and the High Representative of the Union for Foreign Affairs and Security Policy as the spiritual parents of new ENP policy documents.³⁸ In practice, it appears that extra coordination mechanisms are needed to make good on the joint proposals these external action heroes have made to enhance coherence of the Union's multi-pillar ENP.³⁹

At his hearing at the EP, Füle underlined that he would be accountable solely to the European Parliament, whilst the HR would answer to both Parliament and EU Member States. Remarkably, Füle also spoke in favour of a politicisation of the enlargement process by means of an active engagement of national politicians in the debate. He signalled that, as a Commissioner, he would attach more importance to substance rather than procedures when it comes to both enlargement and neighbourhood policy.⁴⁰ Thereby, Füle seems to have given more leeway to the creeping intergovernmentalisation of enlargement and ENP, at least more than his boss was prepared to accept prior to the entry into force of the Treaty of Lisbon.

4. CONCLUDING REMARKS

The Lisbon Treaty was intended to create tools for the European Union to develop a more coherent, more effective and more visible foreign policy,⁴¹ also in the area of EU-neighbours relations. However, the Union's slow and timid response to the dramatic events of the Arab Spring of 2011,⁴² as indeed the

neighbours.' The speech is available at <http://www.europarl.europa.eu/hearings/static/commissioners/speeches/fule_speeches_en.pdf>.

³⁸ See, e.g., European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', COM (2011) 200 final; and European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A new response to a changing Neighbourhood', COM (2011) 303 final.

³⁹ See, e.g., 'HR/VP Catherine Ashton sets up Task Force for the Southern Mediterranean', A 226/11, Brussels, 7 June 2011. The Task Force will bring together expertise from the EEAS, the European Commission, the EIB, the EBRD and other international financial institutions to act as a focal point for assistance to countries in North Africa which are going through political transformation.

⁴⁰ See 'Füle: 'I'll make enlargement more political'', *EurActiv.com*, 14 January 2010.

⁴¹ See *Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, COM (2006) 278 final; the pre-Lisbon Draft IGC Mandate, annexed to the Presidency Conclusions of 22-23 June 2007; and the Annual Report from the Council to the European Parliament on the Main Aspects and Basic Choices of the CFSP (2008).

⁴² Compare, e.g., Statement by EU High Representative Catherine Ashton and European Commissioner for Enlargement Štefan Füle on the situation in Tunisia, Press release A 010/11, Brussels, 10 January 2011; 'EEAS' senior officials mission to Tunisia', Press Release A 029/11, 26 January 2011; and Statement by the EU High Representative Catherine Ashton on Tunisia, Press Release A 034/11, Brussels, 28 January 2011. See also T Garton Ash, 'If this is young Arabs' 1989, Europe must be ready with a bold response' *The Guardian*, 2 February 2011: 'What happens across the Mediterranean matters more to the EU than the US. Yet so far its voice has been inaudible'.

Union's mixed performance in external action more widely in the first year after the entry into force of the Treaty of Lisbon,⁴³ illustrate the limits of the innovations in the sphere of both the attribution of competences and institutional architecture. Whereas the Lisbon Treaty has introduced a neighbourhood clause which now provides a legal base for the conclusion of 'specific agreements' with ENP countries, it still depends on the scope of the objectives and the depth of the envisaged cooperation of the draft bilateral agreement whether Article 8(2) TEU or perhaps other legal bases in the TFEU may be most appropriate. Arguably, Article 8(1) TEU represents a container concept which does not provide the sharp teeth the Union's paper ENP tiger needs to survive in the sometimes rough and currently changing environment of the neighbourhood. The instruments through which the European Neighbourhood Policy has to be implemented have to be borrowed from other parts of the Treaties, from which Article 8 TEU is disconnected. In a way, the inclusion of a specific neighbourhood clause in the Lisbon Treaty represents the overall reactive nature of the EU to its neighbourhood, captured by the *adagium* 'too little, too late'.

Of course, everything falls or stands with the political terms defining the equation. The Lisbon Treaty provides a new institutional framework for EU foreign policy, which also impacts on the governance of the EU-neighbours relations. With the creation of the hybrid function of the HR/VP, supported by a European External Action Service composed of 'supranationalists' and 'intergovernmentalists', and the appointment of a more political savvy European Commissioner responsible for ENP, we are witnessing the creeping intergovernmentalisation of the European Neighbourhood Policy. This ought not, in theory at least, to prejudge the Union's political orientation towards its neighbours, which is a reflection of many internal and external tendencies. Yet, in the current climate of instability in the Southern Mediterranean, continued volatility in the Middle East, ongoing tensions in the Southern Caucasus, and an Eastern Partnership otherwise fragmented by states willing to cooperate and others which do not, centrifugal and centripetal forces will continue to collide in the European Union. According to polls, a majority of Europeans believe that the Union has enlarged too fast. This shows that the mandate for an assertive enlargement policy, but also a strong European Neighbourhood Policy remains weak. As a result, it will be very difficult for the Union's external action heroes to forge a strong common policy for the region as a whole. Instead, differentiation of bilateral EU-neighbours relations, premised on a stronger own merits-based approach and taking sub-regional contexts into account, is – for now – the best way forward.

⁴³ J. Vaisse and H. Kundnani (eds), *European Foreign Policy Scorecard 2010* (London, ECFR 2011). The assessment in the scorecard is of the collective performance of all EU actors rather than the action of any particular institution or country – either the High Representative, the European Council, the European Commission, a group of states like the EU3 (France, Germany and the UK), or an individual Member State.