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Setting up the European External Action Service: An institutional act of balance

Leendert Erkelens and Steven Blockmans



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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**SETTING UP THE EUROPEAN EXTERNAL ACTION SERVICE:
AN INSTITUTIONAL ACT OF BALANCE**

LEENDERT ERKELENS* AND STEVEN BLOCKMANS**

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ABSTRACT

This paper provides an analysis of the process of setting up the European External Action Service (EEAS) in the period between October 2009 and the beginning of January 2011. The focus is on the way the (European) Council, the Commission and the European Parliament anticipated the emergence of the position of the High Representative of the Union for Foreign Affairs and Security Policy / Vice-President of the European Commission (HR/VP) and how they conducted negotiations on the creation of the EEAS. Their respective objectives are unveiled, as well as the way they made use of legal instruments and bureaucratic methods to reach those goals. The argument will be made that the impact of the dynamics generated by the inter-institutional gravitational field played a larger role in defining each actor's actions than the pursuit of the constitutional principles of coherence and effectiveness of EU external action. Looking at the outcome of the negotiations and the positioning of the EEAS in the Brussels arena, a further argument will be made that the post-Lisbon arrangements in the field of EU external action have resulted in a small move away from the so-called 'Community method' towards a more intergovernmental way of EU foreign policy making writ large.

We can now move forward to build a modern, effective and distinctly European service for the 21st century. The reason is simple: Europe needs to shape up to defend better our interests and values in a world of growing complexity and fundamental power shifts.¹

1. INTRODUCTION

On 1 December 2010, one year after the Treaty of Lisbon entered into force, the European External Action Service (EEAS) was formally launched.² An initial transfer of about 1,500 staff took place on 1 January 2011, whereby the EEAS effectively began its operations.³ The legal basis for the creation of the Action Service is surprisingly concise and open-ended. Article 27(3) TEU provides a single general procedural rule for the establishment of the EEAS, i.e. by way of a Council Decision, proposed by the High Representative of the Union for Foreign Affairs and Security Policy (HR), adopted with the consent

¹ Council of the European Union, 'Council establishes the European External Action Service', 12589/10, PRESSE 218, Brussels, 26 July 2010.

² See A. Rettman, 'Ashton names EU foreign-service priorities at low-key launch event', *EU Observer* (Brussels, 2 December 2010).

³ In line with Art. 7 of 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 (hereinafter: EEAS Council Decision). Staffing decisions continued to be made during the first few months of the EEAS's existence, necessitating the occasional revision of the organisation chart.

of the Commission after having heard the opinion of the European Parliament. In fact, most of the questions with regard to the setting up of the EEAS were therefore left open by the Lisbon Treaty. It was up to the negotiators from the different parties involved to reach agreement on structure, tasks and technical issues.

On the face of it, the creation of the new service should not have been a big deal. Its craftsmen would have simply had to construct a bureaucracy functional to the implementation of the competences attributed to the HR. It is therefore perhaps curious that *the* most principled of matters underlying the negotiations related to the positioning of the EEAS in the institutional architecture of the EU. The debates about the establishment of the service carried great significance, as if it were about the introduction of the eighth official EU institution. This is strange if one considers that the EEAS is neither a formal institution ex-Article 13(1) TEU, nor an EU agency possessing legal personality and bearing responsibility by mandate or delegation for one or more specific tasks.⁴ As the name suggests, the EEAS is a service, which has to 'assist', the High Representative in fulfilling his (or, as the first incumbent is a woman, her) mandate.⁵ But because the EEAS was subsequently also expected to 'support' the President of the European Council,⁶ the President of the Commission, and the Commission as a whole in the exercise of their respective functions in the area of external relations,⁷ the task of inserting the EEAS into the Union's new institutional architecture pertaining to external action, a domain known for its political sensitivities and one already overcrowded with passionate players, was bound to be a laborious exercise.⁸ The search for a well-balanced outcome was compounded by, *inter alia*, the decision to transfer 'relevant' officials (and their departments) from both the Commission and the Council General Secretariat, resulting in a substantial drain of know-how and leaving deep traces in the organisational structures of these institutions.⁹

⁴ See B. Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service', 7 *CLEER Working Papers* (2010). The future delegation of certain powers to the service or specific parts of it (as e.g. Union Delegations abroad) is not precluded.

⁵ Art. 27(3) TEU, first sentence.

⁶ Art. 15(6) TEU, last sentence: '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.'

⁷ Art. 17(1) TEU, sixth sentence: 'With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it [=Commission] shall ensure the Union's external representation.'

⁸ These additional tasks for the EEAS were not laid down in the Treaties but favoured by Council and Commission, convinced that integrating these tasks within one service would be instrumental to creating coherence in policy-making and improving coordination between the different of the Union's foreign affairs actors, in line with the obligation enshrined in Art. 21(3) TEU, second clause. See Council of the European Union, 'Presidency report to the European Council on the External Action Service', doc. 14930/09, Brussels, 23 October 2009.

⁹ See *supra* note 3, in conformity with Art. 27(3) TEU. This move implied that also the responsibility of staffing the Delegations was transferred from the Commission to the EEAS. See also M. Lefebvre and C. Hillion, 'The European External Action Service: towards a common diplomacy?', 6 *SIEPS European Analysis* (2010); and M. Emerson et al., *Upgrading the EU's Role as Global*

This essay focuses on the inter-institutional complexities and the ways in which the main actors on the Union's scene dealt with the Lisbon Treaty's new arrangements in the field of external relations in the process of setting up the European External Action Service. As such, the paper dwells upon the legal, political, diplomatic and bureaucratic aspects of inter-institutional relations in the period in which the EEAS took shape, i.e. from October 2009 (when the ratification process of the Lisbon Treaty drew to a close and the first position paper was issued by the Swedish Presidency) to 1 January 2011 (the day when the EEAS started its operations).¹⁰ To that end, the positions adopted and steps taken by the different actors involved in the process of establishing the service, in particular during the negotiations in the Conference of Presidents (or so-called 'quadrilogue'¹¹), will be reconstructed and analysed. To what extent did each of the parties involved try – and were they able – to gain oversight over the EEAS, as indeed the HR/VP? It will be argued that both in terms of organising diplomatic and bureaucratic processes, as well as with respect to institutional issues (which were later considered to be most relevant), the establishment of the EEAS was about more than just translating, in administrative terms, the multiple tasks of the HR/VP. The proposition will be put forward that the impact of the dynamics generated by the inter-institutional gravitational field played a larger role in defining each actor's respective actions than the pursuit of the constitutional principles of coherence and effectiveness of EU external action. In the concluding remarks of this essay, a first attempt will be made to answer the subsidiary question whether the institutional balance in the realm of the European Union's external action has shifted with the creation of the EEAS, under the authority of a new institutional player, i.e. the HR/VP.

2. BUREAUCRATIC MANOEUVRES OF THE PRESIDENT OF THE COMMISSION

When Commission President designate Barroso unveiled his new team in November 2009, he indicated by way of a simple asterisk behind the names of the designate Commissioners responsible for 'International Cooperation,

Actor: Institutions, Law and the Restructuring of European Diplomacy (Brussels: Centre for European Policy Studies 2011).

¹⁰ For an early assessment of the negotiations and their political impact, see A. Missiroli, 'Implementing the Lisbon Treaty: The External Policy Dimension', 14 *Bruges Political Research Papers* (2010). For a first assessment of the Service's operations, see S. Duke, 'A Difficult Birth: the early days of the European External Action Service', in P. Koutrakos (ed.), 'The European Union's External Relations a Year after Lisbon', 3 *CLEER Working Papers* (2011) at 69-81; R. Balfour and H. Ojanen, 'Does the European External Action Service Represent a Model for the Challenges of Global Diplomacy?', 1117 *IAI Working Papers* (2011); S. Blockmans, 'Fit for Purpose? The European External Action Service One Year On', 159 *Oxfam Briefing Paper* (January 2012); and S. Blockmans, 'The European External Action Service One Year On: first signs of strengths and weaknesses', 2 *CLEER Working Papers* (2012).

¹¹ The Conference of Presidents consisted of the HR/VP, the EP President, the rotating President of the Council and the Commission and their discussions concerning the final text of the EEAS Council Decision were baptized 'quadrilogue'. See section 7 and *infra* note 72.

Humanitarian Aid and Crisis response', 'Development' and 'Enlargement and European Neighbourhood Policy' that they would exercise their functions 'in close cooperation with the High Representative/Vice-President in accordance with the Treaties.'¹² This expectation is raised in his Mission Letters addressed to these future Commissioners, in which Barroso stated that their respective portfolios '(...) will require close cooperation between you and the High Representative /Vice-President'.¹³ In his Mission Letter of the same date to Baroness Ashton, however, he referred only to the Treaty, which states that as the HR for CFSP she would also be Vice-President of the Commission. Nothing was mentioned about cooperation with or her role towards the other external relations Commissioners designate. Instead he underlined (as he did in all his Mission Letters) the importance of collegiality as the central mechanism for the functioning of the Commission and his own determination to ensure that the College is the political heart of the Commission. So, at this preparatory stage the responsibilities of the HR as the 1st Vice-President remained rather unspecified. To a certain extent responsibilities bestowed on Catherine Ashton as Vice-President were even eroded. For instance, Barroso indicated that, although Ashton would be the 1st Vice-president, she would not replace him in his absence because of her 'specific functions, notably in the Council'. Instead, his replacement would be assured by the other Vice-Presidents, in the order of precedence defined by the President himself.¹⁴

Another step towards the re-structuring of responsibilities of the new Commissioners occurred at the College's first formal meeting on 17 February 2010: DG Relex staff involved in international climate-change negotiations was moved to the new directorate-general for climate action and the energy task-force was moved to the directorate-general for energy. The Commission maintained that 'this transfer was simply a question of strengthening the two directorates-general', but Member States' diplomats were reported to have said that 'the move was made to insulate the units from the pull of the EEAS', whereas they believed that the EEAS was in need of staff dealing with the external dimensions of internal policies.¹⁵

The HR's 'Vice-Presidential' powers were further curtailed by Barroso's decision to remove the responsibility for the ENP from the portfolio of the Commissioner of External Relations and add it to that of new Commissioner for Enlargement. This re-shuffling of portfolios was not motivated but Barroso asked Commissioner Štefan Füle '... to develop credible and attractive alternatives to membership for those neighbouring countries that will not become members. That is why an effective European Neighbourhood Policy is so important, and why I believe that it deserves the extra attention which could be

¹² Press release IP/09/1837, 27 November 2009.

¹³ Mission Letters of 27 November 2009 from Barroso (II) to Andris Piebalgs and Štefan Füle, and of 27 January 2010 to Kristalina Georgieva, available at <http://www.ec.europa.eu/commission_2010-2014/mission_letters/index_en.htm>.

¹⁴ *Ibid.*, at 2.

¹⁵ T. Vogel, 'Turf war continues over EU's diplomatic corps', *European Voice* (Brussels, 11 March 2010).

offered by close cooperation between you and the High Representative/Vice-President.¹⁶

Finally, the issue concerning the coordination of overlapping portfolios was discussed within the College towards the end of April 2010. Barroso forwarded to the Commission an Information Note containing an overview of all Commissioner groups.¹⁷ In its meeting of 4 May 2010 the College took note of it.¹⁸ Compared to the original number of three Commissioners participating in the group on external affairs under Barroso (I),¹⁹ the group under Barroso (II) comprised the three Commissioners mentioned above (Piebalgs, Füle, Georgieva), as well as the Commissioners for Economic and Monetary Affairs (Rehn) and for Trade (De Gucht). As first Vice-President, Baroness Ashton was tasked to chair this group. In the light of ensuring coherence of the external action of the Commission the expansion of the group so as to gather all external relations Commissioners and the explicit conferment of the chair to the HR/VP definitively meant an improvement.

Interestingly, the Information Note also provides eight instructions regarding the functioning of the groups of Commissioners. The following four elucidate the preparatory character of these ad hoc groups of Commissioners:

- ‘Each group will work on the basis of a mandate from the President setting out the purpose of the group and the product(s) to be delivered.
- The President’s Cabinet and SG will participate in all groups. The Cabinet/Service of the lead Commissioner will prepare papers for discussion in the groups. Meeting reports, agendas and organisation will be done by the SG.
- The President can decide to attend any meeting, which he will then chair.
- These groups will not take decisions but one of their tasks will be to prepare for collegiate discussion/decision.’

In other words, the room of manoeuvring of these ad hoc groups is rather limited: they do not have any discretionary power of themselves; they function within the limits of a mandate provided by the President of the Commission; the President’s Cabinet (and SG) participate in all groups and prepare (among others) the agendas (sic) and the groups do not take decisions but make preparations for discussion or decision-making by the College.

It is also remarkable that all groups are put on an equal footing. The question may be raised whether this is done rightly in view of the specific mandate provided to the HR/VP by the Treaty. According to Article 18(4) TEU, ‘The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union’s external action. He shall be respon-

¹⁶ See *supra* note 13, Mission Letter to Štefan Füle, at 2.

¹⁷ Information Note from the President, Commissioners groups, SEC (2010)475 final, Brussels, 22 April 2010.

¹⁸ European Commission, ‘Minutes of the 1914th meeting of the Commission held in Strasbourg (Winston Churchill building) on Tuesday 20 April 2010 (afternoon)’, PV(2010)1914 final, Brussels, 4 May 2010, at 11.2.

¹⁹ See *supra* note 13.

sible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action.²⁰ Within the Commission, it is thus the HR/VP – and no one else – who is charged with the said responsibilities of the Commission. On the other hand, the President of the Commission possesses competences regarding the organisation of the Commission as well as the content of its work,²¹ through the provision of guidelines.²² The question may therefore be raised to what extent the powers of the President of the Commission affect the responsibilities of the HR/VP? Article 248 TFEU sheds more light on this matter, providing that it is the President who structures, allocates and (whenever necessary) reshuffles the responsibilities upon the Commission among its members. The members shall carry out the tasks devolved upon them by the President under his authority. However, according to Article 248 TFEU responsibilities incumbent on the Commission shall be structured and allocated without prejudice to the responsibilities as provided by article 18(4) TEU. It may therefore be concluded that the HR/VP has his/her own mandate provided for by the Treaty and that his/her tasks are not devolved upon him/her by the President of the Commission.²³ Besides, as High Representative the VP shall only be bound by the Commission procedures to the extent that this is consistent with his/her responsibilities for conducting CFSP on the basis of a mandate provided by the Council.²⁴ From this point of view it is rather questionable that the ad hoc group for external relations, chaired by the HR/VP, should have to function by a presidential mandate. It would be more appropriate to see the HR/VP drawing up the specific terms of such a mandate by him/herself and discuss it within the College with a view to get consensus of opinion. Such a procedure could be in line with the functioning of the Commission as a collegiate body, as well as with the task of President to ensure such a functioning and to lay down guidelines for the Commission's work. Finally, one may wonder why this specific ad hoc group should make use of the services of the Cabinet of the President and of the SG and not of the services of the EEAS. This would not have been legally inappropriate in the light of the tasks assigned to the EEAS Council Decision of 26 July 2010. This Decision provides, *inter alia*, that the EEAS supports the HR in his/her capacity as VP in fulfilling the external relations' responsibilities incumbent on the Commission and coordinating other aspects of the Union's external action '(...) without prejudice to the normal

²⁰ The term 'responsible', as accorded to the HR/VP, is somewhat more clearly expressed in the French language version of Art. 18(4) TEU: 'Il est chargé, au sein de la Commission, des responsabilités qui incombent à cette dernière dans le domaine des relations extérieures et de la coordination des autres aspects de l'action extérieure de l'Union.'

²¹ In accordance with Art. 17(6) (a) and (b) TEU.

²² See J.M. Barroso, 'Political Guidelines for the next Commission', Brussels, 3 September 2009, available at <http://www.ec.europa.eu/commission_2010-2014/president/pdf/press_2009_0903_en.pdf>.

²³ Conversely, the other members of the Commission do carry out their tasks under the authority of the President.

²⁴ See Art. 18(4) TEU, last sentence: 'In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.'

tasks of the services of the Commission.²⁵ It illustrates that even in practical matters it was not considered to be a 'normal' task of the EEAS to provide support to a Vice-President of the Commission endowed with a Treaty-based mandate to ensure coherence and to coordinate the external action of the Union. In this light, the question of 'normality' of tasks to be performed by the Commission services could have been reviewed.

Summing up, it may be concluded that – in striking contrast with relevant Treaty provisions – the coordinating powers of the HR/VP over other Commissioners have not been (fully) effectuated. In conformity with her Treaty based mandate the HR/VP could have made proposals to implement her coordinating powers. Instead, the HR/VP was charged by the President to chair a group comprising all Commissioners with substantial elements of foreign affairs in their portfolios. As such, the Treaty-based coordinating powers of the HR/VP were brought back to the College of Commissioners, chaired of course by its President.²⁶ So within the Commission it is the President who keeps the reins in external matters. Consequently, Barroso's actions diminished the HR/VP's responsibilities as entrusted to him/her by the Treaty, and obviously accepted by Ashton. Finally, the HR's 'Vice-Presidential' powers were curtailed by the removal of several sections from the previous Directorate-General for External Relations to other Directorates-General. Thus, the Commission and its President maintained overall control over Commission policies in external affairs.

3. FRAMING THE FUTURE HR: THE EUROPEAN COUNCIL'S DIPLOMATIC MOVEMENTS

On 1 December 2009 Baroness Ashton took office as the first-ever HR/VP of the Union.²⁷ In the preceding period, EU institutions had already made arrangements with a view to her advent and the establishment of the EEAS. In October 2009 the Swedish Presidency of the Council forwarded a report on

²⁵ See *supra* note 3, Art. 3(1) third indent. This provision figured already in the original EEAS proposal of 25 March 2010 (see *infra* note 56) and was therefore well-known within the Commission at the time of discussions on this matter. For a further analysis of the 'normal tasks' of both the Commission and the Council, see S. Blockmans and M.-L. Laatsit, 'The European External Action Service: enhancing coherence in EU external action?', in P. Cardwell (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era* (The Hague: T.M.C. Asser Press 2012), at 135-159.

²⁶ Since its creation, the group of external Commissioners has allegedly met only twice, both times presided over by Barroso. Information gleaned from interviews with EU officials prior to the publication of S. Blockmans, 'The European External Action Service One Year On: first signs of strengths and weaknesses', *supra* note 10.

²⁷ European Council Decision 2009/880/EU taken with the agreement of the President of the Commission of 1 December 2009 appointing the High Representative of the Union for Foreign Affairs and Security Policy, OJ 2009 L 315/49. At their informal meeting on 19 November 2009, the EU Heads of State or Government agreed to appoint Catherine Ashton as the High Representative of the Union for Foreign Affairs and Security Policy.

the envisaged EEAS to the European Council.²⁸ The report contained the outcome of debates held in COREPER and Council on the main parameters of the future service, such as its scope, legal status, financing, delegations, and authority of the HR. The European Council endorsed the Presidency's report and invited 'the future High Representative to present a proposal for the organisation and functioning of the EEAS as soon as possible after the entry into force of the Lisbon Treaty with a view to its adoption by the Council at the latest by the end of April 2010.'²⁹ Thus, the European Council defined a framework for further action by providing the HR with 'guidelines'.³⁰

According to the European Council, the guidelines were prepared with reference to Article 27(3) TEU.³¹ However, such an inference is at odds with the formulation of this provision, which has the HR as its one and only addressee, not the (European) Council. The European Council could have issued guidelines by making use of its powers to provide impetus for the development of the Union and to define the general political directions and priorities of it.³² However, the implication of having acted accordingly might have been that the establishment of the EEAS could have been viewed as a matter of Union-wide interest, important for its general development. Conversely, the factual approach that was chosen was not without consequences either. In the first place, the setting up of the new service was downplayed as a matter of merely administrative importance, a point of view severely contested by the European Parliament already at that moment in time.³³ Secondly, the European Council in a way pre-empted the prerogative of the HR to formulate a proposal on the matter. Due to the early adoption of the guidelines – i.e. before the entry into force of the Lisbon Treaty – Catherine Ashton was already lagging behind the Action Service's inception process before she could take up her new position and participate in the work of the European Council, as provided by the Lisbon Treaty.³⁴ After Ashton took office the European Council invited her immediately to work on the basis of its guidelines. The main elements of these guidelines are summarised in section 5 of this paper. It will become clear that they left their mark on the draft Council Decision as proposed by the new HR.

In sum, although the HR is legally the only competent authority to take action on this matter, Ashton was 'framed' by the European Council (and its guidelines) from her very first day in office.

²⁸ Presidency report, *supra* note 8.

²⁹ Presidency Conclusions of the European Council of 29/30 October 2009, doc. 15265/1/09, Brussels, 1 December 2009, point I.3.

³⁰ *Ibid.*, point 2: 'In the light of the above [i.e. Art. 27(3) TEU], the Presidency, the Member States, the Commission and the Council Secretariat undertook preparatory work on the EEAS. The present document sets out the results of this work as European Council guidelines for the High Representative in the preparation of the draft Council decision on the organisation and functioning of the EEAS.'

³¹ *Idem.*

³² Art. 15 (1) TEU.

³³ See para. 6 of this study.

³⁴ Art. 15(2) TEU.

4. THE HR/VP CONSTRUCTION

The post of High Representative of the European Union for Foreign Affairs and Security Policy is the cornerstone of the Lisbon system in the domain of EU external relations and is the key innovation in the Union's conduct of foreign policy. Under the Amsterdam Treaty, it was the Secretary-General of the Council who – while exercising the function of HR for CFSP – assisted the rotating Presidency of the General Affairs and External Relations Council (GAERC).³⁵ But the rotating Council Presidency represented the Union in CFSP matters and remained (formally) responsible for the implementation of its decisions.³⁶ This construction has been fundamentally changed by the Lisbon Treaty.

In the area of CFSP, the High Representative now exercises elements of the functions which were previously carried out by the rotating Presidency, the SG of the Council in his capacity as High Representative, and the Commissioner for External Relations. The High Representative conducts the Union's Common Foreign and Security Policy, presides over the Foreign Affairs Council and – as first Vice-President of the Commission – is charged with the external relations falling under the competence of the Commission. This multi-hatted personality provides for a single leader for a single Union, supported by a single service, the EEAS.³⁷

As noted above, the re-arrangements of tasks and responsibilities within the Commission resulted in a reduction of the HR's 'Vice-Presidential' portfolio and functional scope of competences in favour of the Commission as a whole.³⁸ In fact, such a limitation also occurred on the 'HR' side of the position and is mainly due to institutional and organisational changes brought about by the Lisbon Treaty. In the first place, this is a consequence of the European Council (i) gaining the formal status of an institution of the Union, (ii) being headed by a permanent President whose tasks include the external representation of the Union in CFSP matters, at his level and in that capacity,³⁹ and (iii) accruing – formal – dominance in substantive CSFP matters.⁴⁰ And although the HR/VP

³⁵ Art. 18(3) TEU (Amsterdam).

³⁶ See Art. 18(1) and (2) TEU (Amsterdam).

³⁷ See P.J. Kuijper, *Of 'Mixity' and 'Double-hatting', EU External Relations Law Explained* (Amsterdam: Vossiuspers UvA 2008), at 14. The single Union refers to the merger of the former Community and the Union into one international organisation possessing a single legal personality. According to Jean-Claude Piris, the HR is 'triple-hatted'. He argues that the HR took over also the function of High Representative for CFSP/Secretary-General of the Council (SG/HR). Piris is perfectly right when he points to the factual circumstance that Mr Solana, as the first and last SG/HR, did a lot more during his 10-year tenure and appeared as the voice of the EU on the international political scene. See J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge: Cambridge University Press 2010), at 243. Because the HR/VP is also President of the European Defence Agency and Chairperson of the board of the EU Institute for Security Studies, we prefer to use the term 'multi-hatting'.

³⁸ As set out in section 2 of this essay.

³⁹ Art. 15(6) TEU, the second last sentence. It is provided as well that this competence of the President of the European Council is without prejudice to those of the HR in the CFSP area.

⁴⁰ The Lisbon Treaty now specifically provides that alongside the overall task of the European Council to define the general political directions and priorities of the Union it shall lay down strate-

takes part in the work of the European Council, s/he is not a formal member of it.

Secondly, changes in the configurations of the Council of Ministers affected the position of the HR/VP. The GAERC was split up by the Lisbon Treaty into two different configurations: the General Affairs Council (GAC) and the Foreign Affairs Council (FAC).⁴¹ In general, the FAC is chaired by the HR/VP. When necessary, the HR may ask to be replaced by the rotating Presidency. Besides, the HR has to invite the rotating Presidency to preside over the FAC when issues pertaining to the common commercial policy are on the agenda.⁴² Given the fact that trade is an exclusive competence of the EU, and that the HR is VP of the Commission in charge of the coordination of the Commission's foreign affairs responsibilities, it is rather remarkable that the Council's Rules of Procedures prescribe that the rotating Presidency is to be called upon and not a representative of the European Commission. This indicates a slight intergovernmentalisation of one of the bastions of what is Brussels' lingo still called the 'community method'.

The GAC remains fully in the hands of the rotating Presidency.⁴³ According to the Treaty it is up to the GAC – not the FAC – to prepare and to ensure the follow-up of the work of the European Council.⁴⁴ This means that, in principle, the strategic CFSP guidelines are prepared by the GAC. Thus, the formal responsibility to take a decision on draft texts before submitting them to the European Council rests on the GAC's shoulders – in liaison with the President of the European Council⁴⁵ and the Commission.⁴⁶ Some commentators have

gic guidelines on the Union's external action. See Art. 22 TEU, a provision that did not exist in the former TEU. See also Art. 16(6) TEU, last sentence: 'The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.'

⁴¹ Art. 16(6) TEU, in the second last and last sentence respectively.

⁴² See footnote 1(a) attached to Art. 2(5) of the Rules of Procedures of the Council, Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure, *OJ* 2009 L 325/35. Art. 2(5) states: 'The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent. It shall be responsible for the whole of the European Union's external action, namely common foreign and security policy, common security and defence policy, common commercial policy, development cooperation and humanitarian aid.' With a view to ensuring coherence of EU policies in the area of foreign affairs is it worth pointing out the almost complete overlap between the responsibilities of the FAC and those of the ad hoc group of Commissioners charged with external relations (related) portfolios. An exception is EU enlargement, which lays within the purview of the GAC. For these and other institutional points raised in this section of the paper, see Editorial comments, 'The post-Lisbon institutional package: Do old habits die hard?', 47 *CML Rev* (2010) 597-604, at 602-603.

⁴³ The HR/VP has developed a practice of asking the rotating Presidency to also chair the FAC in her absence. This constitutes a remarkable return to the pre-Lisbon situation and runs contrary to the intention to create permanency at the helm of the FAC.

⁴⁴ Art. 16(6) TEU, second sentence: 'The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.'

⁴⁵ Conversely, it is also provided that the President of the European Council ensures the preparations of the European Council on the basis of the work of the GAC. See Art. 15(6)(b) TEU.

⁴⁶ A procedure involving the FAC has been explicitly provided with regard to the preparation of the draft programme of activities of the trio of rotating Council Presidencies. See the Rules of

concluded that the GAC is thus a cornerstone for the work of the European Council.⁴⁷ In practice, however, the GAC has had very few 'upstream' activities in the area of EU external action. With the exception of EU enlargement and the preparation of the G20 meetings (which have been dominated by economic and financial rather than foreign policy issues) it has been the FAC feeding the sporadic discussion in the European Council on EU external action. Moreover, 'downstream', the FAC has become *the* implementing vehicle for the European Council: it is the FAC which elaborates the Union's external action within the framework of the European Council's political guidelines. The decline in foreign policy credentials of the GAC can even be observed by looking at its composition. While large numbers of foreign ministers take part in meetings of the FAC, they do not so much attend the GAC but leave their secretaries of state or Permanent Representatives to do the job.

In the third place the position of the HR within the FAC has changed and has turned into a somewhat hybrid mixture of competences of the former HR position (Solana) and the rotating presidency of the former GAERC. The HR now chairs the FAC but is not any more a member of this Council configuration. The Council consists only of the representatives of the Member States at ministerial level. Pre-Lisbon, the rotating President was a *primus inter pares* of the FAC. Post-Lisbon, the HR/VP is not: s/he has the power to present proposals to the FAC and to conduct the Union's foreign policy but s/he shall carry out that policy as mandated by the Council.⁴⁸ In other words, the HR/VP has nowadays a certain freedom of movement but only insofar as mandated by the FAC, of which s/he is not a genuine member.

Based on the three above-mentioned points, there is sufficient ground to support the argument that the HR side of Ashton's position has been constructed in a substantively weaker way when compared to the position under the former TEU. From a theoretical institutional point of view, the GAC is the main implementing body for the European Council, but in practice it has been eclipsed by the FAC, which has become the cornerstone of the work of the European Council. From a functional point of view the HR (like Solana under the pre-Lisbon regime) only 'takes part' in the work of the European Council. Further, s/he chairs the FAC but is not a member of it and works on the basis of mandates given by its members, as indeed the European Council's guidelines to the FAC. In other words, the HR is more than ever instrumental to the political course as determined by the European Council and the Council.

the Procedure of the Council, *supra* note 42, Art. 2(6). It shall be prepared by the three Member States with the President of the FAC (i.e. the HR) and in close cooperation with the Commission and the President of the European Council. Then the document shall be presented with a view to its endorsement by the GAC.

⁴⁷ See P. Kaczyński and A. Byrne, 'The General Affairs Council. The Key to Political Influence of Rotating Presidencies', 246 *CEPS Policy Brief* (2011). The authors argue that notwithstanding the GAC's institutional key position, in practice its importance and effectiveness have withered. However, no possible implications thereof for the FAC are mentioned.

⁴⁸ Art. 18(2) TEU: 'The High Representative shall conduct the Union's common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.'

Overseeing the construction of the position of the HR/VP *in toto*, it may be concluded that it constitutes a genuinely new post. It may look as a *sui generis* and therefore independent position, supported by a formidable service, also qualified by commentators as *sui generis*,⁴⁹ but looking through the institutional prism, the HR/VP appears to be strongly embedded within both the Commission as well as the (European) Council. On the one hand, bureaucratic moves manoeuvred VP Ashton in a position of dependency within the Commission, notwithstanding the Treaty-based powers bestowed upon her. On the other hand, the Treaty-based hierarchical and mandated nature of her functional relationships with the European Council respectively the Council made the HR/VP very much dependent on the intergovernmental system of EU foreign policy-making and implementation. This implies that for the time being the room for manoeuvre of the occupant of the HR/VP position will be determined largely by those institutions. The ensuing questions are then which of these institutions pulls the High Representative's strings harder and faster. How will the HR/VP cope with those forces, and which of the institutions will get more control over the EEAS as her supporting service? Arguably, the High Representative's primary loyalty ought to be with the Council, pursuant to the last sentence of Article 18(4) TEU. Thus, the institutional balance would be skewed in favour of the Council. But this vision seems not to be supported by our institutional analysis, which provides evidence that notwithstanding his/her legally provided coordinating powers within the Commission the HR/VP accepted to be put into a position of bureaucratic dependency from the College and its President.⁵⁰ Arguably, such a state of affairs cannot be without consequence for the positioning of the EEAS in the Union's institutional web.

Against the backdrop of the HR/VP's initial institutional entanglements we will now look closer at the way Catherine Ashton has acted directly after her appointment, as a new stage in the process of establishing the EEAS.

5. INITIAL ACTIONS OF THE HR/VP

When Baroness Ashton took office as the first HR/VP, one of her main priorities was to live up to the call from the pre-Lisbon IGC and come forward with a proposal for a Council Decision on the establishment of the EEAS.⁵¹ At the time, Ashton not only lacked substantial administrative support but was also under immense pressure from the Member States to quickly improve – as a

⁴⁹ See B. Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service', 7 *CLEER Working Papers* (2010).

⁵⁰ Pieter Jan Kuijper concluded already in May 2008 that the loyalty of the HR/VP 'may be sorely tested'. See *supra* note 37, at 15. See also, Editorial comments, 'Mind the gap!', 45 *CML Rev* (2008) 317-322, at 318-9.

⁵¹ Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 September 2007, OJ 2010 C 83/335 (Declaration no. 15 on Article 27 of the Treaty on European Union): 'The Conference declares that, as soon as the Treaty of Lisbon is signed, the Secretary-General of the Council, High Representative for the Common Foreign and Security Policy, the Commission and the Member States should begin preparatory work on the European External Action Service.'

goal of overriding importance – the Union’s representation on the international scene. The EEAS would be indispensable to help her achieve that goal.

The High Representative was not expected to prepare this project on her own. The Commission, the Member States and the SG of the Council were also called upon to carry out preparatory work.⁵² The guidelines of the European Council provided Ashton with both procedural and substantive recommendations as to how to set up the new Service. She acted accordingly. At the end of January 2010, she created a ‘high level group’ which had to advise her on the setting up of the EEAS. The group consisted of high-level representatives of the Commission, Council and the Member States and was chaired by the HR/VP.⁵³ The European Parliament expected to be invited to the group but was not. MEP Saryusz-Wolski explained the assembly’s disappointment by stating: ‘The Lisbon Treaty is a new creation for the CFSP in the sense that it tries to combine the inter-governmental and the Community approaches. This innovation should be reflected in the way preparation of the service is carried out. Unfortunately, it is not.’⁵⁴ But to get its voice heard he warned that the EP would use its right to approve the financial and staff regulations as needed for the new service: ‘The service will not come into being without the approval of the Parliament.’⁵⁵ These warnings did not persuade the HR/VP to change her position. Soon thereafter, on 25 March 2010, Ashton came forward with a proposal for a Council Decision.⁵⁶ It appeared to be strongly based on the European Council guidelines referred to above (see section 3).

The guidelines provided a rather detailed overview of the scope (including tasks), legal status, staffing and financing of the future EEAS (incl. EU delegations) and its relations with the diplomatic services of the Member States. When seen in the light of Article 27(3) TEU, these guidelines extended the functional scope (items 3 – 15) of the service beyond that of assisting the HR in fulfilling his/her mandate by stating that the EEAS should assist also the President of the European Council, the Commission and its members (point 3). Such a multiple tasking should ensure consistency and better coordination in EU foreign policy-making. In addition, the EU delegations were expected to provide logistical and administrative support to the members of the other insti-

⁵² Ibid.

⁵³ James Morrison (Ashton’s Chef de Cabinet), Pierre de Boissieu (Secretary-General of the Council), Jean-Claude Piris (Director of the Legal Service of the Council), Robert Cooper and Helga Schmidt (Council), Catherine Day (Secretary-General of the Commission), Joao Vale de Almeida (DG RELEX at the Commission), Patrick Child (Head of the Commission’s Delegations), Luis Romero Requena (from the Commission Legal Service), and the 3 Permanent Representatives of the countries making up the presidential ‘trio’, Carlos Bastarreche (Spain, plus the Spanish diplomat Carlos Fernandez Arias Minuesa), Jean de Ruyt (Belgium) and Gábor Iván (Hungary).

⁵⁴ Jacek Saryusz-Wolski (a former chairman of the EP Committee on Foreign Affairs) said in an interview: ‘There is a certain disappointment in the Parliament that it is absent from Ms Ashton’s high-level group, although that the Parliament’s request to be at the very centre of the preparations and the setting up of the European diplomatic service has been well known for a few years’. See *Agence Europe* (Brussels, 3 February 2010).

⁵⁵ Ibid.

⁵⁶ Proposal for a Council Decision establishing the organisation and functioning of the European External Action Service (25 March 2010).

tutions, including the EP (point 9). Of course, providing technical support by one service to different institutions may undoubtedly prove to be cost effective. But demanding from a single civil service to deliver policy support to different political masters might turn into a rather strenuous effort generating internal bureaucratic tensions and external institutional frictions. Nevertheless, the proposal was included in the HR's draft EEAS Council Decision.

In the guidelines, proposals were also made with regard to the transfer of external action responsibilities from Council and Commission to the EEAS. Standards for such transfers were lacking but transfers of responsibilities are part of the internal logic of such an operation. Otherwise the HR/VP could not take charge of responsibilities in this area conferred upon him/her by the Treaty. For example, the Crisis Management and Planning Directorate (CMPD), the Civilian Planning and Conduct Capability (CPCC) and the Military Staff (EUMS) and the Situation centre (SitCen) were to be part of the EEAS (point 7). These structures would form an entity placed under the direct authority and responsibility of the HR in his/her capacity of High Representative for Foreign Affairs and Security Policy. But it should be remembered here that the Member States (and not the HR/VP) remain – in the FAC setting – in charge of determining the overall policies of the Union and of the actions of these entities. Moreover, this re-arrangement of organisational entities active in the field of CFSP and CSDP would have to respect the competences and powers of the Member States with regard to (among others) the formulation and conduct of their own foreign policy, national diplomatic services and relations with third countries.⁵⁷ In other words, a mixed or hybrid steering mechanism has been put in place, preserving, on the one hand, the powers of the Member States regarding Union policies and actions in the area of CFSP and CSDP, and a HR/VP plus EEAS responsible for the operational dimensions of executing those actions, on the other.

The European Council guidelines also displayed a hybrid approach towards the division of competences between the Commission and the tasks of the EEAS. For instance, in the area of programming and implementation of financial instruments, the EEAS (single geographic desks) should only play a leading role in strategic decision-making. Such a procedure should enable the High Representative to assume his/her responsibility of ensuring the coordination and consistency as well as strategic direction of external policies of the EU (item 9). Moreover, 'throughout the whole programming and implementation cycle, there should be very close cooperation and consultation between the High Representative and the EEAS and the relevant Commissioners and their services. The decisions concerning programming will be prepared jointly by the High Representative and the Commissioner responsible. The final proposals in this respect will continue to be adopted by the College of Commissioners' (item 10). This cooperation model was proposed and elaborated in the HR/

⁵⁷ As it is stated, this arrangement will fully respect Declaration no. 14 of the Lisbon IGC, *supra* note 51, which asserts the full competence and powers of the Member States with regard to (among others) the formulation and conduct of their own foreign policy, national diplomatic services and relations with third countries.

VP's draft Council Decision. In combination with the preserved competences of the Member States in foreign affairs matters it put the HR/VP – and with her the EEAS – in a rather dependent position. And in fact it gives further clarification on the legal status of the EEAS as defined in the guidelines (item 16): 'The EEAS should be a service of a *sui generis* nature separate from the Commission and the Council Secretariat. It should have autonomy in terms of administrative budget and management of staff.' In other words, the EEAS should be a separate entity but not fully autonomous from the Commission and the Council General Secretariat. The EEAS only packs a few services necessary for it to operate as a functionally autonomous body (legal service, relations with the European Parliament, security and other areas where the necessary activities could not be handled by the Commission and the Council). The organisational structure further shows that the EEAS manages its administrative budget and staff. Finally, the EEAS should have a substantial – but not a final – say in, e.g., the programming of the existing financial instruments.

Summing up, the guidelines of the European Council, to a great extent taken over in the proposal of the HR/VP, would amount to creating a service simultaneously separate from and bound to Council and Commission. The Council would preserve all of its powers in the area of CFSP and CSDP while mandating operational dimensions thereof to the HR/VP and the EEAS. On the other hand the EEAS would get the strategic lead with regard to programming of financial instruments, albeit in very close cooperation with the Commission, which has the final say regarding the decisions on the application of these instruments. The EEAS should only become autonomous with respect to its administrative budget and management of staff. It may be inferred from the foregoing that based on the HR/VP's proposal the Council would expand its powers – at the expense of the Commission – with regard to these financial instruments, as far as they are being applied within a CFSP and/or CSDP context. The HR/VP's Treaty-based obligation to ensure coherence between Union policies would put her in position to act accordingly and apply this principle from a Council point of view. The EP criticised the draft proposal severely.

6. THE EUROPEAN PARLIAMENT: *INSTITUTION INCONTOURNABLE*

6.1. Preliminary diplomatic steps

In March 2010 Jerzy Buzek, President of the EP, made the observation that because the EEAS would get the size of an entire institution, it would need to be supervised properly.⁵⁸ Actually, the EP referred regularly to the EEAS as an 'institution' or pointed to the institutional aspects of setting up the Action

⁵⁸ Jerzy Buzek to EU leaders on 25 March 2010, as reported on the website of *Euractiv* on 26 March 2010. See <<http://www.euractiv.com/en/future-eu/ashton-puts-french-spider-centre-eeas-web-news-382034>>.

Service.⁵⁹ For instance, it asserted that the setting up of the EEAS should not only be in accordance with Articles 18 and 27 TEU but also with Article 40 TEU on safeguarding the extent of the powers conferred to the institutions with regard to CFSP on the one hand and other Union policies (as referred to in Articles 3 to 6 TFEU) on the other. Such a reference would only be appropriate upon the assumption that the EEAS is a 'body' able of exercising institutional powers.⁶⁰ Moreover, the EP was of the opinion that EEAS staff 'should possess a certain objective independence, so that the service can perform its duties optimally.'⁶¹ The notion of 'objective independence' runs contrary to the standard view whereby staff members provide services as requested by their (political/institutional) superiors. In their 'non-paper', presented one week before Ashton's first proposal on a Council Decision, Elmar Brok and Guy Verhofstadt – the EP's two protagonists on this matter – adopted a subtle position on this issue.⁶² Under the heading 'EEAS Institutional Aspects' they argued that the EEAS would not be an institution in the sense of the Treaty, nor an agency or office. Instead they emphasised the importance of linking the EEAS up to the Commission since the EEAS would be taking over the majority of tasks in the area of the Commission foreign affairs competences. According to Brok and Verhofstadt, this connection should be limited to administrative, organisational and budgetary aspects. For the rest, they insisted that the EEAS should be an autonomous service assisting the HR/VP and accountable to the European Parliament, both in political and budgetary terms.⁶³

Summarising, it may be concluded that the EP and its main spokesmen were of the opinion that the establishment of the EEAS as a new structure in the institutional framework of the Union would have institutional consequences. The expected size of the EAAS and its relative autonomy to exercise tasks as a new 'body' in the foreign affairs arena of the Union were indicative of its institutional powers. In the budgetary and political sense, the EEAS had to become accountable to the EP – one of the main concerns of the Parliament.

⁵⁹ European Parliament resolution of 22 October 2009 on the institutional aspects of setting up the European External Action Service (2009/2133(INI)), OJ 2010 C 265/9.

⁶⁰ Ibid, operative para. 4. Contrary to Art. 18 and 27 TEU, Art. 40 TEU is neither referred to in the proposal nor the adopted text of the EEAS Council Decision. In their 'non-paper EEAS' the MEPs Brok and Verhofstadt ascribe the duty ensuing from Art. 40 TEU primarily to the HR/VP him/herself while being assisted by the EEAS. See *infra* note 66.

⁶¹ Ibid, operative para. 7(c). It is added that: 'such independence could be ensured by appointments for a fixed period, such as five years, with the possibility of an extension, which could be reduced only if the member of staff concerned violates official obligations.' But fixed or indeterminate tenures are rather standard for staff of civil services and do not a quality of 'objective independence'.

⁶² *Non-paper EEAS* of 18 March 2010 (plus attached to it an organizational chart of the EEAS) by Elmar Brok and Guy Verhofstadt, available at the website of *Euractiv* <<http://www.euractiv.com/en/future-eu/parliament-pulls-its-weight-eas-negotiations-news-375926>>.

⁶³ Ibid. According to these MEPs the EEAS assists the HR/VP in her work, as described in Title V of TEU, in particular Arts. 21, 22, 24, 27, 36 and 40. The reference to Art. 40 TEU implies that it is one of the EEAS tasks to assist the HR/VP in observing the demarcation line between CFSP and other Union policies, therefore implying that in this respect the EEAS as such does not possess a competence. The position of the EP on this issue was different stating that the EEAS as a 'body' is responsible for applying correctly Art. 40 TEU. See *supra* note 59.

6.2. The EP's main concerns

The EP considered the establishment of the EEAS as an opportunity to create a diplomatic service commensurate with the desired international role of the EU. The EEAS was expected to raise the Union's – not just the Commission's or the Member States' – visibility and its capacity to act in a credible, effective, coherent and consistent way.⁶⁴ So the stakes were high, according to the EP. But whether this objective could be realised depended to a rather great extent on the way the new service would be set up and how it would fit into the institutional framework of the Union.

Neither in EP documents nor in statements of individual MEPs can explicit analyses be found on the nature or main features of the new service's impact on the Union's institutional balance. However, it was evident that an operation consisting of a transfer of substantive numbers of officials (and their tasks) from the Commission (incl. delegations) and the Council General Secretariat to the EEAS, and the requirement for the new service to provide support to three different political masters, had to result in an institutional shake-up.⁶⁵ Also, owing to the multiple hats of the HR/VP, institutional implications had to ensue from the establishment of a new service having to implement the CFSP as instructed by the Council and by the High Representative in his/her capacity as Vice-President of the Commission.⁶⁶

The EP formulated 'principles' on how to decide on the transfer of officials⁶⁷ and the MEP's Brok and Verhofstadt designated more concretely the departments which should be transferred: bi-lateral desks, multilateral relations, crisis resolution, development, environment and integration of external aspects of other Community policies (e.g. migration, asylum, fisheries, etc.).⁶⁸ Generally speaking, the EP did not directly analyse the possible imbalances resulting from these organisational shifts and new lines of command. Instead, it underlined in positively stated wordings its own vision on the new service and charted a course heading for two important objectives. In the first place, the EP consistently tried to shore up the communitarian (i.e. supranational) character of the EEAS. The second objective was to strengthen the EP's own position and gain parliamentary control over the HR/VP and the EEAS with a view to ensuring the supranational character of the new service. The EP expressed its concern with the 'intergovernmental' character of the EEAS at several occasions, e.g. through its Conference of Presidents: 'The Parliament believes that the Service should be more communitarian than inter-governmental in character, and this is why the Parliament insists that it is attached to the Commission.'

⁶⁴ Ibid. See *supra* note 59, pre-ambulatory para. E.

⁶⁵ See the statement made by EP President Jerzy Buzek, *supra* note 58.

⁶⁶ See *supra* note 59 pre-ambulatory para. J. However, MEPs Brok and Verhofstadt – in their 'Non-paper EEAS' – are of the opinion that not the VP but the College of Commissioners takes the decisions in areas that fall within the competence of the Commission. The HR/VP will need to refer to both the Council and the College and therefore, according to these MEPs, the EEAS is responsive to these two political chains of command. See *supra* note 62, section Leadership, at 3.

⁶⁷ See *supra* note 59, operative para. 6.

⁶⁸ See *supra* note 62, section Architecture, at 3.

The Parliament believes that in these times of increasing intergovernmentalism it is of the utmost importance to ensure that community policies are not intergovernmentalised, ensuring the communitarian nature of the EEAS is essential.⁶⁹ By effectuating both objectives the profile of the Union as an international actor should be enhanced.

7. 'QUADRILOGICAL' NEGOTIATIONS

7.1. Introduction

The EP had to make great efforts to beef up its relatively weak negotiating position and exercise genuine influence on the process of setting up the EEAS. To that end, it developed a negotiation strategy of 'arm twisting'. In a consistent manner, the EP pointed out that the draft EEAS Council Decision could and would not be adopted until full agreement between all parties involved, including the EP, had been reached. Although on the basis of Article 27(3) TEU the EP only needed to be consulted on the draft EEAS Council Decision, the Parliament enjoys the right of co-decision with regard to the staff- and budgetary regulations which needed to be amended to operationalise the EEAS. The EP maximised its negotiating position on the former by wielding its veto power of the latter. In October 2009 the EP officially declared that it would couple the two issues.⁷⁰ In other words, the EP forced the HR/VP – and in her 'slipstream' the Council and the Commission – to enter into direct negotiations on the text of the proposed Council Decision.⁷¹

After consensus had been reached by the Council on the proposal for an EEAS Decision, four-party negotiations started in spring 2010 between the HR/VP, the (Spanish) rotating presidency of the Council, the Commission and the EP.⁷² They took place in the period from April to July 2010 and were baptised with the neologism 'quadrilogue', suggesting a dialogue between four parties. In reality, parties were engaged in serious negotiations. This may be inferred from the substantive results the process produced; also press releases on the progress of these talks laid bare that all parties involved were engaged in a giving-and-taking exercise in order to reach a compromise

⁶⁹ Statement by the Conference of Presidents on the External Action Service of 10 June 2010, available at <<http://www.europarl.europa.eu/en/pressroom/content/20100610IPR75814/>>.

⁷⁰ See *supra* note 59, operative para. 8: 'Recalls the need to find an agreement with the Parliament on the future Commission proposals amending the Financial Regulation and the Staff Regulations; reiterates its determination to exercise its budgetary powers to the full in connection with these institutional innovations.'

⁷¹ See *supra* note 56.

⁷² The four parties involved were: the HR/VP Catherine Ashton, the rotating – Spanish – Presidency of the Council (Minister Miguel Moratinos), the Commission (Commissioner Maroš Šefčovič) and three European Parliament representatives (MEPs Brok, Verhofstadt and Gualtieri). After 5 preceding rounds on this issue the last and decisive round of quadrilogue talks took place in Madrid on 21 June 2010. See European Union Statement of 21 June 2010, A 109/10.

agreement.⁷³ Going by the limited role of the Parliament pursuant to Article 27(3) TEU, the participation of the EP in the quadrilogue negotiations was in itself a significant achievement, undoubtedly conducive in attaining the EP's main objectives: improving parliamentary oversight on the Common Foreign and Security Policy of the Union by enhancing the democratic accountability of the HR/VP and the EEAS.

7.2. The EP's emphasis on the supranational features of the EEAS

In many respects the European Parliament tried to enhance the supranational character of the EEAS by stressing the competences of the Union in the area of external action in general and those of the Commission in particular. It considered, e.g., that the EEAS (...) is a logical extension of the *acquis communautaire* in the sphere of the Union's external relations, since it will result in closer coordination between the administrative units concerned as regards the common approach to the common foreign and security policy and of the Community's external relations conducted in accordance with the Community model'.⁷⁴ While the EP's reasoning can be considered as somewhat open-ended, what remains is its firm conclusion that the EEAS is a logical extension of the *acquis*. Notwithstanding this statement, the EP reminded the Commission – 'once again' – that the service could not be set up without its assent and called on the Commission (...) to put its full weight as an institution behind the objective of preserving and further developing the Community model in the Union's external relations'.⁷⁵ In the light of these statements, one could interpret the references to the notion 'communitarian' as a tool to promote an integrated approach to CFSP and the ex-Community's competences in the field of external relations. Conversely, one could interpret the notion to imply that the Commission ought to help the EP in subduing the Council's efforts to mould the new service in such a way so as to intergovernmentalise the Union's external action writ large.

What did the EP undertake to promote such a 'communitarian' way? In fact, the EP followed a two-way strategy. In the first place it came forward with proposals aimed at increasing the influence of the Commission on the administrative, in particular the budgetary structures of the new service. The EP stated its belief that: '(...) as a service that is sui generis from an organisational and budgetary point of view, the EEAS must be incorporated into the Commission's administrative structure, as this would ensure full transparency'.⁷⁶ Secondly, it tried to ensure that the Commission could maintain as much control as possible over external policy areas for which the Commission did not have exclu-

⁷³ See e.g. the EP Press release of 10 June 2010, 'The Conference of Presidents on the External Action Service', available at <<http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100610IPR75814>>.

⁷⁴ See *supra* note 59, pre-ambulatory para. C.

⁷⁵ *Ibid.*, operative para. 2.7.

⁷⁶ *Ibid.*, operative para. 7.

sive competence. Aspects of these two strategies will be scrutinised in the following two sections.

7.2.1. *The administrative dimension of the 'communitarian' feature of the EEAS*

The EP negotiated rather successfully to enhance the influence of the Commission on the administrative structure of the EEAS, in particular with regard to budgetary procedures.⁷⁷ As an overall rule it became clear that the EEAS would have to follow the same budget lines and administrative rules as applicable to the EU budget falling under Heading V of the Multiannual Financial Framework.⁷⁸ Further, (all) operational expenditures would have to remain within the Commission section of the budget, and not restricted to the CFSP budget and some programmes as provided in the original proposal.⁷⁹ The Commission also obtained the discretionary power to consolidate budget estimates and to amend the budget.⁸⁰ It may be noted here that such a budgetary procedure is fully in line with the general TFEU rules on the issue. These rules prescribe that, with a view to help preparing the establishment of the EU's annual budget, the institutions of the Union have to draw up budget estimates and that it is the competence of the Commission to consolidate and (wherever necessary considered appropriate) to amend these budget estimates.⁸¹ Remarkably, the EEAS emerges here (by implication) as an institution of the Union with respect to budgetary matters. The EP hammered the importance of such an institutional status of the EEAS home (i.e. to the Council and the HR/VP) during the negotiations on the Financial Regulation, held in the autumn of 2010.

The budgetary lines between the EEAS and the Commission were further tightened in the area of development cooperation and the ENP. It was provided that in these areas the estimates of administrative expenditure would have to be drawn up by the HR in consultation with the Commissioners for Development Policy and for European Neighbourhood Policy, regarding their respective responsibilities.⁸² Later that year, this budgetary cooperation obli-

⁷⁷ It is not implied that all amendments result from EP efforts only. After all, they were the outcome of negotiations between four parties. This observation does not run contrary to the very fact that specific amendments as proposed by the EP are very much alike or even identical to the adopted text of the Council Decision on the establishment of the EEAS. Most of these amendments were drafted during or even after the final round of the four-party talks.

⁷⁸ Art. 4(3)(a), last sentence of the second indent of the EEAS Council Decision. The original HR/VP proposal did not contain such a provision.

⁷⁹ Compare Art. 8(1) EEAS Council Decision (see *supra* note 3) and Art. 7(3) of the original HR/VP proposal (see *supra* note 56).

⁸⁰ *Ibid.*, Art. 8(4) EEAS Council Decision. This provision and the Commission competence as included in it did not figure in the original HR/VP proposal for the EEAS Decision.

⁸¹ Art. 314(1) TFEU (first two sentences): 'With the exception of the European Central Bank, each institution shall, before 1 July, draw up estimates of its expenditure for the following financial year. The Commission shall consolidate these estimates in a draft budget which may contain different estimates.'

⁸² See *supra* note 3, Art. 8(3) EEAS Council Decision; a provision not entailed in the original HR/VP proposal.

gation was extended to international cooperation, humanitarian aid and crisis response.⁸³ Such a provision of close cooperation did not feature in the original HR/VP proposal at all.

Further, the internal auditors of the EEAS and the Commission would have to cooperate to ensure the audit policy. Finally, the European Office Against Fraud (OLAF) would get investigative powers with regard to the EEAS.⁸⁴

From the foregoing, one can conclude that as a result of the quadrilogue negotiations, the budgetary procedures of the EEAS got interlocked with those of the Commission. Operational expenditures would remain within the Commission section of the budget. But one can also point to the fact that the quadrilogue resulted in establishing budgetary procedures – as to be applied by the EEAS and the Commission – on the same footing as those between the Commission and the other institutions of the Union. In other words, in budgetary matters the EEAS emerged as an institution, at least with regard to budgetary procedures as provided for by secondary legislation. With regard to the administrative expenditures of three shared competence areas (development, humanitarian aid and ENP) consultations had to be held.

The Foreign Affairs Committee (AFET) of the EP got it right when it said that the operational part (in particular the management of the external action programmes) of the EEAS budget would be part of that of the Commission, whereas the administrative part would remain separate of the EU budget but still fall under the control of the EP.⁸⁵ All in all, as a result from the quadrilogue the budgetary connection between the Commission and those departments it had ‘lost’ to the EEAS was to a large extent restored.

The EP’s authority in budgetary and staff matters over the EEAS was reaffirmed and even further enhanced in separate negotiations which the EP and the HR/VP held on the Financial⁸⁶ and on the Staff⁸⁷ Regulations. These talks took place after the successful conclusion of the agreement on the EEAS Council Decision. On 20 October 2010, parties reached an agreement on both ‘collateral’ regulations. The Parliament was quick to boast that it had increased its oversight of the service. Proudly, the EP declared that, in budgetary terms, the EEAS would be treated as an institution, which would have its own section in the EU budget like other institutions.⁸⁸ Indeed, it was asserted in the amended Financial Regulation that ‘for the purposes of this Regulation’ the EEAS will

⁸³ See *infra* note 86, Art. 6 Financial Regulation.

⁸⁴ See *supra* note 3, Art. 3(4) EEAS Council Decision.

⁸⁵ See the EP Press article of 30 June 2010, ‘External Action Service: EP’s budgetary powers guarantee parliamentary oversight’, available at <http://www.europarl.europa.eu/news/public/story_page/030-76948-176-06-26-903-20100625STO76828-2010-25-06-2010/default_en.htm>.

⁸⁶ Regulation (EU, Euratom) No 1081/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as regards the European External Action Service, *OJ* 2010 L 311/9.

⁸⁷ Regulation (EU, Euratom) No 1080/2010 of the European Parliament and of the Council of 24 November 2010 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities, *OJ* 2010 L 311/1.

⁸⁸ See the EP Press release of 20 October 2010, ‘EU diplomatic service: accountability and balanced recruitment’, issued after the EP adopted its amendments to both instruments.

be seen as an institution.⁸⁹ Thus, for the discharge procedure the EEAS should be seen as an institution and therefore ‘fully subject to the procedures provided for in Article 319 of the Treaty on the Functioning of the European Union and in Articles 145 to 147 of the Financial Regulation’.⁹⁰ As already noted, this also holds true for the budgetary procedure of drawing up budget estimates.⁹¹

In sum, the obligation to hold consultations between the EEAS and the Commission with regard to administrative expenditures in three important ‘communitarian’ external policy areas has helped to restore the connection between both bodies. From a political/institutional perspective it may be stated that these results enhanced the position of the EP as budgetary authority and strengthened its supervisory powers.

7.2.2. *Parliamentary oversight over the external policy dimension of the EEAS*

The EP’s quest to ensure the European Commission’s greater grip on external policy areas was the second line of its two-way control strategy. Initially, the EP referred to the policy area of development cooperation as one be-fitting the Community model: ‘(...) the Lisbon Treaty singles out the Development Cooperation as an autonomous policy area with specific objectives and on an equal footing with other external policies’.⁹² This proposition was upheld by several NGO’s. However, legally speaking, this was only partially correct.⁹³ After all, development cooperation is a shared competence of the Union and the Member States.⁹⁴ Brok and Verhofstadt dropped the point of the autonomous character of development policy. In line with an EP resolution⁹⁵ they emphasised the importance of the role of the HR/VP and the EEAS in ensuring coherence in the pursuit of the different objectives of foreign policy as defined in the TEU. They listed a wide range of policy items for which they saw a crucial role for the EEAS, from international crisis management to international environmental policies. Development also featured on this list.⁹⁶ Brok and

The press release is available at <http://www.europarl.europa.eu/news/public/focus_page/008-86242-281-10-41-901-20101008FCS86210-08-10-2010-2010/default_p001c013_en.htm>.

⁸⁹ Art. 2 of the Financial Regulation (see *supra* note 86) wherein it is stated that: ‘For the purposes of this Regulation: – the term “institution” refers to the European Parliament, the European Council and the Council, the European Commission, the Court of Justice of the European Union and the European Court of Auditors, the European Economic and Social Committee, the Committee of the Regions, the European Ombudsman, the European Data Protection Supervisor and the European External Action Service (hereinafter the ‘EEAS’).’

⁹⁰ See also *supra* note 86, third pre-ambulatory para. The qualification ‘the EEAS as an institution’ was inserted on the basis of an EP amendment. An overview of accepted EP amendments is available on the EP website at <<http://www.europarl.europa.eu/oeil/file.jsp?id=5849462>>.

⁹¹ See *supra* note 81. Except the ECB.

⁹² See *supra* note 59, pre-ambulatory para. H.

⁹³ 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’, 1 *EIPA Working Paper* (2010) available at <<http://publications.eipa.eu/en/details/&tid=1837>>.

⁹⁴ See Art. 4(4) TFEU.

⁹⁵ See *supra* note 59, pre-ambulatory para. J.

⁹⁶ See section 6.2 (third para.) of this essay and *supra* note 68.

Verhofstadt even proposed to establish within the EEAS a specific Directorate-General responsible for Development, as well as a Directorate Neighbourhood within DG Foreign Policy.⁹⁷ But a comparison of Ashton's original proposal and the final Council Decision learns that no amendments were adopted concerning the organisational mainframe of the new service.⁹⁸ Article 4 on the 'Central administration of the EEAS' conceptualises the bureaucratic structure of the service but no new policy areas have been added.⁹⁹

A closer look at the original and final provisions of this EEAS Council Decision learns also that most of the introduced changes concerning the issue of policy and programming competences consisted of legal refinements and improvements without having substantive effects on the division of competences between the Council/HR and the Commission. This applies to Article 2 concerning the 'Tasks' of the EEAS and to the provisions on 'External action instruments and programming'.¹⁰⁰ The latter relates to the programming of existing instruments and does not see upon policy issues.¹⁰¹ These provisions changed only slightly during the negotiations, with one exception: in line with the EP's point of view, the respective roles of the Commission and the HR/VP were sharpened up.¹⁰² The final EEAS Council Decision sets out more clearly that it is up to the HR to ensure the overall political coordination of the Union's external action, in particular through these external assistance instruments.¹⁰³ The management of these programmes continues to fall under the responsibility of the Commission. For the rest, the provisions regarding these instruments did not really change. The basic prescript that during the whole process of planning and implementation both organisations should work together and that all proposals for decision have to be prepared through the Commission procedures and submitted to the Commission remained unchanged.

Thus, it may be concluded that the quadrilogue negotiations did not have as great an effect on the division of foreign competences as that proposed by

⁹⁷ See *supra* note 62, in particular the organisational chart attached to the 'non-paper EEAS'.

⁹⁸ Amendments 76 – 143 of the Committee on Foreign Affairs of 1 July 2010 (document 2010/0816(NLE)). See for example, the rejected amendment 108 which sees upon the setting up of a directorate general for conflict prevention, crisis management and post-conflict management.

⁹⁹ The conceptualization of the top management of the EEAS changed due to EP interventions. But this issue will be dealt with in the next section of this essay regarding the accountability of the EEAS towards the EP.

¹⁰⁰ Compare Art. 9 of the EEAS Council Decision and Art. 8 of the original proposal of the HR/VP. These 7 instruments are: the Development Cooperation Instrument, the European Development Fund; the European Instrument for Democracy and Human Rights; the European Neighbourhood and Partnership Instrument; the Instrument for Cooperation with Industrialised Countries; the Instrument for Nuclear Safety Cooperation; the Instrument for Stability, regarding the assistance provided for in Art. 4 of Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability, OJ 2006 L 327/1.

¹⁰¹ In fact issues of a procedural – not a substantive – nature are regulated in this provision. A balanced distribution of responsibilities between the HR/VP, the Commission, competent Commissioners and the EEAS has been provided for the management, planning and implementation of these programmes.

¹⁰² See *supra* note 98, the EP amendment 131 on the role of the Commission and the EP amendment 132 on the role of the HR/VP.

¹⁰³ See *supra* note 3, Art. 9(1) resp. Art. 9(2) EEAS Council Decision.

the HR/VP. The fact that the EEAS was tasked with the strategic planning of a range of important external action instruments was of course new when compared to the pre-EEAS era but the final decision-making remained within the realm of Commission procedures and executive powers. In sum, the EP's efforts to increase the communitarian character of the EEAS materialised only to a certain degree. As a result of the four-party negotiations the budgetary procedures between the EEAS and the Commission were aligned and budgetary control of the Commission on the EEAS was strengthened from both a procedural and a substantive point of view. Neither did the quadrilogue negotiations lead to a shift in the attribution of powers in the area of external action instruments. The Commission maintained its decisive say in the application of these instruments.

7.3. The EP's quest to enhance the political accountability of the HR/VP and the EEAS

This section focuses on how during the quadrilogue negotiations the EP, on the one hand, and the HR/VP, the Council and the Commission, on the other, dealt with the issue of a direct institutional – and therefore political – relationship between the EP and the High Representative/EEAS. The EP insisted on several aspects of the principle of political accountability: (i) the question of representation (who might be held accountable?); (ii) procedural questions (e.g., at what moment will particular types of issues be discussed?; which rights can be asserted by parties?); and (iii) the question of the scope of the accountability (on what issues should one be held accountable?). To a certain degree all these aspects were dealt with in the quadrilogue negotiations. But legally speaking, the negotiations on the accountability issue revolved around casting the relation between the HR/VP and the EP, as provided for in Article 36 TEU.¹⁰⁴ The essence of this provision consists of the HR's obligation to regularly consult the EP and take its views duly into 'consideration'. The EP also expressed its wish to establish a direct relationship with the EEAS. In fact, the main issue boiled down to the question of enhancing the democratic accountability of the HR as well as the EEAS.

From the very beginning, the EP requested the HR/VP to commit herself to inform relevant EP committees¹⁰⁵ about her intentions to appoint people to senior posts in the EEAS, and to allow the EP to submit those officials to con-

¹⁰⁴ Art. 36 TEU: 'The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament. The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.'

¹⁰⁵ The Foreign Affairs Committee (AFET) and the Development Committee. See *supra* note 59, operative para. 12.

firmation hearings. Further, it demanded that the HR/VP renegotiate questions relating to the access to sensitive information and 'other issues relevant for smooth interinstitutional cooperation'.¹⁰⁶ In their 'non-paper EEAS', Brok and Verhofstadt explained the concept of 'smooth cooperation' in terms of consolidating the consultation and reporting duties as established between Solana and Ferrero-Waldner (former HR resp. former Commissioner for external relations). Further, the EP required to be consulted on all proposals for Council Decisions with regard to Parliament's rights concerning international agreements and budgetary implications of external actions. The other demands concerning nominations of senior officials (information and hearings) were repeated.¹⁰⁷

Another important question was who other than the HR/VP would be allowed to represent the EEAS. Brok and Verhofstadt stressed the necessity to think of an adequate, two-level replacement mechanism. First, in the realm of CFSP, three deputies would need to be nominated: one in charge of bilateral and another of multilateral relations, and a third in charge of crisis management. These three deputies would have to be appointed on the basis of Article 33 TEU, which provides for the nomination of EU Special Representatives. Secondly, with a view to ensuring policy coherence, the HR/VP would need to regularly consult the three Commissioners responsible for Development, Humanitarian Aid and for ENP.¹⁰⁸ According to Brok and Verhofstadt, this model would allow for more parliamentary accountability of the HR/VP and ensure the Community approach to these EU foreign policy areas.

The issue of representation was solved along the two lines proposed by the EP, first by amending the draft EEAS Council Decision so as to also allow senior EEAS staff other than the Secretary-General¹⁰⁹ to act as the High Representative's deputy. MEPs rejected the proposed structure with an 'omnipotent' SG flanked by two deputy SGs, because this would '(...) not provide the politically legitimised deputies that the High Rep needs in order to do her job properly'.¹¹⁰ A cross-section of MEPs added that: '[w]hat is needed are political deputies that can engage on her behalf with both Parliament and partners in third countries.' Instead of the 'French spider' model as proposed by the HR/VP, the MEPs were in favour of a model which split up political and administrative competences at the bureaucratic top level of the EEAS. To that end, the EP preferred a much more horizontal top structure of the service: an EEAS headed by a Director-General, directly answerable to the HR/VP, and not by an SG.¹¹¹ In accordance with the EP's demands, the SG as originally proposed disappeared and was replaced by an 'Executive SG', who is not

¹⁰⁶ *Ibid.*, operative para. 12.

¹⁰⁷ See *supra* note 64, at 4-5.

¹⁰⁸ See *supra* note 64, at 3 and 4.

¹⁰⁹ See *supra* note 56, Art. 4, last sentence.

¹¹⁰ Statement of 25 March 2010, co-signed by Elmar Brok (EPP) and Guy Verhofstadt (ALDE), Hannes Swoboda (S&D) and Rebecca Harms and Daniel Cohn-Bendit (Greens/EFA). See *Euractiv* website of 26 March 2010, at <<http://www.euractiv.com/en/future-eu/ashton-puts-french-spider-centre-eeas-web-news-382034>>.

¹¹¹ See *supra* note 59, operative para. 8.

competent to represent the EEAS.¹¹² The question who, apart from the HR/VP, might represent the EEAS was left open in the final version of the EEAS Council Decision, but solved in talks about the second line of representation.

In the second stage of the quadrilogue negotiations, on 8 June 2010, Baroness Ashton came forward with a draft 'Declaration on political accountability', the adoption of which was made subject to an overall agreement.¹¹³ For situations wherein she would not be able to participate in plenary EP debates, the HR suggested a differentiated system of replacement, depending on the issue at stake. For issues falling exclusively or prevaillingly within the Commission's competences she would appoint a Commissioner. In instances falling exclusively or principally into the realm of CFSP, the replacement would come from the (trio of the) rotating Presidency of the FAC.¹¹⁴

In the declaration, Ashton also addressed the EP's requests to have hearings with senior EEAS officials. She committed herself to allow newly appointed heads of strategically important delegations, as well as EU Special Representatives, to appear before the AFET Committee for an exchange of views before taking up their posts.¹¹⁵ Added to that, the HR promised to facilitate the appearance of these officials as well as other senior EEAS staff in relevant parliamentary committees in order to provide regular briefings.¹¹⁶

On the question how to interact with the EP, the HR declared that she would seek an exchange of views with the EP on mandates and strategies 'even prior to their adoption'.¹¹⁷ She also declared to continue the practice of holding in-depth dialogue on all strategic planning phases of the financial instruments (except the European Development Fund).¹¹⁸ Finally, the HR confirmed Parliament's rights concerning international agreements; inserted a detailed paragraph (No. 4) which provided conditional assurances on submitting confidential information on CSDP missions and other classified documents on a 'need-to-know' basis.

When compared with the initial ideas held by the European Council, the HR/VP and the Commission, these arrangements concerning the replacement of the HR/VP and the direct representation of the EEAS by its senior officials and Heads of Delegations amounted to substantial changes. It may be concluded that the accountability of the EEAS as a *sui generis* organisational entity was raised by concessions on the part of the HR on the above-mentioned issues. The scope of the relationship between the EP and the HR/EEAS was significantly widened. For instance, the HR broadened the obligation of regularly

¹¹² See *supra* note 3, Art. 4 (1) last sentence EEAS Council Decision, where the original clause '(...) and [the Secretary General] shall represent the EEAS' was deleted.

¹¹³ See Notices from European Union Institutions, Bodies, Offices and Agencies: Adoption of a Council Decision establishing the organisation and functioning of the European External Action Service. Draft Declaration by the High Representative on political accountability, OJ 2010 C 210/1.

¹¹⁴ *Ibid.*, point 6.

¹¹⁵ *Ibid.*, point 5.

¹¹⁶ *Ibid.*, point 7.

¹¹⁷ *Ibid.*, point 1.

¹¹⁸ *Ibid.*, point 3.

consulting the EP to include exchanging views on mandates and strategies – even before their adoption. Further, extensive commitments were made by the HR on questions regarding her representation in cases of absence and on whether EEAS’ representatives might appear in Parliament.

All in all, the amendments to the draft EEAS Council Decision with respect to the administrative top-structure of the service, in combination with the HR’s Declaration on political accountability, her own replacement and the representation of the EEAS by different categories of its officials, may be considered as seriously reinforcing the institutional and therefore political relationship between the EP and the HR/EEAS. The impact of this model of representation and oversight consists of an increased transparency of the EEAS and the way it operates, as well as an enhanced accountability of the HR/VP and the EEAS. The longer-term effect could be a (slight) move away from the intergovernmental method of policy- and decision-making towards a more integrated form of policy-making in the field of EU external action.

7.4. EP opinion on the draft EEAS Council Decision and reception thereof by other actors

On 8 July 2010 the European Parliament approved a legislative resolution on a proposal for a Council Decision establishing the organisation and functioning of the European External Action Service (EEAS).¹¹⁹ This EP opinion was welcomed enthusiastically by the HR/VP and the President of the European Council. The same day, the HR/VP issued a statement that she was ‘(...) delighted that an overwhelming majority of the EP has approved this opinion on the European External Action Service, based on my initial proposal.’¹²⁰ The President of the European Council stated that this was a good day for Europe and commended the efforts of the HR and of all those who in the Parliament, in the Council and in the Commission contributed to the establishment of ‘(...) what will be a key asset for the European Union.’¹²¹ An Opinion of the EP will seldom have been embraced more warmly than this one on the EEAS. Less than two weeks later the Council adopted the final Decision establishing the organisation and functioning of the European External Action Service, identical to the EP legislative resolution.¹²² It was quite an amazing achievement, brought about by serious parliamentary arm twisting in four-party negotiations.¹²³

¹¹⁹ European Parliament legislative resolution of 8 July 2010 on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service (08029/2010 – C7-0090/2010 – 2010/0816(NLE)) (Consultation). The resolution was adopted by 549 votes to 78 with 17 abstentions.

¹²⁰ Statement by Catherine Ashton, Press release IP/10/911, Brussels, 8 July 2010.

¹²¹ Statement by Herman Van Rompuy, Press release PCE 156/10, Brussels, 8 July 2010.

¹²² See *supra* note 3.

¹²³ After five preceding rounds on this issue, the last and decisive round of Quadrilogue talks took place in Madrid on 21 June 2010. See European Union Statement of 21 June 2010 (A 109/10).

8. CONCLUDING REMARKS

It is beyond any doubt that the balance of institutional power in the area of EU external action has started shifting since the entry into force of the Lisbon Treaty. This is partly the result of the Treaty provisions which have emboldened the prerogatives of the Council and codified those of the European Council in the field of CFSP. In part, this is also the consequence of the decision to upgrade the position of the Council's High Representative, who now also has a foot within the European Commission as its first Vice-President, and who is the main EU official responsible for coordinating the different strands of the Union's external action policies. The newly established European External Action Service assists the HR/VP in effectively carrying out this task, as well as the many other duties which have been bestowed upon him/her by the Treaty. The fact that this new service has been created by way of transfers of entire departments and their officials of the Commission and the Council General Secretariat, as well as by secondments of diplomats of the Member States, makes it perfectly clear that institutional functions and relations in the realm of EU external action are no longer the same as those in the pre-Lisbon period. The pre-Lisbon delegations of the Commission have been strengthened with the addition of political staff and converted into delegations of the European Union. These new realities indicate a creeping intergovernmentalisation of EU external action writ large: nearly every foreign policy action will from now on also be viewed through the prism of the CFSP.

On the other hand, the Commission and especially its President have tried to ring-fence the communitarian character of external relations policies. Through all kinds of pre- and post-Lisbon manoeuvring, Barroso has tried to clip Ashton's wings. Both the composition of the Commission and the way in which EU external action is coordinated within the Commission are testament to this. In the (quadrilogue) negotiations leading up to the adoption of the EEAS Council Decision, the Commission found an ally in the European Parliament, which insisted on safeguarding, as much as possible, the communitarian way of policy- and decision-making in the realm of EU external action. Through the financial and staffing Regulations and the declaration of political accountability of the HR/VP, the EP has strengthened its grip on EU foreign policy-making beyond its expanded treaty powers in the field of trade.

Arguably, it is early days to draw firm conclusions on where exactly the new institutional balance in the domain of EU foreign affairs has settled. A lot could depend on the assumption of powers granted to the HR as Vice-President of the Commission and on the practical functioning of the EEAS in crafting an integrated form of EU external action. At the time of writing, however, the EEAS is still very much in establishment mode. Staffing decisions, especially on the secondment of national diplomats, will continue to be made throughout much of 2012 and a first thorough review of the functioning of the service is only foreseen to take place in mid-2013.¹²⁴ The latter may lead to amendments to

¹²⁴ See Art. 13(3) of the EEAS Council Decision: 'By mid-2013, the High Representative shall provide a review of the organisation and functioning of the EEAS (...). The review shall, if neces-

the EEAS Council Decision of 26 July 2010 and thus have repercussions on the institutional balance.

Both in the figurative and the literal sense, the EEAS represents a new, hybrid player on the Brussels' block (or, rather, Rond Point), positioned in-between the Commission and the Council. Whereas the sheer size of its headquarters (with an additional 140 delegations in the world) may resemble that of an EU institution, and the founding Council Decision spells out that the EEAS shall be a functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission, with the legal capacity necessary to perform its tasks and attain its objectives, the entity is first and foremost a service placed under the authority of the HR/VP. To a large degree, therefore, the EEAS' tasks and objectives follow on from the competences and tasks entrusted to the HR/VP. As we have demonstrated, Ashton, in her capacity as Vice-President, has effectively accepted to be deprived of her Treaty-based coordinating powers within the Commission and is instead expected to act according to the mandate provided to her by its President. Within the Council too, the High Representative acts upon a mandate given to him/her. Whereas the High Representative can show initiative on CFSP/CSDP and carve out a policy space left between the Member States (and the Commission) by contributing proposals, it is ultimately up to the European Council to establish the strategic guidelines and to the European Council and the Council of Ministers to sanction the decisions in these areas. Thus, within the sphere of the Commission and that of the Council, the HR/VP factually respectively formally lacks decision-making powers. Ashton acts by two separate mandates but is expected to align the two to each other. Given the different methodologies on which the institutional positions are based ('communitarian' and intergovernmental), this is by no means an easy task. Due to the umbilical cord between the HR/VP and the EEAS this configuration also defines the position in which the EEAS finds itself.

This position has not only been defined by the interdependencies with the European Commission and the Council, but also with those to the European Parliament. The EP has contributed to the formal recognition of the EEAS as an institution in budgetary matters, in the sense that the standard procedures for EU institutions for drawing up budget estimates and for the discharge of the budget apply to it as well. But the assumption of these specific responsibilities do not by themselves enhance the status of the EEAS as an institution in the sense of Article 13 TEU. Rather, it enhanced the position of the European Parliament as a budgetary authority over the EEAS. The EP also managed to increase the political accountability of the HR/VP and the EEAS, e.g. by getting the High Representative's promise to seek exchanges of views on mandates and strategies even before their adoption by the Council. The same procedure applies to senior EEAS officials like newly appointed Heads of delegation and EU Special Representatives. Even if these exchanges of views may not pro-

sary, be accompanied by appropriate proposals for the revision of this Decision. In that case, the Council shall, in accordance with Article 27(3) TEU, revise this Decision in the light of the review by the beginning of 2014.'

duce binding results, the Commission and the Council will have to heed the outcome of what may (over time) become a fruitful dialogue between the EP and the HR/EEAS. If and when the HR/EEAS manage to secure the support by the EP for the policy space they have created, then this may again have an impact on the institutional balance overall.

At the time of writing, it is our impression that the post-Lisbon institutional balance in the area of EU external action slightly tilts in the direction of the Member States, and the intergovernmental method of policy-making in the realm of EU external action writ large. This is the consequence of (i) Ashton being marginalised within the College by the President of the European Commission; (ii) the High Representative's formal dependence on mandates given by the (European) Council; (iii) the transfer of large parts of the Commission's bureaucracies in the fields of External Relations and Development to the EEAS; (iv) the transfer of power in strategic planning of external assistance instruments from the Commission to the EEAS; and (v) the mainframe through which the HR/VP (and by consequence the EEAS) approaches EU external action, i.e. the conduct of CFSP and CSDP. These points lead us to believe that the aim set forth by the Lisbon Treaty to enhance coherence in EU foreign policy-making has not yet been attained. If and when the HR/VP were to use the full potential of his/her multiple competences, as for example the power to present proposals to the FAC,¹²⁵ the full capacities of the EEAS, and if s/he were to effectively operate in the inter-institutional gravitational field by integrating the different strands of external actions, then s/he would be able to conduct a more visible and a stronger EU foreign policy. Given the current constellation this would require from the HR/VP and the EEAS a considerable amount of creativeness, productivity and – above all – political *savoir faire*.

¹²⁵ See section 4 of this essay and *supra* note 48.