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E-mail: info@cleer.eu
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Shaping the institutional profile of the European External Action Service

CLEER WORKING PAPERS **2014/6**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

CLEER

Between autonomy and cooperation: shaping the institutional profile of the European External Action Service

Luis N. González Alonso (ed.)

CLEER WORKING PAPERS **2014/6**

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

BETWEEN AUTONOMY AND COOPERATION: SHAPING THE INSTITUTIONAL PROFILE OF THE EUROPEAN EXTERNAL ACTION SERVICE

LUIS N. GONZÁLEZ ALONSO
(ED.)

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LIST OF TERMS AND ABBREVIATIONS

CFSP	Common Foreign and Security Policy
CRS	Crisis Response System
CSDP	Common Foreign and Defence Policy
CSPs	Commission Communication on country strategy papers
DCI	Development Cooperation Instrument
DG DEVCO	European Commission DG Development and Cooperation
ECJ	European Court of Justice
EDF	European Development Fund
EEAS	European External Action Service
EIDHR	European Instrument for Democracy and Human Rights
EU	European Union
EUSR	EU Special Representatives
FAO	Food and Agriculture Organisation
FPI	Foreign Policy Instrument
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the Commission
HoCs	Heads of Cooperation
HoMs	Heads of Mission
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organisation
IMO	International Maritime Organisation
IOV	International Organisation of Vine and Wine
MFA	Ministry of Foreign Affairs
RGPP	General Review of Public Policies
OECD	Organisation for Economic Cooperation and Development
OSCE	Organisation for Security and Cooperation in Europe
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

LIST OF CONTRIBUTORS

Mireia Estrada-Cañamares is a PhD candidate at the European University Institute (Florence). She was a trainee at the EU delegation to Ethiopia between August and November 2014.

Erwan Fouéré is Associate Senior Research Fellow at the Centre for European Policy Studies, Brussels, and former EU Special Representative for the Former Yugoslav Republic of Macedonia.

Luis N. González Alonso is Professor of Public International and EU Law at the Law Faculty of the University of Salamanca.

Soledad Rodríguez Sánchez-Tabernero is a Doctoral research fellow at the Department of Public International and EU Law of the University of Salamanca.

Juan Santos Vara is Professor of Public International and EU Law and Director of the Master Program in EU Studies at the Law Faculty of the University of Salamanca.

Fabien Terpan is Associate Professor in Public Law and holds a Jean Monnet Chair at *Sciences po Grenoble.*

INTRODUCTION
THE EUROPEAN EXTERNAL ACTION SERVICE AND THE NEW INSTITUTIONAL BALANCE IN EU EXTERNAL ACTION: RECONCILING AUTONOMY AND COOPERATION

Luis N. González Alonso

This CLEER Working Paper brings together some of the contributions presented at the conference *The EEAS and the new institutional balance in EU external action: reconciling autonomy and cooperation*, which was held at the Law Faculty of the University of Salamanca on 25-26 September 2014 with the participation of academics coming from different Member States and a certain number of EU officials and national diplomats. The conference was organised with the support of CLEER, as part of the implementation process of a research project funded by the Spanish Ministry of Economy and Competitiveness.[1]

As is clear from its title, this academic event was conceived with the aim of revisiting and deepening the analysis of institutional transformations brought about by the establishment and the subsequent initial operation of the EEAS. Faced with this purpose, many might wonder: once again? It is true that in the last few years we have witnessed an almost feverish political and institutional debate on this issue. This has been due, on the one hand, to the high expectations raised by the emergence of this new actor on the EU institutional stage and, on the other, to the perspective of an imminent review of its operation that might eventually lead to a formal revision of the EEAS founding Decision.[2]

The conclusions adopted in this regard by the General Affairs Council in December 2013 seem to have calmed down the debate[3], proving that for the moment there is no political will to reopen the discussion on the very sensitive compromises which made possible the setting up of the EEAS in 2010, and that short or even medium-term changes will not be structural in nature, but the result of a gradual and probably slow evolution. Recommendations put forward by the HR in her report of July 2013 (*EEAS Review*), some of which are starting to be implemented without any reform of legal texts, should certainly serve as a blueprint for this process. But it holds equally true that at the end of the day what this document 'clearly demonstrates is that the EEAS has yet to find its institutional space in Brussels and fully gain the confidence of the Member

[1] "The establishment of the European External Action Service: legal and institutional implications", DER2011-28459/JURI. The conference organisers and the editor are grateful to the CLEER Governing Board, particularly to Steven Blockmans, and to Tamara Takacs for their assistance and support in the conception of the conference and in publishing this Working Paper. Our gratitude as well goes to all the speakers and panel chairs taking part in the confererence.

[2] According to Art., 13 (3) of Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service, *OJ* [2010] L 201/30, 3.8.2010.

[3] General Affairs Council meeting, 'Council conclusions on the EEAS Review' (17 December 2013).

States.'[4] An impression ultimately confirmed, for instance, by the Court of Auditors in its 2014 Special Report on the establishment of the EEAS.[5]

Therefore, *the show must go on* (the academic and political one, of course) since the new architecture of EU external action needs to be fine-tuned in many aspects and the shaping of the Service's institutional position is still to a great extent work in progress. Indeed, at the time of writing we are about to inaugurate the first truly post-Lisbon institutional cycle, at least as far as external action is concerned: the first one with a fully operational EEAS at its heart from the very beginning, equipped with a somewhat reasonable range of instruments which are now to be tested, let us say, in normal conditions. This, coupled with other relevant developments such as the renewal of the whole set of external financial instruments[6] or the revamped interest of Member States for giving new momentum to the Common Security and Defence Policy,[7] draws a picture in which a certain number of institutional issues regarding the EEAS clearly merit further analysis and reflection.

The approach we have opted for to this end, both in the conception of the conference and in this Working Paper, intends to be much more of an operational than a conceptual or theoretical one, even though resort had been made in their titles to terms such as 'institutional balance', 'autonomy' or 'cooperation', which are, of course, very useful to frame the discussion and highlight the main features of the EEAS as a newcomer to the EU institutional scene. Accordingly, attention will essentially be paid to key aspects of current and foreseeable ways of interaction between the Service and other EU external action players: some of those which may influence or determine to a greater extent the shaping of its final institutional position.

Be that as it may, what is beyond any reasonable doubt is that the EEAS has come to stay and consequently to alter the classic institutional balance prevailing for decades in EU external action. This was, indeed, the objective pursued by the Lisbon Treaty while seeking to reinforce consistency and coherence in this domain. The problem is that the treaties remain completely silent on the extent or meaning of the changes this process might entail and, furthermore, the clues offered by the EEAS Decision are somewhat confusing in this regard. It is true that in its first articles, this legal text clearly points to the concepts of *autonomy* (*functional autonomy*, to be more precise) and *cooperation* as the fundamental features of the Service's institutional position. But it is also apparent that both of them do require further clarification and, as it has been consistently held, they should have been more accurately defined within the Decision's review process.[8] Obviously, this has not been the case.

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[4] S. Duke, '"Reflections on the EEAS Review"', 19 *European Foreign Affairs Review* 2014, at 24.

[5] European Court of Auditors, 'The establishment of the European External Action Service', *Special Report nº 11* (2014), available at <http://eca.europa.es>.

[6] All of them published at the *OJ* [2014] L 77, 15.3.2014.

[7] At least as a matter of principle, following the Conclusions of the European Council of December 2013 (Part I of the Conclusions, specifically devoted to CSDP).

[8] S. Blockmans and C. Hillion (eds.), 'EEAS 2.0. Recommendations for the amendment of Council Decision 2010/427/EU establishing the organisation and functioning of the European

At first glance, these two notions do not necessarily appear to be mutually exclusive and it may therefore be argued that they would not need to be reconciled in any way. By definition, European foreign policy is a cooperative undertaking: quoting the EEAS own review document, 'it is something new and unique that brings together all of the policies and levers at the EU's collective disposal and allows them to be focused on building influence and delivering results across the world to promote EU values and interests.'[9] In such a context, it sounds perfectly normal – if not imperative – for a new institutional body specifically entrusted with a consistency or coherence-building mandate to enjoy a certain degree of autonomy in order to be able to effectively ensure cooperation among all actors concerned.

However, when we go into the details of the EEAS Decision and of the highly complex institutional environment in which it is bound to operate, one cannot avoid the impression that the EEAS has actually been conceived much more as a 'cooperation-supplier or provider' than a 'cooperation-shaping or generating' body. It is, in essence, an institutional actor whose tasks are largely defined by reference to the tasks of other players[10] and is consequently dependent upon the cooperation and support from other actors involved to fulfil its mission. In addition, and contrary to what might seem to be the case, this dependence has not been something limited to the EEAS' setting-up period: it will certainly remain inextricably linked to its operational capacity in the future and will thus determine its institutional position.

It is under these premises that the challenge of reconciling autonomy and cooperation may be viewed as a crucial issue for the Service and, in my opinion, as well as a very useful parameter in ascertaining the way in which institutional balance regarding EU external action may evolve in the post-Lisbon era. The final picture we might envisage in this regard will depend to a large extent on the ability of the EEAS itself to meet this challenge (naturally under the direct authority of the High Representative), thus becoming (or not) a true consistency and coherence-generating body.

It is worth noting in this sense that along its initial period of activity, the EEAS has successfully fostered cooperation both with the Commission and with Member States through a broad array of well-known initiatives (ranging from formal co-location agreements with national governments to joint decisions, working arrangements and operational guidelines concerning particular topics with the Commission). This does not mean, however, that it had been able to fulfil its coherence mandate satisfactorily; on the contrary, it may be argued that the EEAS has largely neglected it. The prevailing and quite evident focus on classic foreign policy issues during this period may undoubtedly be explained as a result of past habits, but it also has to do with a clear inability to assert its autonomy *vis-à-vis* the Commission and national governments.

External Action Service', 1 *SIEPS* 2013, 8-14, available at <http://www.sieps.es> and <http://www.ceps.eu>.

[9] *EEAS Review*, at 3.

[10] S. Blockmans and C. Hillion (eds.), 'EEAS 2.0. A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service', 1 *SIEPS* 2013, at 22, available at <http://www.sieps.es> and <http://www.ceps.eu>.

Insofar as this autonomy is closely linked to the High Representative's institutional position, a new narrative seems to emerge from the statement of intent made in this regard by Commission President-elect Jean-Claude Juncker at the European Parliament in July 2014, and from his first decisions concerning the internal organisation of the new Commission.[11] Nevertheless, it remains to be seen whether some of these initiatives are well-oriented or not in order to effectively redress the imbalances they are meant to correct without creating new ones. This is the case, for instance, of the highly symbolic decision to move the HR's Headquarters from the EEAS' premises to the *Berlaymont* seeking to enhance her coordinating role as Vice-President of the Commission.[12] Whilst such a measure may be judged convenient to do away with one of the main deficits identified over Ashton's term of office, it is very likely to prove detrimental to her successor's performance as President of the Foreign Affairs Council and, in broader terms, to her capacity to further promote cooperation between the EEAS and national governments on a certain number of sensitive issues: once again the tension between autonomy and cooperation and the challenge of reconciling them within a changing and highly demanding institutional environment.

In conclusion, it is fairly clear that all these paradoxes will probably find their more suggestive expression in the work of EU Delegations on the ground. Actually, they started to operate as real laboratories of the post-Lisbon way of conducting EU foreign policy even before the EEAS as a whole effectively enjoyed any substantial capacity to deliver change. Far away from Brussels − not only geographically − they have benefited in terms of autonomy from the new global authority vested in Heads of Delegation, while at the same time unveiling the type of serious problems that may emerge whenever cooperation and support from the Commission and from national diplomatic services are lacking. In any event, and beyond the controversial and sufficiently addressed issue of consular protection, these shortcomings have not prevented EU Delegations from acting as true catalysers of cooperation in many areas of activity (some of which are duly analysed in this Working Paper), thus revealing on a small and on the spot scale the potentialities of the Service. For the time being, Member States generally recognise that the transformation process of former Commission delegations into EU delegations has been a considerable success, but this shared view still needs to be translated into a much more consistent commitment on their part;[13] a commitment that allows for all those potentialities to be fully exploited in practice and to have a positive impact on the consolidation of the EEAS as a whole.

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[11] 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the new European Commission', *Opening Statement in the European Parliament Plenary Session* (15 July 2014), 10-11; and 'Questions and Answers: The Juncker Commission', *European Commission Memo* (10 September 2014).

[12] Mission letter from Jean-Claude Juncker, President-elect of the European Commission, to Federica Mogherini, (10 September 2014).

[13] See in this regard the main findings of the survey carried out among Member States by the European Court of Auditors in order to draft its Special Report on the establishment of the EEAS, *supra* note 5, at 22.

ARTICLE 40 TEU AND THE EUROPEAN EXTERNAL ACTION SERVICE: THE ETERNAL PARADOX?

Soledad Rodríguez Sánchez-Tabernero[1]

1. INTRODUCTION

The field of EU foreign relations law is a complex one, which shows a specific nature 'at the crossroads between legal orthodoxy and diplomatic realism'.[2] The specific nature of the EU as an international actor calls for a complexity of legal rules, which is generally lacking in States. Intergovernmental vs. Supranational tensions within the EU are well shown in the legal rules governing EU external action. For that reason, legal rules occasionally curtail the achievement of EU's objectives in the international scene, which are left to diplomatic realism and the willingness to cooperate between the actors involved.

It is in this context that Article 40 TEU must be placed. Article 40 TEU appears indeed as a reaction to those tensions. The formal abolition of the pillar structure as a result of the entry into force of the Treaty of Lisbon – albeit with material specificities in the form of a 'hidden pillar' for CFSP – was however accompanied by a reform of ex Article 47 TEU into the current Article 40 TEU.[3] This amendment would essentially entail the cease of the so-called 'community privilege' over CFSP, where the Court would always favour former Community legal bases over CFSP ones by virtue of ex Article 47 TEU, as was perfectly seen in the *ECOWAS* judgment, where development cooperation prevailed over the CFSP legal basis.[4] It is therefore understandable that Member States as Masters of the Treaties tried to hamper the integrationist drive of the Court, supported by ex Article 47 TEU, by adding a two-way component to ex Article 47 TEU and transforming it into a mutual non-affectation clause.

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[1] This paper has benefited from funding from the FPU grant awarded by the Ministry of Education. I would like to thank Professors Luis N. González Alonso and Juan Santos Vara for their comments on previous drafts of this paper. I would also like to thank the participants at the conference on 'The European External Action Service and the New Institutional Balance in EU External Action: Reconciling Autonomy and Cooperation', University of Salamanca, 25-26 September 2014, and particularly my co-panelist Prof. Christophe Hillion and Prof. Carmen Martínez Capdevila for their valuable comments and discussions after my presentation. All remaining errors and omissions are of course my own.

[2] S. Adam, 'The Legal Basis of International Agreements in the European Union in the Post-Lisbon Era', in I. Govaere *et al.* (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden: Martinus Nijhoff Publishers 2014), at 65.

[3] See I. Govaere, 'Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon', 13 *Cambridge Yearbook of European Legal Studies* 2010-2011, 87-111; L.N. González Alonso, '¿Quién dijo que desparecen los pilares? La configuración jurídica de la acción exterior de la UE en el Tratado de Lisboa', in J. Martín y Pérez de Nanclares (ed.), *El Tratado de Lisboa: la salida de la crisis constitucional* (Madrid: Iustel 2008), 393-404.

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

The European External Action Service (EEAS) was set up in an attempt to overcome those legal rules resulting from the intergovernmental-supranational tension that would lead to the maintenance of the former pillar-divide in the CFSP/non-CFSP duality. Indeed, such duality was further reinforced by the amendment of ex Article 47 TEU in the current mutual non-affectation clause of Article 40 TEU. Despite the fact that the EEAS aimed at bridging gaps between CFSP and non-CFSP aspects of EU external action under the coherence mantra, the effects of Article 40 TEU in the setup and functioning of the EEAS are clearly noticeable and admittedly not always positive. Even though delimitation has been described as a dimension of coherence,[5] rules of delimitation such as Article 40 TEU can also impede the development of synergies, a purpose for which the EEAS plays a key role. This is particularly so since it is in the horizontal balancing of competences where the natural field for the duty of coherence takes place.[6]

Among the three levels of coherence identified by Cremona and Van Vooren,[7] the EEAS comes in to fulfil a role in the issue of complementarity, particularly as the HR, whom it supports, is entrusted with ensuring coherence of EU external action (Article 18(4) TEU). However, delimitation between CFSP and non-CFSP areas is clearly shown in various aspects, such as its legal basis, its composition and nature, but also its tasks and division of labour within the EEAS, not only in Brussels, but also in EU Delegations. Finally, budgetary issues also show the effects of Article 40 TEU. One can thus talk of dividing lines *inside* and *outside* the EEAS.

In order to bridge these gaps or dividing lines, both inside and outside, the EEAS depends on cooperation among its own structures and with the institutions. After all, the EEAS has a mere supporting role, while final decision-making still depends on the same institutions as it did before it was created. Whether it can attain its objectives largely depends on constant cooperation with traditional actors and their willingness to make use of the tools offered by the EEAS.[8]

For that reason, this paper aims to analyse some of the effects of Article 40 TEU and deliminate the room for manoeuvre left for the EEAS as a warrant for coherence of EU external action. It will firstly provide some preliminary reflections on Article 40 TEU, paying particular attention to what is left of ECOWAS on the basis of recent judgments of the Court. Secondly, a closer look at the

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[5] Cremona and Van Vooren identify three levels in the multi-tiered concept of coherence: rules of hierarchy, delimitation and complementarity. See e.g. M Cremona, 'Coherence through Law: What difference will the Treaty of Lisbon make?', 3 *Hamburg Review of Social Sciences* 2008, 11-36; M. Cremona, 'Coherence in EU Foreign relations law", in P Koutrakos (ed.), *European Foreign Policy – legal and political perspectives* (Cheltenham: Edward Elgar 2011), 55-93; B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence*, (Abingdon: Rouletdge 2012).

[6] C. Martínez Capdevila and I. Blázquez Navarro, 'La incidencia del Artículo 40 TUE en la acción exterior de la UE', 28 *Revista Jurídica de la Universidad Autónoma de Madrid* 2013, 197-219, at 201.

[7] See *supra* note 5.

[8] H. Merket, 'The European External Action Service and the Nexus between CFSP/CSDP and Development Cooperation', 17 *European Foreign Affairs Review* (2012), 625-651 at 647.

effects of delimitation on the EEAS will be presented as a catalyser or a hurdle for coherence. To this end, various aspects where the effects of Article 40 TEU are, in our view, particularly striking will be presented. To start with, a reflection on the legal basis for the creation of the EEAS is necessary before moving on to its composition and nature, organisation and tasks or management of financial instruments and budgetary issues. Finally, the potential of cooperation within the EEAS and between the EEAS and the institutions will be presented as a way of bridging the delimitation gaps and creating synergies.

2. SOME REFLECTIONS ON ARTICLE 40 TEU: WHAT IS LEFT OF ECOWAS?

The ruling in *Commission v. Council* regarding the conclusion of the agreement on SALW with ECOWAS was a paradigmatic case in which the prevalence of community legal basis over CFSP was shown. When facing a measure that was equally capable of serving a CFSP objective and a development objective, ex Article 47 TEU mandated for the EC legal basis to rule over CFSP competences.[9] The Treaty of Lisbon removed the absolute priority given to TFEU legal basis and placed the two forms of external EU competence on an equal legal footing.[10]

Following the jurisprudence of the Court of Justice, ex Article 47 excluded recourse to a 'dual inter-pillar legal basis'. However, it has been argued that ex Article 47 TEU itself did not preclude recourse to a dual legal basis. On the contrary, it would be the Court's case law prohibiting the use of two legal bases in cases when procedures are incompatible and where the respect of the powers of the European Parliament is at stake.[11]

It is interesting to analyse whether the ECOWAS ruling under ex Art. 47 TEU is transposable to Art. 40 TEU. In that sense, according to Eeckhout, it can be affirmed that the ECOWAS ruling continues to be relevant insofar as the CFSP may not trespass the boundaries set by the TFEU, even if current Art. 40 TEU 'looks both ways' as opposed to ex Art. 47 TEU, which showed a clear preference for the protection of the *acquis communautaire*.[12] Eeckhout identified three main principles stemming from the ECOWAS ruling.

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

[10] A. Dashwood, 'The Continuing Bipolarity of EU External Action', in I. Govaere *et al.* (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau*, (Leiden: Martinus Nijhoff Publishers 2014), 3-16, at 16.

[11] C. Martínez Capdevila and I. Blázquez Navarro, *supra* note 6, at 211; E. Sharpston and G. De Baere, 'The Court of Justice as a Constitutional Adjudicator', in A. Arnull *et al* (eds.), *A constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart Publishing 2011), 123-150, at 145. See also i.a. ECJ, Case C-300/89, *Commission v. Council (Titanium Dioxide)* [1991] *ECR* I-2867, paras. 13, 17-21.; ECJ, Opinion 2/00, *Cartagena Protocol on Biosafety* [2001] *ECR* I-9713, paras. 22-24; ECJ, Case C-178/03, *Commission v. Council (Rotterdam Convention)* [2006] *ECR* I-107, paras. 41-44.

[12] P. Eeckhout, *EU External Relations Law* (2nd Ed.) (Oxford: Oxford University Press 2011), at 269, 290; G. De Baere, *Constitutional Principles of EU External Relations* (Oxford: Oxford University Press 2008), at 210.

Firstly, former Art. 47 TEU protected all EC competences regardless of whether they were exclusive or shared. They conformed a type of *lex specialis* versus CFSP that could not however be interpreted narrowly, but on their own terms.[13] *Secondly*, this principle would be qualified by the fact that competences had to be delimited on the basis of the main purpose or component of the measure. This would imply a possibility of adopting a measure under CFSP with an incidental effect on trade, for example, or other cases where no measure would be incidental to the other.[14] *Finally*, a third principle could be drawn. The court excluded recourse to a dual legal basis in these cases, in line with AG Mengozzi's opinion underlining the incompatibility of decision-making procedures under the TEU and the EC Treaty.[15] This clearly precludes a more coherent foreign policy for the EU.[16]

Taking these three principles stemming from ECOWAS as identified by Eeckhout, the latter two would still be applicable after Lisbon, while the first principle would be balanced by Article 40 TEU. Even though the judgment in the Mauritius case[17] does not develop on Article 40 TEU *per se*, the second of the three ECOWAS principles is still arguably valid regarding the procedures to be applied to the conclusion of international agreements under Article 218 TFEU.[18]

The applicability of the centre of gravity doctrine after the Lisbon reform has been disputed for various reasons. Article 40 establishes the necessity to respect the procedures and the scope of powers of the EU institutions in each field. Applying this test involves retaining as a legal basis that corresponding with the main component, while ignoring the accessory one. Besides, it has been suggested in the literature that applying this test to CFSP would equalise it with the rest of EU policies, while CFSP is singled out from other EU policies in the Lisbon Treaty.[19] On the contrary, according to Dashwood, the usual centre of gravity test would apply. The difference would lay in the fact that Article 40 'no longer provides a means of cutting the Gordian knot' in cases where an analysis of the content and aim of the measure does not give a sufficient reply. The reply would thus have to be found 'on pragmatic policy grounds'[20].

In *Parliament v Council* (Sanctions case) the Court did not recall Article 40 TEU. It did however hold, following its dual legal basis case law that Articles 75 and 215 TFEU could not be used as a joint legal basis. The Court held that it was not possible to combine two legal bases where one called for the applica-

[13] P. Eeckhout, *supra* note 12, at 272.

[14] Ibid.

[15] Opinion of AG Mengozzi, Case C-91/05, *Commission v. Council* (ECOWAS) [2008], fn 76; P. Eeckhout, *supra* note 12, at 272.

[16] Ibid. This view is also shared by C. Martínez Capdevila and I. Blázquez Navarro, *supra* note 6, at 201; C. Hillion and R.A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?', 46 *Common Market Law Review* 2009, 551-586.

[17] ECJ, Case C-658/11, *Parliament v. Council (Mauritius)* [2014], nyr.

[18] Ibid., paras. 48-61.

[19] I. Govaere, *supra* note 3, at 105; C. Martínez Capdevila and I. Blázquez Navarro, *supra* note 6, at 210.

[20] See A. Dashwood, *supra* note 10, at 12.

tion of the ordinary legislative procedure where the Council votes by QMV with another legal basis where the Council decides by unanimity.[21]

What changes from the legal background in *ECOWAS* under Lisbon is that Article 40 determines that the implementation of the CFSP cannot affect the application of procedures and the scope of powers of different institutions for implementation of non-CFSP competences, and vice versa. This raises the question of whether Article 40 does not present 'the legal nail in the coffin of a comprehensive approach to EU external security action', or even of the EEAS coherence-building mandate.[22]

As with ex Article 47 TEU, Article 40 TEU must be read in its context, and therefore attention should be paid to other EU Treaty provisions such as the objective of asserting the Union's identity in the international scene in Article 2 TEU or the duty of consistency in Article 3 or 11 TEU, plus Article 7 TFEU.[23] Whether a contextual interpretation in the light of the duty of coherence could lead the Court to a more flexible interpretation of this watertight division is an interesting issue, provided that the ECJ tends to favour further integration.[24]

The recently decided *Mauritius* case had given hopes for a clarification or a restatement of the ECOWAS ruling, particularly in view of the Opinion of AG Bot. However, this judgment, rather than clarifying the mechanisms in which the ECJ was going to rule on cross-pillar mixity, simply ruled on procedural requirements of Article 218 TFEU.[25]

That is so since there is a certain specificity in the choice of legal basis of an international agreement concluded by the Union. This legal basis is composed of a substantive provision, which reflects the substance, and a procedural provision which applies to its negotiation, signature and conclusion.[26] The procedural legal basis for CFSP and non-CFSP international agreements will therefore be Article 218 TFEU. The question is therefore not of procedural compatibility in the choice of legal basis, but of choosing the right procedural track under Article 218 TFEU.[27]

The case concerned an action for annulment sought by the European Parliament over a Council Decision authorising the Union to conclude an agreement with Mauritius over the conditions of transfer of pirates from the Atalanta naval force to Mauritius and on their conditions after transfer.[28] The Decision was

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[21] See C. Martínez Capdevila and I. Blázquez Navarro, *supra* note 6, at 212; ECJ, Case C-130/10, *Parliament v. Council (Sanctions)* [2012] *ECR* I-472, paras. 46-48.

[22] S. Blockmans and M. Spernbauer, 'Legal Obstacles to Comprehensive EU External Security Action', 18 (Special Issue) *European Foreign Affairs Review* 2013, 7-24, at 14.

[23] See G. De Baere, *supra* note 12, at 268.

[24] For an interesting analysis of the Court's case-law and its role as a motor of European integration as well as a discussion of the vast literature on this issue see T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor of European Integration": Legal Limits to Judicial Lawmaking', 50 *Common Market Law Review* 2013, 931-964.

[25] At the root of this case lies a broad interpretation of Art., 24(1) TEU by the Council. See S. Adam, *supra* note 2, at 84.

[26] See S. Adam, *supra* note 2, at 81.

[27] Ibid., at 82.

[28] Council Decision 2011/640/CFSP of 12 July 2011 *on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of trans-*

adopted on the basis of Article 37 TEU and Article 218(5) and (6) TFEU and the Parliament was merely informed of the decision to authorise the opening of the negotiations on the date of adoption (22 March 2010) and of the adoption of the contested decision by letter of 17 October 2011, when the decision had been adopted on 12 July 2011 and published in the Official Journal on 30 September 2011, the Agreement signed on 14 July 2011 – and provisionally applied since.[29]

The Parliament sought the annulment of the contested decision based on two pleas, regarding the infringement of Article 218(6) and 218(10) TFEU. On Article 218(6) it argued that the EU-Mauritius agreement related not only to the CFSP, but also to judicial cooperation in criminal matters, police cooperation and development cooperation. Since the ordinary legislative procedure is applied to those fields of EU action, the Parliament, supported by the Commission, argued that the contested decision should have been adopted on the basis of Article 218(6)(a)(v) TFEU and thus after obtaining the consent of the Parliament.

The choice of the substantive legal basis upon which the Decision was adopted was not challenged by the Parliament. The Court recalled its legal basis case-law[30] and then proceeded to linking the choice of procedure for concluding an international agreement under Article 218 TFEU to the choice of substantive legal basis, on which basis it rejected the Parliament's claims.[31]

Therefore, the Court did not dwell on interpretations of Article 40 TEU which could have given some clarification in the way the Court was going to deal with cross-pillar instruments after Lisbon.[32] The centre of gravity approach is restated in this judgment.[33] However, it is precisely Article 218 TFEU itself, which applies the centre of gravity doctrine regarding preparatory acts (Article 218(3) TFEU)[34] and therefore a restatement of the centre of gravity approach in this context may not be that useful as a hint of the tools the Court is going to use when deciding over substantive legal bases and Article 40 TEU. This ruling may also be useful as a further support, if still needed, for the thesis that CFSP is an integral part of the EU legal order to which different procedures apply but yet to which the same general principles, such as the democratic principle apply horizontally.

The *Mauritius* case can be compared with the *Philippines* case.[35] In this ruling, the Court of Justice firstly restated the centre of gravity test along with its

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fer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, *OJ* [2011] L 254/1, 30.09.2011.

[29] It is interesting to note that the Parliament was informed even after the publication in the Official Journal.

[30] See ECJ, Case C-658/11, *supra* note 17, para., 43.

[31] Ibid., paras. 57-61;

[32] S. Blockmans and M. Spernbauer put forward different options that the Court could have taken. The Court found an easier way out, which involved linking procedures under Art., 218 TFEU with the substantive legal basis, which had not been challenged. S. Blockmans and M. Spernbauer, *supra* note 22, 19-21.

[33] See ECJ, Case C-658/11, *supra* note 17, para., 43.

[34] See C. Martínez Capdevila and I. Blázquez Navarro, *supra* note 6, at 218.

[35] ECJ, Case C-377/12, *Commission v. Council (Philippines)* [2014], nyr.

case-law on dual legal basis.[36] However, in the next paragraph the Court seems to either depart from the centre of gravity approach or to make an exception regarding the use of dual legal basis broader.[37] The case concerned the conclusion of the Framework Agreement on Partnership and Cooperation between the European Union and the Republic of the Philippines, which was adopted on the basis of Articles 207 and 209 TFEU, in conjunction with Article 218(5) TFEU, as proposed by the Commission, as well as Articles 79(3) TFEU (readmission of third country nationals), 91 TFEU, 100 TFEU (transport) and 191(4) TFEU (environment) added by the Council. The Commission sought the annulment of the decision and the Court ruled in its favour.

Although this case dealt with non-CFSP areas of competence, where the application of the centre of gravity test is, in principle, not disputed, it may be relevant to see the way in which the Court can extract certain objectives from Article 21 TEU for different policies.[38] Whether this reasoning could in turn be used for ruling over CFSP/non-CFSP conflicts of competence is an interesting issue.[39]

3. DELIMITATION AS A CATALYSER OR A HURDLE FOR COHERENCE? A LOOK INSIDE THE EEAS

While delimitation has been identified as one of the levels of coherence, the effects of Article 40 TEU have been clearly shown in the set-up and functioning of the EEAS, occasionally hampering the creation of synergies. The effects of Article 40 TEU are seen in various aspects. This paper will focus on key aspects based, mainly, on the text of the EEAS Decision[40] and the EEAS-COM Working

[36] Ibid., para., 34.

[37] Ibid., para., 35.

[38] See Case C-377/12, *supra* note 35, paras. 36-37. It is however true that development cooperation states its own set of objectives in Art. 209 TFEU, which could function as lex specialis.

[39] There is disagreement in the literature concerning whether that type of reasoning can apply to CFSP. The Mauritius case does not shed much light over this issue, since the Court accepts the fact that the Parliament admitsthat the objectives of the Atalanta mission fall within CFSP aims (ECJ, Case C-658/11, *supra* note 17, paras. 44 onwards). Had the Court analysed this question, it would have provided some insights into how it is going to deal with 'traditional' CFSP objectives post-Lisbon. C. Martínez Capdevila and I. Blázquez Navarro as well as I. Govaere reject the view that this reasoning is applicable to CFSP on the basis of the special nature of the CFSP (See I. Govaere, 'Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon', 13 *Cambridge Yearbook of European Legal Studies* 2010-2011, 87-111, at 105; C. Martínez Capdevila and I. Blázquez Navarro, *supra* note 6, at 210). Besides, it could be considered that singling out CFSP objectives from the general objectives of EU external action other than those specifically laid down in the treaties, such as those of development cooperation in Art. 209 TFEU could constitute a *contra legem* interpretation of the Treaties. See B. Van Vooren, 'The Legacy of the Pillars Post-Lisbon: Objectives of the CFSP and the New Non-Affectation Clause', (paper presented at the Jean Monnet Seminar on 'Boundaries of EU Law After the Lisbon Treaty', in Dubrovnik, April 2009), 25-26.

[40] Council Decision 2010/427/EU *on the European External Action Service*, *OJ* [2010] L 201/30, 03.08.2010.

Arrangements.[41] Firstly, reference to the legal basis on which its decision was adopted should be made. Secondly, its composition and nature also reflect the CFSP/non-CFSP divide. Although Article 40 TEU is only referred to in one provision of the decision (Article 4(3)(a) third indent EEAS Decision), this does not imply that it would cease to apply.[42]

3.1 **The legal basis of the EEAS Decision**

Article 27 TEU is placed in Chapter 2 'Specific Provisions on the Common Foreign and Security Policy' of Title V of the EU Treaty, rather than, in Chapter 1 'General Provisions on the Union's External Action'. Should it be considered that the legal basis belongs to the CFSP, it then should abide by Article 40 TEU, pursuant to which the implementation of the CFSP is not to affect 'the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union' and *vice versa*.[43]

Despite the fact that it is placed under the CFSP title, the Court appears to have accepted jurisdiction to review the legality of acts of the EEAS based on the EEAS Decision.[44] In this sense, its place in the Official Journal, under EU numbering rather than CFSP, should also be underlined. The aforementioned reasons have led to consider that the measure would have a horizontal nature and scope, rather than merely CFSP.[45] Should this be the case, implications regarding Article 40 TEU would derive.

In this sense, it could thus be argued that it is a *sui generis* legal basis and therefore not falling under CFSP or non-CFSP categories. In that case, Article 40 TEU would not apply to EEAS acts. Such interpretation would make sense on the face of the purpose of the creation of the EEAS. Otherwise, EEAS procedures would be considered as CFSP-procedures, which could not affect the application of former 'community' procedures, and vice versa.[46]

Article 2 EEAS Decision would further sustain such an interpretation for various reasons. Firstly, paragraph 1 refers to 'mandates' to support the HR 'in his/her capacity as Vice-President of the Commission'. This paragraph could also support such an interpretation, since Article 40 would impede a CFSP act

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[41] Working Arrangements between Commission Services and the European External Action Service (EEAS) in Relation to External Relations Issues, SEC (2012)48, 13.01.2012.

[42] G. De Baere and R. A. Wessel, 'EU Law and the EEAS: Of Complex Competences and Constitutional Consequence', paper presented at the conference *The EU's Diplomatic System: post-Westphalia and the European External Action Service* (19 November 2013), available at <http://www.utwente.nl/mb/pa/research/wessel/wesselconf11.pdf13>.

[43] See G. De Baere and R. A. Wessel, *supra* note 42.

[44] Order of the General Court, Case T-395/11, *Elti d.o.o. v. Delegation of the European Union to Montenegro*; S. Blockmans and C. Hillion, *EEAS 2.0: A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service* (Stockholm: SIEPS 2013), 10-11.

[45] Ibid., 10-11.

[46] See M. Gatti, 'Coherence vs. Conferred Powers? The Case of the European External Action Service' in L.S. Rossi and F. Casolari (eds.), *The EU after Lisbon: Amending or Coping with the Existing Treaties?* (The Hague: Springer 2014), 247-50.

to have effects on non-CFSP issues. For that reason, it has been suggested, that should the EEAS Decision be amended, additional legal bases could be considered, besides Article 27(3) TEU, since it is clear that the scope of the EEAS Decision is broader than CFSP insofar as the EEAS also supports the HR/VP qua VP.[47] Although choosing an additional legal basis could cause problems in view of the Court's case-law on dual legal basis, it may also ensure compliance with Article 40 TEU, provided that the procedures laid down in Article 27(3) TEU are met.[48]

3.2 **The EEAS' composition and nature: troubled by Article 40 TEU?**

The EEAS is conceived as a *sui generis* service, distinct from institutions, bodies or agencies. Such nature, as 'a *functionally autonomous body* of the Union, *separate* from Commission or Council General Secretariat, *under the authority* of the High Representative',[49] represents the need to place it in a middle ground to avoid conflicts with Article 40 TEU, which would derive if the service were placed under the authority of any of the institutions.[50]

The EEAS lacks legal personality, which is more the result of a political choice rather than a legal one.[51] This option can also be linked to the rationale for the introduction of Article 40 TEU in Lisbon to avoid ECOWAS effects and retain CFSP specificity, which all show the intergovernmental traits, present in the Lisbon Treaty. By not granting the EEAS legal personality, they would impede the EEAS from becoming 'a separate kingdom'. For that reason, it has been said that its status is 'that of a bird with politically and legally clipped wings'.[52] Along with the question of legal personality, it is interesting to wonder whether the EEAS has standing before the ECJ. If it were not capable to appear before the Court it may have Council-Commission litigating between each other in

[47] See S. Blockmans and C. Hillion, 'EEAS 2.0: Recommendations for the amendment of Council Decision 2010/427/EU on the European External Action Service' Centre for European Policy Studies (CEPS) (13 November 2013), at 20, available at < http://www.ceps.eu/book/eeas-20-recommendations-amendment-council-decision-2010427eu-european-external-action-service>, where the authors suggest possible additional legal bases such as Art. 21(3) TEU, 17(1) TEU or 209 TFEU.

[48] Ibid.; ECJ, Case C-130/10, *Parliament v. Council (Sanctions), supra* note 21. This consideration could also be somewhat limited in view of the recent judgment in the *Philipinnes* case which seems to broaden the possibility for the use of a joint legal basis. See ECJ, Case C- 377/12, *Commission v. Council (Philippines), supra* note 35.

[49] Art., 1(2) EEAS Decision, *supra* note 40.

[50] This was also due to the tensions during the negotiations between the intergovernmentalists and the Commission and EP who wanted it to be part of the Commission. See J. Wouters *et al., Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities* (Brussels: European Parliament, Directorate-General for External Policies 2013), at 18, 20. Besides, if the EEAS was to support the HR/VP in fulfilling its coherence-building mandate, it also makes sense that it does not lie under the authority of any of the institutions but of the HR/VP itself.

[51] B. Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service', 48 *Common Market Law Review* 2011, 475–502, at 485.

[52] See J. Wouters *et al., supra* note 50, at 20.

defence of the EEAS.[53] The EEAS has already been taken to Court regarding budgetary and staff issues without its passive *locus standi* being contested in procedures that have been closed and there are also currently pending procedures on these issues.[54] The argument that active *locus standi* for the EEAS is not enshrined in the Treaties appears as rather simplistic, particularly in view of the Court's jurisprudence granting *locus standi* to the European Parliament.[55] The EEAS must be able to defend the full exercise of its tasks, or at the very least, it must be able to challenge other institutions before the Court, and particularly the Commission, when they act in breach of their duty of cooperation as laid down in Article 13.5 TEU or in Article 3 EEAS Decision.[56]

Regarding EU Delegations,[57] the effects of Article 40 TEU are shown in the need for Delegations to report to the HR/VP and the Commission, under the authority of the Head of Delegation.[58] This reflects the duality of EU external action and the ways used to overcome such duality through cooperation. This duality is further shown in the possibilities of making full use of the capacities of EU officials posted in EU Delegations. Particularly, Commission officials funded from the administrative budget are affected by a 'centre of gravity test', which implies that they can only exceptionally perform CFSP tasks and in any case they should not exceed 20% of their working hours.[59] On the contrary, EEAS staff can work on non-CFSP issues, which in turn makes sense given the purpose of the EEAS.

Furthermore, one of the problems raised by the triple-hat of the HR/VP is that of time constraints.[60] Such problem could be overcome by the appointment of deputies. However, there are difficulties to deputise the HR/VP within the EEAS, which are also linked to delimitation issues. It has recently been argued that the EEAS should not only support the HR/VP but also his or her deputies. However, as primary law currently stands, a full deputisation of the HR/VP would

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[53] The Court of Justice could come to a solution in line with that regarding the European Parliament. See B. Van Vooren, *supra* note 51, 495-96.

[54] M. Gatti, 'Diplomats at the Bar: The European External Action Service before EU Courts', 5 *European Law Review* 2014, 664-681, at 665. See e.g. Order in Case T-221/13, *Page Protective Services v EEAS* [2013] regarding budget and the following staff cases: ECJ, Case F-52/13, *Diamantopoulos v EEAS* [2014]; Order in Case F-154/12, *Locchi v EEAS* [2013]; Order in Case F-70/12, *Parikka v EEAS* [2012]; ECJ, Case F-64/12 DEP, *Martinez Erades v EEAS* [2012]; Order in Case F-15/11, *Mariën v EEAS* [2011].

[55] See ECJ, Case C-294/83, *Parti écologiste "Les Verts" v. European Parliament* [1986] *ECR* I-1339; ECJ, Case C-70/88, *European Parliament v Council (Chernobyl)* [1990] *ECR* I-2041.

[56] The capacity to be sued of EU 'bodies, offices and agencies', categories could appear clear in the letter of Art., 263 TFEU. The Court's case-law on this issue is however confusing. As interesting as the study of the passive and active *locus standi* of the EEAS may be, a full study of this question falls outside the scope of this paper due inter alia to extension constraints. For an interesting review of the question see the article by M. Gatti, *supra* note 54.

[57] The issue of EU Delegations is treated in detail by other contributions and therefore is just used as an illustration. For a detailed analysis see the contributions by M. Estrada Cañamares and J. Santos Vara in this volume.

[58] Working Arrangements COM-EEAS, *supra* note 41, at 3.

[59] See J. Wouters *et al., supra* note 50, at 65.

[60] Ibid., 31-32.

not seem possible. On the contrary, a functional deputisation to comply with Article 40 TEU might run counter to the very purpose of the triple-hat figure.[61]

3.3 Organisation and tasks: dealing with delimitation on a daily basis?

The EEAS is entrusted with supporting the HR in carrying out its multiple missions, such as implementing the CFSP and acting as the Commission Vice-President.[62] This implies that depending on whether the EEAS is dealing with CFSP or with Commission issues it will have to abide by different rules. Therefore, the old inter-pillar competence issues appear inherent to the daily functioning of the EEAS. If they are not overcome, ECOWAS type of disputes on competence delimitation could arise.[63] At the same time, the EEAS supporting role is crucial in helping to bridge the gap between CFSP and non-CFSP issues.[64]

The old problems of competence delimitation are furthered insofar as the allocation of powers to the EEAS is done *without prejudice* to 'the normal tasks' of the General Secretariat of the Council and of the Commission. Therefore, the EEAS tasks are still defined according to the traditional actors involved in EU foreign policy, while 'the very idea of normality has shifted dramatically with the entry into force of the Lisbon Treaty'.[65]

Regarding substantive tasks, development cooperation is a paradigmatic example of how Article 40 TEU affects the EEAS. Development cooperation (Article 209 and 212 TFEU) falls under the non-CFSP legal bases. Division of labour is fuzzy in this area (see Article 9 EEAS Decision & Working Arrangements). Firstly, the EEAS is responsible for managing crisis-response funding (short-term part of the Instrument for Stability and electoral observation, under EIDHR), while responsibilities overlap in other areas.[66] It has been argued in literature that the management of development programmes by the EEAS is problematic for institutional balance, and in that sense for Article 40 TEU.[67] However, from a formalistic point of view, the EEAS Decision does not allocate any power to the EEAS, since only the Treaties can confer powers on institutions, and as obvious as it may sound neither is the EEAS an institution nor is the EEAS Decision a Treaty.[68] As a matter of fact, EEAS actions do impinge upon Commission treaty-based powers, since programming documents require

[61] See S. Blockmans and C. Hillion (eds.), *supra* note 47, at 4.
[62] See M. Gatti, *supra* note 46.
[63] See H. Merket, *supra* note 8, at 648.
[64] See S. Blockmans and M. Spernbauer, *supra* note 22, at 12.
[65] See B. Van Vooren, *supra* note 51, at 481.
[66] See M. Gatti, *supra* note 46, 250-251.
[67] Van Reisen has put forward the problems posed for institutional balance. It is submitted that institutional balance writ large would also involve problems regarding Article 40 TEU, which underlie the rationale of Art. 40 TEU. See M. Van Reisen, 'Note on the Legality of Inclusion of Aspects of EU Development Cooperation and Humanitarian Assistance in the European External Action Service (EEAS)', *EEPA Briefing Paper No. 13* (2013), 2-3.
[68] See M. Gatti, *supra* note 46, at 250.

the expertise of trained officials, which is hardly questionable by the College of Commissioners when adopting the final decision.[69] Such an alteration can be explained by the HR/VP's coordinating mandate and by those cases in which the EEAS can bring an added value through its political expertise.[70]

3.4 **Management of external action instruments and budgetary issues**

Article 9 of the EEAS Decision covers external action instruments and programming in development policy, an area in which duality in external action is adequately seen, along with the potentialities of cooperation as a means to bridge delimitation gaps.[71] In particular, for the preparation of the Multiannual Financial Framework, the EEAS and the Commission services must ensure a coordinated position regarding any external relations instruments, such as the ENPI, DCI or EDF.[72] The programming, planning and implementation phases of the aforementioned instruments are also a paradigmatic case on how Article 40 duality in external action can be overcome through the various procedural duties derived from cooperation between the EEAS and DG DEVCO (information, consultation, etc.).[73]

Regarding actions under the CFSP budget, cooperation occurs inversely. It is the EEAS who has to fully involve the Foreign Policy Instrument (FPI) from an early stage and maintain it fully involved, particularly since the FPI prepares the necessary budgetary impact assessment for each action in consultation with Commission services and the EEAS and later prepares a financing decision that must be adopted by the HR/VP qua Commission.[74] The FPI is an illustrative case of the effects of delimitation and the possible ways to bridge its gaps, at least ad interim. While it is formally a Commission service assisting the HR/VP in its role as VP, it is based on EEAS premises, in order to foster cooperation between the EEAS and the policy instruments it programs or plans, which have to be ran by the Commission.[75] That is the case for the Instrument for Stability or the European Neighbourhood Policy Instrument.

Another example of the gaps found in financial management and implementation by EU Delegations is Article 4(2) paragraph 5 of the EEAS Internal Rules. This provision enables the Head of Delegation to subdelegate budget implementation tasks belonging to the Commission to Commission staff, but not to EEAS staff.[76] On paper, this appears as a rather artificial division of work.[77] For that reason, the High Representative in her Review considered that the admin-

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[69] Ibid.

[70] Ibid., at 251.

[71] For a detailed analysis of joint programming in development policy, see the contribution by M. Estrada in this volume.

[72] See Working Arrangements COM-EEAS, *supra* note 41, at 17.

[73] Ibid., 17-22. See J. Wouters *et al., supra* note 50, 49-50.

[74] See Working Arrangements COM-EEAS, *supra* note 41, at 26.

[75] See J. Wouters *et al., supra* note 50, at 56.

[76] See Working Arrangements COM-EEAS, *supra* note 41, at 5.

[77] See in this regard, S. Blockmans and C. Hillion (eds.), *supra* note 47, at 14.

istrative budget of delegations should be simplified so as to ensure a single source of funding, combining money from EEAS and Commission Budgets.[78]

3.5 **Bridging gaps through cooperation?**

Some of the gaps caused by horizontal delimitation in the composition and functioning of the EEAS have been exposed. As a service created to enhance cooperation and synergies, the only way left for the EEAS to overcome those hurdles is through cooperation in two dimensions: within the EEAS and of the EEAS with other institutions.[79] Indeed, as put forward by Hillion, cooperation appeared as a *raison d'être* for the EEAS.[80] A duty of cooperation of general application exists between the institutions and the Member States and among the institutions themselves.[81] Besides, Article 3 of the EEAS Decision restates this duty of cooperation between the Commission and the EEAS, who shall consult each other on all matters except on CSDP.

In spite of the vital importance of cooperation for the EEAS, Article 3(2) of the EEAS Decision also reflects duality regarding the duty of cooperation in the sense that this duty between the Commission and the EEAS is reflected in a duty of consultation on all matters except on CSDP, which is regrettable in view of the fact that crisis management is deeply affected by duality in external action and full consultation between the military branch of crisis management, and the Commission directorates responsible for crisis management would constitute a strong asset to bridge those gaps. It has however been argued that since Article 3(2) only excludes a duty of consultation, an *a contrario* reasoning would lead to consider that there is a duty of information on CSDP aspects between the Commission and the EEAS and within the EEAS itself, when CSDP and other Union policies are involved, in view of the general application of the duty of cooperation.[82]

Besides, according to Hillion, Article 3 of the EEAS Decision should be understood as a specific illustration of the duty of cooperation enshrined in the treaties as developed by the Court of Justice in its case-law. Therefore, even though the EEAS Decision limits the cooperation on CFSP issues to a mere duty of information,[83] it appears strange that an instrument of secondary

[78] European External Action Service, 'EEAS Review', 29.07.2013, short term recommendation no. 17.

[79] Cooperation between the EEAS and the Member States is relevant on the vertical dimension, which falls outside the scope of this paper.

[80] Presentation by Christophe Hillion at the conference on 'The European External Action Service and the New Institutional Balance in EU External Action: Reconciling Autonomy and Cooperation', University of Salamanca, 25-26 September 2014 (unpublished).

[81] ECJ, Case C-266/03, *Commission* v. *Luxembourg* [2005] *ECR* I-4805, para., 58.

[82] See B. Van Vooren, *supra* note 51, at 481

[83] According to the report issued by the European Court of Auditors, it is the HR/VP who decides whether or not to consult the Commission on the basis of whether the question exclusively falls under CFSP or not, which sometimes is even a matter of opinion, despite the fact that the proposal may have implications for the Commission. See European Court of Auditors, 'The Establishment of the European External Action Service', *Special Report No 11* (2014), para., 55.

law restricts the scope of a Treaty-based obligation which is of general application.[84]

As has been stated, crisis response mechanisms are a good reflection of the effects of Article 40 TEU, particularly since crises involve issues belonging to the Commission mandate but also CFSP aspects.[85] Particularly, the comprehensive approach aims at effectively combining these aspects.[86] Despite the fact that the HR and the EEAS are tasked with implementing CFSP, crisis-related non-CFSP actions, such as civil protection mechanisms, are still managed by the Commission and its directorates.[87] Furthermore, the mandates of the EU-Situation Room (EEAS) and Emergency Response Centre (COM) overlap as they both monitor crises outside the EU[88]

The EEAS boasts a coordinating potential to bridge those gaps, which it has deployed in various aspects. Firstly, the HR appointed a Managing Director for Crises Response and Operational Coordination. She also set up a Crisis Response System[89] (CRS), which includes the Crisis Platform,[90] comprising services belonging to EEAS, the Commission and General Secretariat of the Council. The Crisis Platform has the potential to become 'a coordination hub cutting across the CFSP/non-CFSP divide'[91]. Recent crisis have shown that these tools are actually being used in practice, with the examples of the Crisis Platforms set up for Libya, Syria, Mali/Sahel, Myanmar/Burma, the Democratic Republic of the Congo, Guinea-Bissau or Central African Republic. The case of Mali, in particular, has been seen by the EEAS as a good example of the coordinating potential of the EEAS.[92]

Cooperation and information exchange is also vital on the ground. On the face of a crisis, the Head of Delegation will maintain overall responsibility for political relations while ECHO carries out assessment missions as to humanitarian and civil protection needs through the deployment of civil protection teams. In doing this, the EEAS and the concerned EU Delegations remain fully involved. Inter-service missions, such as those deployed in Central African Republic or in Mali can also be considered.[93] Furthermore, in cases when a CSDP mission

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[84] For that reason, and given the importance of cooperation for the EEAS as a tool to fulfil its coherence mandate and overcome the delimitation hurdles, a leaner formulation of Article 3 EEAS has been proposed by S. Blockmans and C. Hillion (eds.), *supra* note 47, 6-7.

[85] See S. Blockmans and C. Hillion (eds.), *supra* note 44, 51-52.

[86] See Joint Communication of the Commission and the High Representative of the European Union for Foreign Affairs and Security Policy to the European Parliament and the Council, 'The EU's comprehensive approach to external conflicts and crises, Brussels, 11.12.2013, JOIN (2013)30 final.

[87] Cf. M. Gatti, *supra* note 46, at 252. M Gatti refers to institutional balance. However, the institutional balance reflected in the Treaty of Lisbon is the inevitable result of the application of Art., 40 TEU.

[88] Ibid., at 253.

[89] Ibid., at 254.

[90] See Working Arrangements COM-EEAS, *supra* note 41, at 30. See H. Merket, *supra* note 8, 643-44.

[91] See M. Gatti, *supra* note 46, at 254.

[92] See EEAS, 'Sahel-Crisis Response', available at http://eeas.europa.eu/crisis-response/where-we-work/sahel/index_en.htm.

[93] See Working Arrangements COM-EEAS, *supra* note 41, at 31.

is already in place or in the process of deployment, joint meetings are organised to discuss possible cooperation between the CSDP mission and the civil protection mission.[94]

In general, the options left to the EEAS to bridge the gaps created by Article 40 TEU are restricted to cooperation with the institutions and within its own directorates. Cooperation with the Commission is channelled through the Working Arrangements: a non-binding document which compliance with largely depends the good will of the institutions. However, the Working Arrangements can be seen as a development of the duty of cooperation laid down in Article 3(5) EEAS Decision and in Article 13(2) TEU.

If we take the view that the EEAS decision is a CFSP act, then it should not affect non-CFSP issues. In line with the ECOWAS case-law, the Working Arrangements, as a soft law instrument not resulting to legal effects[95] appear as an appropriate way to overcome the hurdles presented by Article 40 TEU, since they will not violate Article 40 TEU. At this point, cooperation with the institutions largely depends on informal contacts between EEAS staff and their former colleagues.[96] However, it is expected that as time passes the close ties between the EEAS staff and their colleagues at the Commission will erode. This should also be the case when the EEAS starts recruiting staff on its own.[97]

If cooperation appears as a way to overcome delimitation hurdles, it is regrettable that the responsibilities of the Higher Representative regarding coordination (Article 18(4) TEU) had already been curtailed by President Barroso. While the Vice President was charged to chair a group of all Commissioners with external relations portfolios (Humanitarian Aid, DEVCO, Economic and monetary affairs, Trade), President Barroso brought those powers back to the College and chaired those meetings himself.[98] Instead, the Commission President should facilitate the work of the HR/VP to 'give the final coordinative say' across EU external action.[99]

This last point underlines another element which affects EU foreign policy even more so than external action duality. As Allan Dashwood pointed out, the bipolar organisation of EU external action does not necessarily put the Union at a disadvantage *vis-à-vis* other international actors. Indeed, in States with active foreign policies, responsibilities are divided among different ministries. What is needed is a strong sense of political direction, which can be provided by the Council and European Council via Article 22 TEU.[100]

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[94] Ibid.

[95] See S. Blockmans and C. Hillion (eds.), *supra* note 44, 11-12.

[96] This also poses a challenge in the sense of building a common esprit de corps within the EEAS. See H. Merket, *supra* note 5, at 649. See also J. Wouters *et al., supra* note 50, at 21, 24.

[97] See European Court of Auditors, *supra* note 83, para., 56.

[98] See S. Blockmans and M. Spernbauer, *supra* note 22, 12-13.

[99] See J. Wouters *et al., supra* note 50, at 32.

[100] See A. Dashwood, *supra* note 10, at 14.

4. CONCLUDING REMARKS

This paper attempted to provide an overview of the content of Article 40 TEU and its effects on the set-up and functioning of the EEAS as a provider of coherent EU foreign policy. The question of whether Article 40 TEU was really the 'legal nail in the coffin' of the EEAS coherence-building mandate was raised at the beginning of this paper along with whether the continuing duality in EU external action, further reinforced with Lisbon and Article 40 TEU, can successfully be overcome through inter-institutional cooperation in order for the EEAS to fulfil its coherence mandate.

Regarding the first of those questions, the somewhat pernicious effects of Article 40 TEU are clearly seen in the set-up and functioning of the EEAS. Duality in EU external action has created a certain artificial *modus operandi* in EU external action, both within the EEAS and outside the EEAS, for which we can refer to dividing lines inside and outside the EEAS. It has been argued in literature that a review of Article 2 of the EEAS Decision would be necessary in order to strengthen the HR/VP qua VP's coordinating role within the Commission, provided that Article 40(1) TEU is respected.[101] In any case, the Court needs to find a balance between sufficient flexibility and legal stability in order to respect Article 40 TEU while not hampering the possibilities for synergies, which are required in order to achieve a coherent foreign policy.[102] Contextual interpretation of Article 40 TEU in light of the duty of coherence could prove useful in this respect. This contextual interpretation could lead to a less watertight division between CFSP/non-CFSP matters that would leave room for the third level of coherence, namely to closer cooperation and synergies. Perhaps the appeared broadening of the dual legal basis exception referred to in the Philippines case, albeit not falling under the CFSP, could be a welcomed step in this regard. Further reflection on possibilities given by contextual interpretation of Article 40 TEU in light of the duty of coherence is still needed and lays excellent avenues for future research.

Nevertheless, the hurdles posed by Article 40 TEU could be overcome by fruitful cooperation among the institutions and within the different services of the EEAS, in Brussels and on the ground. To this end, a leaner formulation of the duty of cooperation laid down in Article 3(5) of the EEAS Decision would be welcome, particularly as to its scope. It is not understandable that a provision of secondary law restricts the scope of a treaty-based obligation such as the duty of cooperation laid down in Article 13(2) TEU. As to crisis management, cooperation tools such as the Crisis Platform or inter-service missions have been used in cases such as those of Mali, which has been considered a success by the EEAS. Further advances in this area would be in line with the 'comprehensive approach' mantra.

However, not all that glitters is gold, and that is the case regarding cooperation in practice. There have reportedly been real turf battles across Rue de la Loi. When cooperation has been fluent it has been thanks to the informal circuits

[101] See S. Blockmans and C. Hillion (eds.), *supra* note 47, at 4.
[102] See S. Blockmans and M. Spernbauer, *supra* note 22, 22-23.

maintained between the EEAS staff and former colleagues both within the EEAS and with the institutions. At higher levels, the coherence-building mandate of the HR had already been curtailed by former President Barroso. From what we have seen so far, the appointment of the new College of commissioners could result in better cooperation between Juncker and Mogherini. President Juncker seems to be willing to enhance the Vice-President role of the Higher Representative and Vice-President of the Commission by chairing the RELEX cluster. The same must be said of Federica Mogherini, who has decided to move her offices to the Berlaymont. The question that must be raised, however, is whether this move will not neglect the EEAS, which she is expected to head.

On the whole, Article 40 TEU and delimitation still present difficulties for the functioning of the EEAS. A rather paradoxical outcome, indeed, for a 'body' designed to overcome them.

MEMBER STATES' COOPERATION WITH THE EEAS: THE CASE OF THE QUAI D'ORSAY[1]

Fabien Terpan

The relationship between the French Ministry of Foreign Affairs (MFA) and the European External Action Service (EEAS) must be placed in the wider perspective of the on-going debate on continuity and change in French foreign and security policy. Has France moved away from a 'Gaullist legacy'[2] stemming from the 1960s and the early years of the Fifth Republic (1958–1969), and based on the ideals of independence, sovereignty, 'grandeur'? What factors do shape French foreign policy? What role did the European Union (EU) play in these changes?

There is wide-reaching consensus in the existing literature on the idea that the 'Gaullist legacy' has not disappeared, but has rather evolved in many ways, in particular since the 1990s and the end of the Cold War. This combination of change and continuity must be kept in mind when discussing the Europeanisation of French foreign policy. Unsurprisingly, the authors engaged in this debate[3]

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[1] This article is based on a series of interviews conducted in 2012 and 2013 at the French Ministry of Foreign Affairs, in the framework of a collective research on 'the EEAS and National Diplomacies' co-directed by Rosa Balfour (European Policy Centre, Brussels) and Kristi Raïk (Finnish Institute of International Affairs). The first results of this research have been published at: <http://www.epc.eu/documents/uploads/pub_3385_the_eeas_and_national_diplomacies.pdf>. A collective book will be published in 2015, including a more elaborate version of this working paper (Rosa Balfour, Caterina Carta, Kristi Raïk (eds.), *The EEAS and National Diplomacies* (Farnham : Ashgate 2015)).

[2] M. Vaïsse, *La grandeur. Politique étrangère du général de Gaulle, 1958-1969* (Paris: Fayard 1998). M. Vaïsse, *La Puissance ou l'influence? La France dans le monde depuis 1958* (Paris: Fayard 2009). M. Blunden, France, in I. Manners and R. Whitman (eds.), *The Foreign Policies of the European Union Member States* (Manchester: Manchester University Press 2000), 19–43. A. Treacher, *French Interventionism. Europe's Last Global Player* (Farnham: Ashgate 2003). R. Balme, 'France, Europe and the World. Foreign Policy and the Political Regime of the Fifth Republic', in S. Brouard, A.M. Appleton and A.G. Mazur (eds.), *The French Fifth Republic at Fifty* (Basingstoke: Palgrave Macmillan 2009). M. Maclean and J. Szarka (eds.), *France on the World Stage. Nation State Strategies in the Global Era* (Basingstoke: Palgrave 2008). F. Charillon, *La Politique Etrangère de la France* (Paris: La Documentation Française 2011).

[3] B. Irondelle, 'Europeanization without the European Union: French Military Reforms 1991-1996', *Journal of European Public Policy* 2003, 208–226. C. Pajon, 'L'Europe de la défense et la transformation des identités militaires: quelle européanisation? Le cas des militaires britanniques, allemands et français', 10 *Politique Européenne* 2003, 141–171. R. Wong, *The Europeanization of French Foreign Policy: France and the EU in East Asia* (Basingstoke: Palgrave Macmillan 2006). F. Terpan, 'L'Européanisation de la Politique de Défense de la France', in H. Oberdorff (ed.), *L'Européanisation des Politiques Publiques* (Paris: Presses Universitaires de France 2008), 111–127. F. Terpan, 'The Europeanization of the French Defence Policy', European Consortium for Political Research, *Standing Group on the European Union Fourth Pan-European Conference* (25–27 September 2008), University of Latvia, Riga. P. Rieker, 'From Common Defence to Comprehensive Security: Towards the Europeanization of the French Foreign and Security Policy?',

come to nuanced conclusions: French foreign policy is 'Europeanising', although with several limitations.

The growing importance of the EU in French foreign and security policy has been widely acknowledged since the end of the Cold War. Building a European foreign and security policy has become a priority goal. The development of both the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) has been encouraged, as a way to make the EU more autonomous in international affairs and as a means to strengthen the French influence worldwide, through political leadership in Europe. Documents such as the French White Books on Security and Defence in 1994, 2008 and 2013 make it clear that it would be both pointless and counterproductive to 'go alone' in the field of foreign and security policy and that the 'new' security tasks such as conflict prevention, peacekeeping or crisis management would be better fulfilled in a collective framework. The EU has become a core element of a renewed French defence policy, which has entered into a process of Europeanisation[4] including a reorientation of goals and means, an adaptation by institutions and policymaking, and the creation and development of a strategic culture promoting the idea of Europe as a military power. However, the existence and/or the degree of Europeanisation of French diplomacy are debatable. Two main arguments contradict the idea that France is strongly committed to the building of a common European foreign and security policy. First, Europeanisation is rhetorical as France continues to give priority to its independence of action; and second, Europeanisation is often confused with other processes such as 'Atlanticisation', 'Westernisation', or support to multilateralism.

The case of the EEAS will help to assess how and to what extent 'Europeanisation' has affected French foreign policy. More precisely, I will try to check whether the EEAS has inaugurated a new phase of 'Europeanisation' in the history of French diplomacy.

This article will focus on two main dimensions of the 'Europeanisation' process: uploading and downloading. According to many scholars, in EU foreign policy[5] and in EU studies[6] more generally, Europeanisation is not limited to the classic downloading approach, but also includes an uploading process from the national to the European level.[7] Downloading is seen as the adaptation of national policies, organisations and working processes in response to requirements and changes at the EU level. Uploading is defined as the instrumental

37 *Security Dialogue* 2006, 509–529. F. Charillon and Wong, R., 'France: Europeanization by Default?', in C. Hill and R. Wong (eds.), *National and European Foreign Policies Towards Europeanization* (London: Routledge 2011).

[4] F. Terpan, 'L'Européanisation de la Politique de Défense de la France', op. cit. F. Terpan, *The Europeanization of the French Defence Policy*, op. cit.

[5] R. Wong, 'The Europeanization of Foreign Policy', C. Hill and M. Smith (eds.), *International Relations and the European Union,* (Oxford: Oxford University Press 2005), 134–153. R. Wong and C. Hill (eds.), *National and European Foreign Policies*, *Towards Europeanization* (London: Routledge 2011).

[6] T. Exadaktylos and C. Radaelli, 'Research Design in European Studies: The Case of Europeanization', 47 *Journal of Common Market Studies* 2009, 507–530.

[7] S. Saurugger, *Theoretical Approaches to European Integration* (Basingstoke: Palgrave Macmillan 2013).

use of the EU by member states, which try to shape EU policies with a view to promote their national interests and transfer national preferences.[8]

In the case of France and the EEAS, and taking into account both the empirics collected and the existing literature on French foreign policy, I argue, in the first section, that Europeanisation does not correspond to the traditional top down influence exerted by Brussels-based institutions on national policies (downloading). Even though French diplomats acknowledge the importance of EU membership, the creation of the EEAS has not triggered major evolutions in the structure and functioning of the French MFA. Instead, Europeanisation of French diplomacy is an attempt to upload national preferences at EU level. French diplomats broadly share the view that the EEAS is closer to being a vehicle for promoting French national ambitions, rather than a source of transformation at the national level. In the second section, I put these findings in a wider perspective, first by explaining the French attitude through a cost/benefit approach, secondly by comparing the position of the Quai d'Orsay with that of the other Member States.

1. HAS THE EEAS TRIGGERED A EUROPEANISATION OF THE FRENCH MINISTRY?

There is no wide-reaching reform aiming at adapting the *Quai d'Orsay* to European diplomacy. French diplomats describe the relations between member states and the EEAS in very instrumental terms. The EEAS is seen as a useful but imperfect instrument, which can be used as a 'power multiplier'. In a way, French diplomatic elites in the *Quai d'Orsay* have been socialised to EU foreign policy, but their main concern is about uploading national interests, not adapting to the EEAS.

1.1 **Continuity and Change at the Quai d'Orsay: Adapting to the EEAS?**

This section presents the transformation of the *Quai d'Orsay* since the EEAS was launched (2009–2013). A major change had occurred a decade before, in 1999, when the French Ministry for Cooperation and Development was merged into the Ministry of Foreign Affairs. This was supposed to help 'normalise' the French African policy, or at least avoid a big divide between the African policy and other areas of external action. A more recent reform, dating back to 2009–2010, took place alongside the adoption of the Lisbon Treaty in 2007–2009 and the creation of the EEAS in 2010. However, an examination of the three 'or-

[8] A third dimension of Europeanisation – crossloading or elite socialisation contributing to policy convergence and a common diplomatic culture – can be combined with the downloading and uploading processes. Indeed, when member states upload national preferences to the EU, they often adjust their positions in order to maximize their chances to shape the EU agenda. Similarly, downloading processes affecting the organisation and policies of EU ministries of foreign affairs (MFAs) are often combined with crossloading phenomena such as the internationalization of EU membership by foreign policymakers.

ganisational' changes identified in the years 2009–2013 demonstrates that they were due to internal rather than external reasons, which invalidates the idea of the downloading process influencing the French MFA. The 'substantive' dimension of downloading (also considered as crossloading) will be analysed later.

Organisational Changes

A new public management approach

The main reason for reforming the organisation of the MFA in 2009–2010 was the adoption of a new public management approach at the ministerial level. The General Review of Public Policies (RGPP), launched in 2007, was applied to the MFA in early 2009.[9] To some extent, the creation of the EEAS could be considered as one of the elements to which the MFA must adapt. But the EU and its diplomatic service are not mentioned explicitly in any reform document. On 25 March 2009, the *Quai d'Orsay* announced a series of measures complementing the orientations of the RGPP. None of them was directly linked with the European Union. The *Quai d'Orsay* rejected the idea that the reform of the MFA could be linked with the EEAS.

The main point of the RGPP approach concerns the number and format of embassies and consulates. Three categories were created, depending on the importance of the host state and the scope of action that the embassy or consulate performs, i.e. all kind of missions, several priority missions, or a small number of missions. This evolution led to cuts in staff and diplomatic representation which, in addition to the decreasing budget of the Ministry, triggered considerable criticism, mostly by diplomats and politicians.[10] The number of staff was reduced by 1150 between 2009 and 2013, mainly in big embassies such as Antananarivo, Berlin, Dakar, London, Madrid, Rabat, Rome and Washington DC. The number of consulates was also reduced, while the number of embassies remained unchanged.

However, having an extensive diplomatic network remains a key objective for France. Clearly linked with the RGPP, reductions were not triggered by the establishment of the EEAS. The EEAS is not seen as a means to reduce the French diplomatic presence worldwide, at least in the short and medium term. This situation might change in the future, due to budgetary constraints; but to date there is no plan to close embassies and consulates in places where EU delegations could take over.

The creation of the EU Directorate

The office dealing with CFSP and the one in charge of the 'Community' aspects of external relations in the French MFA were merged in March 2009 into a

[9] F. Charillon, *La Politique Etrangère de la France* (Paris: La Documentation Française 2011), at 37.

[10] A. Juppé and H. Védrine, Cessez d'affaiblir le quai d'Orsay!, *Le Monde*, 6 July 2010, available at <http://www.lemonde.fr/idees/article/2010/07/06/cessez-d-affaiblir-le-quai-d-orsay_1383828_3232.html>. J. C. Rufin, 'Le quai d'Orsay est un ministère sinistré, *Le Monde*, 6 July 2014.

single directorate, dedicated to EU external action. The other offices are supposed to coordinate with the EU directorate prior to any contact with the EEAS. All diplomatic messages must be checked by the EU Directorate before being sent. Thus, the EU Directorate, which has gained considerable importance, is not a simple geographic service, but rather aims at coordinating the work of the other directorates, before meetings at the EU level. Yet, also in this case, there is no evidence of a French desire to adapt to the creation of the EEAS.

Bilateral agreements

Bilateral arrangements have been developed with other MFAs, in particular with Germany. France and Germany share some resources, such as buildings for diplomatic or consular representation abroad, and have launched a joint internship programme for students. However, the Conseil d'Etat, the highest French public law jurisdiction, has stopped the *Quai d'Orsay*'s co-locations of embassies with Germany. Pooling and sharing with other member states is not a major trend for France and it is unlikely to change in the foreseeable future. For bilateral arrangements, as well as the three other changes mentioned above, the diplomats interviewed have all denied any direct EEAS influence.

A substantive downloading process/crossloading process

Thus, the creation of the EEAS has not triggered major changes in the structure and functioning of the MFA. There is no wide-reaching reform aiming at adapting the *Quai d'Orsay* to European diplomacy. The idea of a division of labour is not on the table. During the recent Conference of Ambassadors on 29 August 2013, the French Foreign Minister Laurent Fabius only mentioned the EEAS *en passant*, making a vague reference to European burden-sharing and co-locations.[11] Clearly, the French administration tries to prevent any evolution that would endanger the tradition of national 'grandeur' and the position of France as an international actor.

This does not mean that French diplomats are unaware of the consequences that the new European service could entail. On the contrary, the fact that the EEAS might trigger convergence is acknowledged and even welcomed. A substantive downloading process – or crossloading process – already exists, which includes: increasing salience of European political agenda, adherence to EU common objectives, internalisation of EU membership,[12] and socialisation of foreign policy makers.[13] There is no evidence that this process has increased since the inception of the EEAS, although it is too soon to draw definite conclusions. But evolutions such as the creation of a EU Directorate dealing with both

[11] L. Fabius, *Discours de Clôture de la XXIème Conférence des Ambassadeurs* (29 August 2013), available at <http://www.diplomatie.gouv.fr/fr/le-ministre/laurent-fabius/discours-21591/article/discours-de-laurent-fabius-a-la>.

[12] C. Hill and R. Wong (eds.), *National and European Foreign Policies Towards Europeanization* (London: Routledge 2011), at 7

[13] M. Blunden, 'France', in I. Manners and R. Whitman (eds.), *The Foreign Policies of the European Union Member States* (Manchester: Manchester University Press 2000), at 26.

political and economic issues, while not being justified by the creation of the EEAS, reflect the same motivation behind the launch of EEAS: to bring together different aspects of external action and facilitate a global approach. In the French MFA, preservation of national interests and convergence with other member states' foreign policies are not seen as mutually exclusive. This observation, derived from the study of potential downloading processes, is also valid when looking at uploading processes, as the next section will show.

1.2 **French Expectations and the Quest for Effective Leadership**

French diplomats broadly share the view that the EEAS is a means to promote French national interests, rather than a source of transformation at the national level. This is consistent with the idea of Europeanisation as an uploading process, through which member states: *a*) seek to attribute competences to the EU; *b*) decide upon the degree of autonomy allowed to the EU institutions; and *c*) transfer their national preferences at the European level, using the EU as a 'power multiplier' or a 'cover/umbrella'.

The existence of an uploading process is confirmed by several elements, which fit very well in the three features of uploading: *a*) the contribution that France made to the setting up of the EEAS (conferral of competence); *b*) the use of the EEAS as a complement to national diplomacy, in a spirit of 'power multiplier' (autonomy); and *c*) the transfer of national preferences by promoting French leadership through different means (power multiplier).

Support to the launching of the EEAS

The French executive was very supportive of the creation of a European diplomatic service and played an active role in its foundation. In accordance with the French position, the EEAS is situated between the Council and the European Commission, and ensures that the Commission is kept at a distance in the field of security and defence. It was crucial for France that the EEAS did not become totally autonomous from the member states, and that it would comprise national staff as well as officials from the Council's General Secretariat and the former Directorate-General for the External Relations (DG RELEX).

The EEAS as a power multiplier

In France's view, the EEAS is supposed to complement member state MFAs and not replace them. According to French diplomats in the MFA, the rationale behind the creation of the EEAS was not to transfer specific tasks to the European level, but rather to bring coherence to the EU's external action and make Europe more visible in the international arena. Although they acknowledge that the EEAS already fulfils tasks which compete with national MFAs, and that transfers may occur in the medium and long term, the EEAS must bring added value to national diplomacies without harming MFAs.

This explains the dual position defended by French diplomats on the EEAS: the new Service must do more than what it actually performs, but it should not do too much either.

On the one hand, the EEAS is described as a 'baby' who still needs to grow or an 'instrument' which does not function very well yet. French diplomats consider that the transformation of the Commission offices into EU delegations has already brought changes to EU's diplomatic representation, but the process is still on-going and needs further improvements. They note that the EEAS does not issue its documents and reports at regular intervals and the latter are often rather poorly written. They acknowledge the existence of a constant flow of information and contacts between EU delegations and member state embassies, but state that the way heads of EU delegations perform their functions varies a lot, depending on the country and the personality of the official, since the background and the profile of the head of delegation are of considerable importance. They see the need for EU delegations to become more 'political' and less 'technocratic', in the sense of being constrained by 'administrative red tape'.[14] The EEAS is structured in a way that is very similar to a ministry of foreign affairs, but the culture of the EEAS is far from that of an MFA. The lack of political advisers is a serious problem and, although the process of strengthening the political skills has started, this remains insufficient. Recruitment of national diplomats in EU delegations should primarily be targeted at people with a 'political' background, i.e. diplomats exerting political functions within national MFAs. In addition, the EEAS is seen as an administration deprived of a 'rapid reaction' culture, contrary to the French MFA. This is mainly because the officials from the Commission have no background in crisis management.

French officials argue that the EEAS could be more active, visible and efficient if a new High Representative of the Union for Foreign Affairs and Security Policy (HR/VP) were appointed. The role played by Pierre Vimont, a high-rank French career diplomat, as EEAS's 'number 2', is important but far from sufficient. In addition, they all consider that Catherine Ashton has not managed to ensure coherence among the Commissioners in charge of external policies, nor has she placed 'economic' external policies under the influence of a strong political framework. In particular, Stefan Füle, the European Commissioner for Enlargement and European Neighbourhood Policy, has benefited from a large room for manoeuver instead of being constrained by precise political guidance. At the beginning of her mandate, Ashton was also criticised for not being active enough in security matters, as if she were not truly interested in the building of the Common Security and Defence Policy. However, more recently she has become more active on this file, an evolution which is acknowledged by the French MFA.

On the other hand, apart from these expectations towards the EEAS, the MFA places limits on the empowerment of the EEAS. Although the officials at the French MFA have no clear views on the potential impact of the EEAS, they

[14] One interviewee illustrates this technocratic problem with the example of financial issues and the complexity of accounting rules in EU delegations, which hamper their political and diplomatic work.

foresee some promising cooperation domains such as EU diplomatic demarches, representation and analysis or consular protection. However, for each of these areas of cooperation, the Service is seen as a complement to national diplomacies, and this position will undoubtedly remain unchanged in the near future.

Regarding EU diplomatic demarches and initiatives on the ground, while agreeing on the leading role played by EU delegations, French officials argue in favour of a complementary role for national ambassadors. Besides, the possibility for 'big' member states to be involved should be maintained, as they can provide added value to EU demarches. The current code of conduct for diplomatic demarches is viewed as 'restrictive'. On the other hand, it is sometimes seen as beneficial for France to let the EU delegations undertake 'difficult' demarches, such as investigating human rights claims, because they can have side effects and jeopardise economic (or other) interests.

As far as representation and analysis are concerned, according to the French MFA the EEAS could replace national activity only in those countries which are not closely linked with French diplomacy. In international organisations, EU representatives are welcome, with the exception of the UNSC where France is reluctant to support a strong European involvement due to its special position as a permanent member, although Paris accepted that the High Representative/Vice-President (HR/VP) addresses the UNSC.[15] The coordination role of EU delegations is largely seen as positive or very positive, although it is difficult to generalise. Coordination meetings are held on a regular basis in all countries, and new procedures have been adopted, based on best practices, but the intensity of coordination depends on the country. What is seen as promising is the designation of a 'lead state', which provides for a steering role of one member state in crisis coordination and consular protection, in close contact with the EU delegation.

Regarding consular protection, all member states would benefit from burden-sharing and coordination. French officials regret that the United Kingdom has hindered some evolution towards Europeanisation in this domain. Since the 1997 Amsterdam Treaty, each member state has a duty to protect EU citizens abroad where they are not represented by their own nationality. Thus, the current burden on French diplomatic missions is considerable, due to its large diplomatic network. In cases of emergency, consular protection and evacuation should be coordinated by EU delegations, according to the *Quai d'Orsay*. France also supports the creation of a 'European Fund' to ensure that every member state shares the burden.

At a more political level, the High Representative (HR) is criticized for her low profile on several international issues. At the same time, the French Foreign Minister is not willing to accept any reduced visibility whatsoever. Thus, the HR should be more visible, while the French Minister should remain active in the international arena. French diplomats note that the most influential member

[15] C. Ashton, Address by the High Representative Catherine Ashton at the UN Security Council on the Cooperation between the EU and the UN on International Peace and Security, *140214/02* (14 February 2014).

states (the three 'big' member states – France, Germany and the United Kingdom – and a few others) try to resist any evolution which would give true leadership to Ashton, but are obliged to accept some degree of co-decision with her in the making of EU foreign policy. The HR/VP is expected to coordinate with national foreign ministers more than she actually does, and some note that coordination was more efficient with Javier Solana as the High Representative.

Transfer of national preferences through leadership

The MFA searches for organisational tools and schemes favouring French leadership in the EEAS and EU foreign policy. This is an important task for the Ministry, which is not empowered with administrative coordination in fields other than foreign policy.[16] Three strategies have been developed in recent years.

First, French diplomacy has been organised in a way which ensures the definition of clear and strong national positions to be defended in Brussels. The new role of the Directorate in charge of the EU may not be a response to a European request (downloading); yet, it is a form of Europeanisation in that it is meant to facilitate the uploading of French preferences.

Second, France has been proactive in EEAS's staffing issues, and the presence of French personnel in the Service is regarded as highly satisfactory. There was no pre-selection at national level, but information was circulated widely among civil servants. An intranet site was open to any civil servant keen to apply, not only diplomats. A programme was set up to support candidates, and a website was dedicated to applications. Advice was given to help candidates fill in the application form and prepare for the job interview, which is quite different from the oral exams organised in France to join the *Quai d'Orsay*: indeed, the interview to join the EEAS was perceived as being of 'Anglo-Saxon type'. The programme also included a linguistic dimension, and a seminar on recruitment to the EEAS was organised in collaboration with the *Ecole Nationale d'Administration* (ENA).

Many French candidates applied for positions in the EEAS, which proves that the EEAS is of great interest to French civil servants. The MFA has highlighted that the EEAS is a top priority for France and a very valuable experience for those who are appointed. The Human Resource Office played a key role in convincing potential candidates that the EEAS is important and that a position in the EEAS would be an asset when returning to the French administration. The appointment of Pierre Vimont as the EEAS Executive Secretary General serves as an example of the French readiness to send its best officials to the EEAS. France was very successful during the first stage of the staffing process, but the MFA is expecting a 'negative' trend, with the next rounds of appointments benefiting Central and Eastern European countries.

[16] C. Lequesne, *La France dans la nouvelle Europe: assumer le changement d'échelle* (Paris: Presses de Sciences Po 2008). C. Lequesne and O. Rozenberg, *The French Presidency of 2008: The Unexpected Agenda* (Stockholm: Swedish Institute of European Policy Studies 2008).

The *Quai d'Orsay* keeps in close contact with the French staff working in the EEAS, as well as in the Commission and the Council of the European Union. Contacts are frequent, with diplomats seconded to EU institutions and the EEAS in particular, and significant relations are also in place with nationals working as EU officials. This network of French diplomats and experts contributes to creating a steady flow of information and promoting French interests within the EEAS. At the same time, the MFA notes that these people are disconnected from their country and have to remain as neutral as possible. It is very likely that French diplomats in the EEAS will be 'Europeanised' and will help to generate a European diplomatic culture. While French diplomats bring their national diplomatic culture to the EU level, they most certainly spread a European diplomatic culture once they get back to the national level. Uploading does not preclude crossloading.

The uploading of French preferences to the EU level depends on the way the MFA is connected to the EEAS. French diplomats are satisfied with the current level of contacts between the two institutions. However, it is not clear whether this flow of exchanges has increased since the entry into force of the Lisbon Treaty. Several Council Working Parties meet on a more regular basis, and more representatives from the French MFA could be added in a few of them, in order to help fill the gap between the MFA and 'Brussels'. French officials have also noticed an increase in information-sharing. From a French perspective, the preparation of the Foreign Affairs Council's meetings has changed, and improved, thanks to the new status of the High Representative. Still, the HR needs to take into account the positions of member states, especially the most influential ones, just as the Presidency had to do before the Lisbon Treaty. There are frequent 'conference calls' between France, Germany, the UK and the EEAS, giving birth to a kind of 'club' of big member states, which is most welcomed by the French MFA. It is, therefore, possible to argue that France has gained privileged access to the EEAS.

France is well-situated to exert influence, on both the EEAS and other member states[17], especially 'privileged' ones such as Germany and the UK, whose positions are crucial in EU foreign and security policy. At the same time, France is the object of external influences, with crossloading complementing uploading.

There is plenty of evidence to suggest that France seeks to use the EEAS as both, a 'power multiplier' and a 'cover/umbrella'. For example, the MFA worked hard to convince the EEAS and member states, in particular Germany, that a European strategy was needed towards the Sahel region. These efforts led to the adoption of an official EU document in 2011. Most of the French initiatives in Africa tend to justify French activism in a region where its actions are sometimes viewed with suspicion, for historical and political reasons. For example, France negotiated with other member states in order to convince them to launch EU operations in the Democratic Republic of Congo (Artemis in 2003, EUFOR in 2006, EUPOL since 2007, EUSEC since 2005), Chad/Central African Republic (EUFOR in 2008–09), and the Central African Republic (EUFOR in 2014).

[17] F. Charillon and F. Ramel, 'Action Extérieure et Défense: L'Influence Française à Bruxelles', *Les Cahiers de l'IRSEM*, French Defence Ministry (2010).

The French 'Recamp' programme, aimed at supporting the development of African crisis management capacity, was Europeanised and became 'EuroRecamp' in 2011. More generally, the EU was used to demonstrate that the French foreign policy is now driven by ethical considerations.[18] Therefore, it is not surprising that the MFA tries to use the EEAS to 'cover' a French initiative (see, for example, the use of the EU to legitimise the France's 'African policy') or to search for a bigger impact than what it would have had through individual action. However, empirics do not confirm that this use of Europe as an 'influence multiplier' or a 'cover/umbrella' has increased since the inception of the EEAS.

2. ANALYSING THE FRENCH POSITION TOWARDS THE EEAS

In this last section, I explain the position towards the EEAS by using two analytical tools: *a*) The French position is the result of a cost-benefit calculation; support for the development of the EEAS is dependent on the balance between costs (in terms of losses in national sovereignty) and benefits (in financial terms or in terms of influence and prestige): the higher the gap between cost and benefit, the more limited the Europeanisation process; and *b*) The French position towards the EEAS depends on the balance between five competing objectives: Europeanisation, 'grandeur', independence, cooperation with other member states, and partnerships outside the EU. The Europeanisation of the MFA is strong when it does not compete with another objective: each time it clashes with another important priority, the Europeanisation process weakens.

2.1 **Explaining the French position through a cost-benefit approach**

The French support for the development of the EEAS is dependent on the balance between costs (in terms of losses in national sovereignty) and benefits (in financial terms or in terms of influence and prestige): the higher the gap between costs and benefits, the more limited the Europeanisation process.

The cost/benefit analysis will be applied to seventeen items which have all been mentioned in the first section. These items pertain to different kinds of interrelations between the French MFA and the EEAS, be it potential or actual relations. They can be classified in six categories, depending on the type (top down/bottom up) and the degree (non-existent or weak/medium/strong) of Europeanisation (see Table 1).

The stronger forms of Europeanisation (points 12, 13, 14, 15, 16 and 17) are explained by a huge difference between low costs and high benefits. Each time benefits largely exceeds costs, Europeanisation is welcomed by the MFA. The costs of empowering a Directorate for European affairs (point 13) are non-existent, while the benefits of defending strong positions at EU level are high. Similarly, a strong presence by French officials in the EEAS (point 14), as well

[18] F. Charillon, 'L'Ethique: Le Nouveau Mot d'Ordre de la Politique Etrangère de la France?', 3 *Revue Internationale et Stratégique* 2007, 87–93.

Table 1 – Six Types of Top-down/ Bottom-up Europeanisation of the French MFA

A. Top-down Europeanisation/Downloading
Non-existent (or weak): 'organisational' downloading process
1. Application of a new public management approach to the EEAS
2. Reduction in the number of embassies and consulates
3. Bilateral agreements with embassies from other member states
Medium: crossloading or 'substantive' downloading process
4. Increasing salience of the EU political agenda, adherence to a common objective, compliance with EU decisions and internalisation of EU membership
Strong
B. Bottom-up Europeanisation/ Uploading
Weak (or non-existent): search for complementarity in diplomatic activities
5. European and national demarches
6. Representation and analysis at EU and national level
7. Cooperation in diplomatic protection
8. Work-sharing between the Foreign Minister and the High Representative
Medium: French expectations of the EEAS
9. Demands for a more active EEAS
10. Demands for a more 'political' EEAS
11. Demands for more rapid reactions by the EEAS
Strong: French leadership in creating and influencing the EEAS
12. Creation of the EEAS
13. New role of the Directorate dealing with European affairs
14. Staffing policies in the EEAS
15. Privileged access to the High Representative and the EEAS
16. Attempts to influence foreign policies of other member states
17. Use of the EEAS as a 'cover/umbrella'

Source: Author's own

as privileged access to the HR and the EEAS (point 15), will only strengthen French influence, without weighing the financial burden on the MFA.

In opposite cases, when the cost-benefit analysis is negative, with high costs and low benefits, Europeanisation remains weak or non-existent, be it in downloading or uploading. Hence, the 'organisational' downloading process is non-existent or weak (points 1, 2 or 3), because the MFA would lose a lot in terms of influence and prestige if national diplomatic means were reduced and compensated by a rise in European diplomatic representation. The uploading process of searching for complementarity between the MFA and the EEAS by transferring certain diplomatic tasks to the EU level – such as representation and analysis, demarches, diplomatic protection and representation by the High Representative (points 5, 6, 7 and 8) – is weak for the very same reasons. Diplomatic protection, however, is a little different from the other cases, since French diplomats would more easily accept a loss of power in this field, given that Europeanisation could help France lighten its financial and administrative burden, without losing much in terms of prestige and influence.

In between these two opposite categories are situations where costs equate benefits, leading to a medium level of Europeanisation. This pertains to crossloading or 'substantive downloading' (point 4), as well as 'French expectations

of the EEAS' (points 9, 10 and 11). Crossloading or 'substantive downloading' (point 4) means less autonomy for EU member states, but does not prevent France from taking the lead and searching for a 'power multiplying' effect. The same reasoning applies to 'expectations of the EEAS' (points 9, 10 and 11), where France could lose something due to competition with the EEAS, but it could also gain a lot if the EEAS helps the EU to emerge as a 'global power'.

2.2 Is the French position similar or different from that of the other Member States?

This section aims at comparing France with the other member states, in order to check whether the case of the *Quai d'Orsay* is specific or, on the contrary, rather similar to that of the other member states. To answer this question, I rely on the results of a research project co-directed by Rosa Balfour and Kristi Raïk (and based on a series of interviews conducted in 15 member states),[19] as well as additional information provided by the French diplomats.

As Balfour and Raïk notice, there are a number of features that are common to all countries. First, when there are foreign policy adaptations, they do not seem to be linked with the EEAS. They result from a broader europeanisation process, which started long before the inception of the external service. Second, every member state seeks to upload national preferences, in a more or less visible manner. Third, apart from a few exceptions (United Kingdom, Czech Republic), there is a general demand for more leadership on the part of the EEAS and the High Representative. This demand, however, is combined with the idea that the EEAS should remain under the control of the member states, within a preserved intergovernmental framework.

This general pattern of relation between the EEAS and national Ministries of Foreign Affairs should not mask the existence of differences between the member states. Dissimilarities do exist among the so-called 'Big Three' (France, Germany and the United Kingdom) and between the 'Big Three' and countries of small and medium size.

France, Germany and the UK have succeeded in rationalising their diplomatic networks while avoiding a downsizing. No one, however, justifies these changes by the creation of the EEAS and the opportunities it offers. They all try to exert control over the EEAS and, in this regard, they all are satisfied with the level of contacts with the EEAS (compare to other member states, they all enjoy a privileged access to the service).

Regarding the differences, it seems that, even if the three member states wanted to have a lot of nationals working in the EEAS, France was the most successful in the staffing process. Germany was less successful in the first stage and therefore had to change its staffing strategy. The UK was also less successful but has obtained key posts, starting with the High Representative

[19] R. Balfour, K. Raïk (eds.), 'The European External Action Service and National Diplomacies', 73 *European Policy Centre Issue Paper* 2013, available at http://www.epc.eu/documents/uploads/pub_3385_the_eeas_and_national_diplomacies.pdf .

herself. More importantly, France and Germany want the High Representative and her external service to be more active in taking initiatives. This is not surprising, as France and Germany claim 'parenthood' over the EEAS, while the UK makes no mystery that it was reluctant since the beginning and remain very prudent. The British, more than the Germans and the French, were satisfied with Ashton, not for her performance in advancing European interests, but because she has not threatened national sovereignties. When it comes to the functioning of the EEAS, however, Germany pushes for more integration (enlargement of the EEAS' competences to the European Neighbourhood Policy and financing assistance), while France is more cautious, and the UK is actively opposing any kind of competence creep.

These attitudes towards the EEAS mirror the different positions of the three countries on CFSP in general. Regarding foreign policy issues, France and Germany are more supportive of CFSP than the UK. Regarding security issues, France is clearly pro-active, while Germany varies between support and reluctance, and the UK still gives precedence to the US and NATO.

From the viewpoint of small and medium size member states, the 'big three' are seen with distrust. They all reject the leadership of a 'directoire' and want the EEAS and the High Representative to counterbalance (instead of accepting) the leadership of the 'big three'. The influence of the three cannot be denied, because they weigh a lot more than other countries in terms of diplomatic, political and military resources, and due to their privileged access to the service. It should not be overestimated, however, in a EU composed of 28 member states deciding by unanimity/consensus. And it does certainly not take the form of a 'directoire', for two main reasons: the remaining differences in the three countries' diplomacies and the fact that small and medium size countries can ask for/follow the leadership of the HR/EEAS whenever they want to oppose the big countries.

3. CONCLUSION

Europeanisation in the field of foreign affairs and security is a longstanding process, which dates back to the early 1970s. The European External Action Service is only another stage in this process – and French diplomats view the developments since the introduction of the Lisbon Treaty in this light.

The EEAS is seen by French diplomats at the *Quai d'Orsay* as a new instrument, allowing the EU to become more visible on the international scene. Of course, the MFA tries to influence the EEAS and the other member states, and seeks to use it as a power multiplier, but it also needs to find compromises with other states and take into account the proposals made by the EEAS. Although French diplomats try to project national priorities to the EU level, they are aware that they also need to adapt to the decisions taken by the EU on foreign and security issues.

Paris' support of the EEAS therefore results from the balance between costs (in terms of losses in national sovereignty) and benefits (financial, or in terms of influence and prestige). Stronger patterns of Europeanisation are visible when the EU framework is not in competition with other aims of French foreign policy.

By contrast, the higher the gap between costs and benefits, the more limited the Europeanisation process.

The French position is not so different from those of the other member states. All the member states are cautious and favour uploading processes over downloading adaptation. The emphasis that France has put on CFSP may, however, explain why the French efforts to upload national preferences to the EEAS are more visible, compare to Germany and the UK.

EU DELEGATIONS, EU SPECIAL REPRESENTATIVES AND COMMON SECURITY AND DEFENCE POLICY MISSIONS: BUILDING A TRUE COOPERATIVE RELATIONSHIP

Erwan Fouéré

INTRODUCTION

A distinguishing feature of the EU's foreign policy identity is the formidable human resources at its disposal – 139 Delegations spread across the globe, as well as 11 EU Special Representatives together with, at last count,17 CSDP Missions addressing critical conflict or potential conflict situations as close as Bosnia and Hercegovina and as far away as Afghanistan. They represent the human face of the EU out in the field, and determine the success or failure in the implementation of EU's foreign policy.

The Lisbon Treaty set out key objectives to ensure that the EU achieves maximum consistency and coherence in the development of its foreign policy. It provided for the establishment of a new body (the European External Action Service, with Council Decision 2010/427/EU of 26 July 2010 setting out the organisation and functioning of the new Service), and new actors, one of them being the High Representative for Foreign and Security Policy and Vice President of the European Commission.

Although the objectives were clear, the methods used unfortunately added new layers of bureaucracy and a more burdensome decision making process. Fault lines quickly appeared both at Headquarters with the lack of a common narrative or strategic vision, as well as in the Delegations with split management rules for both the EEAS and Commission staff, as well as for budgets, which Delegations had to manage. Problems also arose in CSDP mechanisms with long delays between the decision to establish a CSDP mission and the availability of the necessary resources to make it work.

The assessment of the Court of Auditors in its Special Report published earlier this year was quite clear, 'The establishment of the EEAS was rushed and inadequately prepared, beset by too many constraints and vaguely defined tasks'.[1]

The Report particularly highlights the lack of an overall vision, thereby undermining the key objective of consistency and coherence. 'It has not developed a comprehensive planning framework, so each department decides how to plan

[1] European Court of Auditors, 'The Establishment of the European External Action Service', *11 Special Report* (November 2014), paras. 13-22, available at < http://www.eca.europa.eu/lists/ecadocuments/sr14_11/sr14_11_en.pdf>.

its own activities. This hampers the EEAS's overall efficiency as tasks and resources do not necessarily follow top-level objectives.'[2]

In her mid-term review of the EEAS, published in July 2013, the HR/VP outlined some of the difficult challenges that the new Service had to face from the outset. To use her own words: 'I have likened it to trying to fly a plane while still bolting the wings on.'[3] Her welcome frankness was however not matched by clear recommendations on what needed to be done. It will now be up to the new HR/VP to review the situation and put forward new approaches.

While it would be wrong to ignore some notable successes of these first years of the EEAS, such as the Pristina/Belgrade dialogue, nevertheless it is true to say that the record of these years did not live up to the expectations set by the Lisbon Treaty, and left many, both inside and outside of the EU institutions, disappointed. A major reappraisal is therefore necessary. This is all the more urgent in view of the emerging crisis in Europe over Ukraine and the increasing complexity of foreign policy challenges facing the EU.

The appointment of the new HR/VP and the start of the next European Commission's five year mandate, offers a golden opportunity to rectify some of the ills that have beset the new Service. Some adjustments to the 2010 Council Decision will certainly be helpful. However, I believe this by itself will not be enough.

A NEW STRATEGIC FRAMEWORK?

As stated in the Court of Auditors Report above mentioned, what is needed is a new strategic framework for EU foreign and security policy. The last comprehensive document setting out the EU's strategic foreign policy goals dates back to the European Security Strategy adopted in 2003.[4] Already then, references to the importance of 'greater coherence', and to the need to 'develop a strategic culture that fosters early, rapid, and when necessary, robust intervention' featured prominently. This was further emphasised in the European Council's Report in December 2008 on the implementation of the European Security Strategy, where it is stated that the EU must be ready to shape events by 'becoming more strategic in our thinking'.[5]

There is no reason why the new HR/VP could not come forward with a new document setting out a strategic framework which would guide the EU's foreign and security policy in the years ahead.

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[2] Ibid., para., 28.

[3] European Union External Action Service Review (Summer 2013), available at < http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf>.

[4] European Security Strategy, *A Secure Europe in a Better World*, adopted by the European Council at its 12 and 13 December 2003 meeting, as laid down in Art. 13 (2) TEU (Nice) assigning the European Council to decide on common CFSP strategies in areas where the Member States have important interests in common.

[5] Report on the Implementation of the European Security Strategy – Providing Security in a Changing World (10 December 2008), available at < http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf>.

This could help in building a common narrative, which has been lacking so far. It would provide greater impetus for enhanced coherence in the EU's foreign policy actions and between the different EU foreign policy actors, with the visibility that would come with it. Above all, it could help to promote a 'culture' of EU foreign policy, an 'esprit de corps' bringing together the different institutions, both at Headquarters and out in the field, all working for a common purpose. This 'esprit de corps' would help to replace the sterile debate as to whether it is the Commission or the EEAS which should prevail, with one where it is the EU itself which benefits.

From my own modest experience out in the field, I would propose the following practical solutions to address some of the fault lines that have appeared since the establishment of the EEAS:

RECRUITMENT PROCEDURES

In addition to the findings of the Court of Auditors regarding the unnecessarily heavy procedures for appointment of the Heads of Delegation, I would underline the need to pay greater attention to the profile of the Head of Delegation to be appointed in conflict zones or countries prone to conflict, or emerging from conflict such as in the Balkans. Whether it is a diplomat from the diplomatic service of an EU member state or an established EU official, the person appointed should have proper experience in dialogue facilitation and mediation. This was one of the issues highlighted at the Irish Presidency Conference on the role of the EU as a Peacemaker, organised jointly with the European Parliament and the EEAS in May 2013.

DELEGATION MANAGEMENT

The split in Delegation management rules and procedures for EEAS staff on the one hand and European Commission staff on the other has created a difficult situation for the Head of the Delegation. As 'captain of the ship', he or she has to make sure that all the staff irrespective of whether they are EEAS or Commission row in the same direction. The current rules make that task all the more difficult. Some of these rules are archaic to say the least, such as setting a limit on the amount of time a Commission staff can work on EEAS matters, and only add to a disjointed service. It also undermines the objective of ensuring coherent policy objectives linking the political dimension with the project selection and management.

The same is the case with regard to the budgets managed by the Delegation, with different rules governing the EEAS and Commission budgets. Clearly there will need to be modifications to the Financial Regulations to enable a more rational solution for Delegations in managing their 'financial circuits' and in the 'delegated authority'.

TRAINING

With the influx of diplomats from EU member states at different levels in the Delegations, there is a need for more consistent training. At the moment, the training budgets available for Delegations or even at HQ are pitiful and don't allow for adequate training. There should be a more systematic approach to training which could take place not just at HQ level, but also at regional level out in the field, which could help to reduce costs, and would bring Delegations in one region to meet together and exchange experiences.

EU SPECIAL REPRESENTATIVES

In her 2013 Review above mentioned, the HR/VP proposed that EUSRs be 'fully integrated within the EEAS while retaining a close link to the member states via the PSC' (Political and Security Committee).[6]

Past experience has shown that EUSRs constitute an important network of senior advisers and diplomats who underpin the functions of the HR/VP and ensure a visible presence of the EU in countries prone to conflict, over and above the EU Delegations that are still struggling under financial and administrative constraints. In particular the 'double-hatted model has proven to be a good way of ensuring maximum synergy between the merged EUSR and Delegation staff to achieve the best results in EU action in the field, as was the case in the Macedonian model. I believe this model should continue.

As for individual EUSRs, it is by no means certain that integrating them into the EEAS as proposed by the HR, will be the right solution. Apart from the danger of becoming lost in the multiple layers of the EEAS hierarchy, the flexibility under which they operate would be lost and they would lose their ability to act as a focal point within the EU institutional system in what unfortunately remains a very competitive environment.[7]

INTERACTION WITH EUSRS AND CSDP MISSIONS

In an ideal environment, the interaction between Delegations, EUSRs and CSDP missions should work well with clear lines in the chain of command and regular consultation at the field level. However in reality, how it works often depends on the personalities of the people involved. The important element for ultimate success resides in the EU pursuing a comprehensive approach in the appointment of the EUSR or in the development of the CSDP mission from its inception, making sure that it fits into an overall strategy for the country or region concerned. This would make close interaction on the ground much easier.

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[6] See EEAS Review, *supra* note 3.

[7] See further E. Fouéré, 'The EU Special Representatives: A dying breed?', Centre for European Policy Studies (CEPS) Commentaries (13 December 2013), available at < http://www.ceps.eu/book/eu-special-representatives-dying-breed>.

CLASSIFIED INFORMATION AND COOPERATION WITH MEMBER STATES OUT IN THE FIELD

Delegations are often not equipped to process classified information, or lack proper security clearance. In countries or regions prone to conflict, having access to secure information becomes crucial. In my own experience, because of at times lack of up to date intelligence information from HQ, I often had to depend on the intelligence gathering capacity of some of the larger member states who made classified information available to me on an informal basis.

This is an area which should be the subject of clear procedures and guidelines to ensure a more systematic cooperation between Delegations and member states' embassies out in the field. It also emphasises the importance of the EU developing at HQ level more comprehensive intelligence gathering cooperation with member states.

WORKING WITH CIVIL SOCIETY AND MEDIA

There needs to be a more systematic and intensified level of cooperation with civil society actors out in the field. At the moment, despite dedicated EU funded programmes, the level of cooperation with civil society often depends on the personality of the Head of Delegation concerned. Cooperation with civil society organisations is particularly important in post conflict societies, where the level of trust between the government and the citizens often remains weak. These civil society organisations assume a vital role of bridge building in creating a climate of trust, particularly in multi-ethnic societies. The same goes for the media.

COOPERATION WITH OTHER INTERNATIONAL ACTORS

There needs to be more active interaction with organisations such as the Council of Europe and the OSCE. This is particularly important in those regions, such as the Caucasus or the Balkans, where notably the OSCE Field Missions are present. The EU constitutes over half of the OSCE membership and provides 70% of its budget. The EU should be more systematic in depending on the OSCE's expertise in areas where the EU lacks such expertise, such as in the media and on minority issues. The added value of building a more strategic partnership out in the field can only enhance the EU's effectiveness in achieving its foreign policy goals.

CONCLUDING WORDS

To conclude where I started – the European Union has at its disposal unique human resources with a rich experience gained over many years. This has helped to shape the EU's foreign policy identity, with many successes to its credit, going back to the initial stages of the Political Cooperation in the early

seventies. This should not be forgotten. Indeed the 'institutional memory' of those achievements should be preserved to ensure a more consistent policy approach and avoid wasting resources on trying 'to re-invent the wheel'.

What is needed now is a more determined approach to ensure that the EU's human resources capacity, reflected both at Headquarters and out in the field, achieve its full potential. Making the administrative rules less complex, and adjusting the Council Decision establishing the EEAS will help to address some of the fault lines that have arisen during these first years of its existence.

Above all, what is needed is a change of mind set between the EU institutions from one of competition to one of the added value which each one can bring to the benefit of the EU and its foreign policy identity.

A LEGAL APPROACH TO JOINT PROGRAMMING IN DEVELOPMENT COOPERATION POLICY: COOPERATION IN ACTION LED BY UNION DELEGATIONS

Mireia Estrada-Cañamares[1]

1 INTRODUCTION

Joint programming in development cooperation policy, by which I mean external assistance coordination at the programming level, between the EU and its member states, is clearly on the move. The initiative has already led to joint programming documents in around 10 third states,[2] and it is expected that 'joint programming processes [will be] operational in 40 or more partner countries by 2017'.[3] In spite of these developments, nothing can be found in DG DEVCO's website regarding joint programming in this area of EU external action.[4] The exercise has not, at least for the time being, attracted much attention from the literature either. The pieces written so far analyse joint programming from the aid effectiveness perspective. The main focus is therefore on how the initiative can lead to a more effective use of development cooperation funds and the state of play regarding its implementation.[5]

My aim is to add the legal dimension to the academic debate by examining how joint programming fits into development cooperation policy and EU external relations law more generally. On the one hand, despite being a soft law initiative, there is a strong legal framework underpinning joint programming, which has led me to refer to it as a 'tailor-made' initiative for development cooperation policy. On the other hand, the exercise has an important explanatory value as regards the link between the principles of sincere cooperation, coherence and effectiveness, which is well established in the treaties and case law of the European Court of Justice (ECJ). The renewed role of Union delegations as lead-

[1] I was a trainee at the EU delegation to Ethiopia between August and November 2014. Any reference to joint programming in Ethiopia is taken from information obtained during this traineeship. Besides, I would like to thank professors Marise Cremona and Christophe Hillion for their feedback on an earlier draft of this paper. All remaining errors and omissions are my own.

[2] Data presented by EEAS' and DEVCO's officials at the 'EU Joint Programming Guidance Workshop', Stockholm (11-12 September 2014). The aim of the Workshop was to discuss a guidance package on joint programming for EU and member states' staff that should be finalised by the end of 2014.

[3] Mexico High Level Meeting Communiqué (16 April 2014), at 12, outcome document of the First High Level Meeting of the Global Partnership for Effective Development Co-operation.

[4] This is not the case for joint programming in the European Research Area, on which the Commission's website provides detailed information, available at <http://ec.europa.eu/research/era/joint-programming_en.html>.

[5] Two examples of this approach are: M. Furness and F. Vollmer, 'EU Joint Programming: Lessons from South Sudan for EU Aid Coordination', 18 *DIE Briefing Paper* (2013); and G. Galeazzi *et al*., 'All for one or free-to-all? Early experiences in EU joint programming', 50 *ECDPM Briefing Note* (2013).

ers of the process since the Lisbon Treaty innovations, as well as the difficulties they are encountering in bringing it forward, deserve attention too. Furthermore, section 2 addresses the notion and place of joint programming in the EU's development cooperation policy agenda and sets the scene for the legal analysis.

2 JOINT PROGRAMMING IN DEVELOPMENT COOPERATION POLICY: WHAT IS IT ABOUT?

2.1 **A three step exercise, and no more**

It is crucial to clarify at the outset the notion of joint programming in development cooperation policy, because even in EU policy documents this is not always obvious. The clearest reference to joint programming, on the basis of which the exercise is currently being implemented, is the one in the 'Council Conclusions for Busan' (2011). In the light of these Conclusions, the initiative comprises three different steps: '[1] joint analysis of and joint response to a partner country's national development strategy, identifying priority sectors of intervention, [2] in-country division of labour: who is working on which sectors, [3] indicative financial allocation per sector and donor.'[6]

The first element of joint programming is thus concerned with the identification of the partner country's specific needs and the definition of the overall lines of the EU response.[7] In compliance with the principles of ownership and alignment, the Union promotes the use of the partner country's development strategy or plan, as the basis of joint programming. Whenever possible, the choice of the EU's strategic sectors of intervention should be grounded on national policy documents.[8] Once the main lines of the EU response have been drawn, the question as to 'who does what' becomes central. The second step of joint programming therefore consists in a division of labour between the different actors involved (EU, member states and 'like-minded' donors).[9] Pursuant to the principle of concentration, each actor should focus on a limited number of sectors, according to its comparative advantages.[10] Previous to carrying out the division of tasks, 'mapping' exercises are essential so as to have a clear picture

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[6] Council Conclusions, 'The EU Common Position for the Fourth High Level Forum on Aid Effectiveness (HLF-4, Busan, 29 November – 1 December 2011)', at 27. For instance the EU delegation to Ethiopia bases joint programming in the country on the notion provided in these Conclusions.

[7] Notice that joint programming happens between Union and member states' development cooperation policies. References to the EU here and throughout the paper therefore often imply the Union and its member states acting 'jointly'.

[8] Commission Communication, 'Increasing the impact of EU Development Policy: an Agenda for Change', *COM (2011) 637* final welcomed by the Foreign Affairs Council (14 May 2011), at 4.

[9] Notice that joint programming is open to 'like-minded' non-EU donors. 'Council Conclusions for Busan', *supra* note 6, at 28.

[10] See, for example, the EEAS-Commission 'Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI) – 2014-2020' (15 May 2012), at 9 and at 13.

about who is doing what and how. The first and second stages should finally lead to indicative financial allocations, whereby donors commit to allocating certain sums of money in the sectors where they will operate and within the framework of the agreed strategy. Furthermore, joint programming cannot succeed without a certain degree of synchronisation of the programming/planning cycles of all actors involved (donors and partner country). This is so because, if the EU and its member states decide to jointly address the needs of a state by sharing a strategy and dividing the work among themselves, they will necessarily have to operate on the basis of similar timeframes.[11]

In the best-case scenario, the three core elements of joint programming, referred to here as the three 'steps' of the process, should be included in a single joint programming document. In the context of the programming of the 11th European Development Fund (EDF) and Development Cooperation Instrument (DCI) for 2014-2020, and again in an ideal situation, the joint programming documents should have been agreed upon before the conclusion of EDF and DCI programming documents, which would have allowed the latter to incorporate the results of the joint programming exercise. In practice, however, this proved difficult.[12] In the case of Ethiopia, for example, a 'Joint Cooperation Strategy' was signed in 2013,[13] but the second and third steps of the initiative are yet to be concluded. The National Indicative Programme (NIP) for Ethiopia's 11th EDF was thus not able to reflect on specific financial commitments resulting from joint programming. In view of these circumstances and in order to have joint programming operational as soon as possible, the compromise solution found has been to advance the mid-term review of the 11th EDF to 2016-2017. It is expected that, by then, a final joint programming document will be in place, so the results can be included in the review.

Besides the exchange of information accompanying joint programming, other main benefits of the initiative include the reduction of aid fragmentation, overlapping activities and funding gaps, as well as the lowering of transaction costs for donors and partner countries alike.[14] This is why for joint programming to have a real impact its three core elements must be completed. Nevertheless, in line with its gradual and multi-step character, joint programming can be said to occur in a partner country as soon as the EU and its member states have decided to work towards a joint programming document.[15]

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[11] See 'Instructions for 11th EDF and DCI programming', *supra* note 10, at 12.

[12] Notice that the EEAS and the Commission even considered the possibility of joint programming documents replacing EDF and DCI multi-annual indicative programmes (MIPs) if they contained 'all the elements required for a MIP', 'Instructions for 11th EDF and DCI programming', *supra* note 10, at 15.

[13] 'European Union "+" Joint Cooperation Strategy for Ethiopia' (27 January 2013), available at: <http://www.entwicklung.at/uploads/media/EU_Joint_Cooperation_Strategy_01.pdf>. Note that '+' refers to Norway, who has joined the EU as a 'like-minded' donor.

[14] On the problems that joint programming is called to mitigate, see the Commission Communication, 'EU Code of Conduct on Division of Labour in Development Policy', *COM (2007) 72 final,* at 3. The General Affairs and External Relations Council adopted the 'Code of Conduct' (15 May 2007).

[15] 'Instructions for 11th EDF and DCI programming', *supra* note 10, at 12.

The ambiguous boundaries between joint programming and joint implementation in EU policy documents are probably the main cause of confusion affecting the initiative. Commitments to joint programming are often accompanied by references to joint implementation. For instance in the recent 'Mexico Communiqué',[16] under the heading 'EU Joint Programming: Helping to Manage Diversity', the EU committed to foster joint implementation. The 'Council Conclusions for Busan' should however mitigate any conceptual fuzziness since they clearly indicate: 'joint programming does therefore not encompass bilateral implementation plans.'[17] Indeed, joint programming stops at the level of indicative financial allocations per sector and donor, where specific projects, which would correspond to the 'implementation phase', are not defined. As a process, therefore, joint programming consists of three stages 'and no more'. Despite the clear dividing lines between joint programming and joint implementation, no one should be surprised if both are referred to together, since the former clearly paves the way for the latter.[18] By way of example, if joint programming leads to an effective division of labour between EU donors, it will make sense for the actors that remained active in a given sector to work together for instance through co-financing[19] and delegated cooperation arrangements.[20]

Finally, despite not being an integral part of joint programming, a common results framework, or 'common framework for measuring and communicating the results of development policy',[21] should accompany the initiative. It is only logical that, if based on the results of joint programming, a donor phases out in a specific sector, it will have to be satisfied with the way in which the actors that remained active in the sector measure the success of their actions.

2.2 **A response to the international aid effectiveness agenda**

The promotion of certain elements of joint programming, such as joint studies and analyses and the division of work in the context of country strategies, can be found in development cooperation policy documents from the early 2000s. These activities were presented in the framework of EU's efforts to maximise the effectiveness of its external action, following the increase in the number of external partners, instruments and financial resources in that area of EU action.[22]

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[16] See Mexico High Level Meeting Communiqué, *supra* note 3, at 12.

[17] 'Council Conclusions for Busan', *supra* note 6, at 27.

[18] Notice that Art., 210(1) TFEU, which provides the legal basis for joint programming in development cooperation policy (see *infra*, subsection 3.1, at 56-58), refers to the possibility of member states contributing to the implementation of Union programmes.

[19] See, for instance, the 'Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: The European Consensus', *2006/C 46/01*, para., 31.

[20] 'Delegated cooperation is a practical arrangement where one donor (a "lead" donor) acts with authority on behalf of one or more other donors (the "delegating" donors or "silent partners").' 'Communication on an EU Code of Conduct', *supra* note 14, at 7.

[21] See 'Agenda for Change', *supra* note 8, at 11.

[22] 'Statement by the Council and the Commission of 20 November 2000 on the European Community's development policy'; and 'Guidelines for strengthening operational co-ordination

The first explicit reference to 'joint multi-annual programming' in development cooperation policy appeared in the 'Report of the Ad Hoc Working Party on Harmonisation' (2004).[23] In it, joint programming was listed among the recommendations put forward by the working party in the context of the Union's preparation for the Second High Level Forum on Harmonisation and Alignment for Aid Effectiveness (Paris, 2005). In the subsequent 'European Consensus on Development'[24] and in the Commission Communication on 'EU Aid: Delivering more, better and faster',[25] the EU confirmed its commitment to work towards joint programming as a means of pushing the international aid effectiveness agenda forward.

That joint programming efforts were not intended to stop at the level of joint studies and analyses of the partner country's situation was clearly addressed in the Commission Communication on country strategy papers (CSPs) and joint programming (2007).[26] The Commission referred to a possible second stage of joint programming, whereby the actors involved could share a 'joint response strategy' including common cooperation objectives, division of labour and financial allocations. In practice, however, joint programming exercises did not move beyond the rather vague phase of joint analyses. Following the scant success of previous initiatives, and convinced that 'who does what' was the key issue to address in order to enhance complementarity among EU donors, the Union designed an 'EU Code of Conduct on Division of Labour in Development Policy'. This Code presented joint programming as a 'pragmatic tool' to advance the division of labour.[27]

The real commitment to joint programming as the main EU contribution to the international aid effectiveness agenda materialised in the 'Council Conclusions for Busan': 'in order to show leadership in Busan and beyond (…), the EU will improve and strengthen joint programming at the country level'.[28] While acknowledging that joint programming is not an exclusive EU initiative, the Council claimed that the Union would be its 'driving force'. As to why there was new *momentum* at this point in time to strongly commit to joint programming in international fora, three reasons can easily be identified. These reasons appear in the introductory pages of the 'Agenda for Change',[29] adopted just one month before the 'Council Conclusions for Busan'. First, the EU was convinced that

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between the Community, represented by the Commission, and the Member States in the field of External assistance', *5431/01* proposed by the Commission and adopted by the General Affairs Council (21 January 2001).

[23] General Affairs and External Relations Council, 'Report of the Ad Hoc Working Party on Harmonisation – Advancing Coordination, Harmonisation and Alignment: the contribution of the EU', *14670/04* (23 November 2004).

[24] See Joint statement by the Council, *supra* note 19.

[25] COM (2006) 87 final.

[26] Commission Communication,'Increasing the impact of EU aid: a common framework for drafting Country Strategy Papers and Joint Multiannual Programming', *COM (2006) 88 final*.

[27] 'Communication on an EU Code of Conduct', *supra* note 14; and Council Conclusions, 'an Operational Framework on Aid Effectiveness', *15912/09 adopted by the General Affairs and External Relations Council* (17 November 2009).

[28] See Council Conclusions, *supra* note 6, at 12.

[29] See Commission Communication, *supra* note 8, 3-4.

the work towards the Millennium Development Goals (MDGs) needed to be accelerated, as the 2015 target was approaching. Second, the creation of the post of the HR/VP and the EEAS as its assisting body provided 'new opportunities for more effective development cooperation'.[30] Third, as a result of the economic and financial crisis, aid effectiveness was considered even more crucial. The EU commitment to joint programming put forward in Busan has been confirmed in the recent 'Mexico Communiqué', resulting from the First High Level Meeting of the Global Partnership for Effective Development Cooperation (April 2014). Under the section 'voluntary initiatives', the EU has committed to promoting the extension of joint programming and has even indicated that the initiative 'should be operational in 40 or more partner countries by 2017.'[31]

The close ties between policy developments on joint programming within the EU development cooperation policy and the Union's commitment to the international aid effectiveness agenda show that joint programming is in fact a response to this agenda. There are, however, other arguments to defend this claim. The fact that joint programming incorporates a set of principles designed in international aid effectiveness fora (e.g. alignment, synchronisation, concentration, ownership), its character as not only an 'EU thing' (i.e. it is open to like-minded donors, and not all member states need to take part),[32] and its listing as one of the commitments of all signatories to the 'Busan Partnership Document' and the 'Mexico Communiqué',[33] are further pieces of evidence in the same direction.

3 JOINT PROGRAMMING WITHIN EU EXTERNAL RELATIONS LAW

3.1 **A tailor-made initiative for development cooperation policy**

Despite its development in soft law instruments, joint programming is an initiative that fits perfectly not only into EU development cooperation policy, but also into the broader picture of EU external relations law. Article 210 TFEU provides a clear legal basis for an initiative like joint programming in this area of EU external action when it establishes: (a) 'the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes'; (b) these actors 'may undertake joint action' and the Commission 'may take any useful initiative' to work towards such coordination. Following the wording of this provision, joint programming can be

[30] On the effects of these institutional changes over joint programming, see *infra* subsection 3.2, at 59.

[31] See Mexico High Level Meeting Communiqué, *supra* note 3, at 12.

[32] See, for instance, the 'Council Conclusions for Busan', *supra* note 6, at 28.

[33] Outcome documents of the Fourth High Level Forum on Aid Effectiveness (Busan, 2011) and the First High Level Meeting of the Global Partnership for Effective Development Co-operation (Mexico City, 2014), respectively.

considered an initiative taken by the Commission[34] to ensure coordination between EU and member states' aid programmes.

Besides fitting into the language of Article 210 TFEU, joint programming matches perfectly the nature of development cooperation policy as a non-preemptive shared competence (Article 4(4) TEU).[35] The initiative is an attempt to coordinate two different levels of action (i.e. EU and member states) and no success regarding this coordination will lead to the EU preventing member states from acting in their own development cooperation policies. This is evident in Article 210(1) TFEU, as it refers to EU-member states coordination in development cooperation as a means 'to promote the complementarity and efficiency of their action'. By using the term 'complementarity', the provision implies that coordination (e.g. through joint programming) will at best lead to the EU-member states development cooperation policies reinforcing each other. Coordination will not, on the contrary, result in member states being pre-empted from exercising their competence in the field of development cooperation. In fact, despite the leadership of Union delegations and the use of the EU framework, member states in Heads of Cooperation (HoCs) and Heads of Mission (HoMs) meetings on joint programming, will always be exercising their national development cooperation policies and coordinating certain aspects of those collectively and with the Union's policy in the same area.[36]

That joint programming does not encroach upon the competence of member states to decide on their own development cooperation policy is clear in EU policy documents. For instance, in its 'Conclusions for Busan', the Council stated: 'joint programming respects Member States' sovereign decisions e.g. on choice of partner countries and level of financial allocations in these countries.'[37] Yet another proof that joint programming makes sense for non-preemptive shared competences is that the other policy field in which it is being developed is the European Research Area, which falls into the exact same category of EU competences (Article 4(3) TFEU).

Article 210 TFEU is, however, not the only provision in the treaties that is relevant to joint programming in development cooperation policy. In fact, if we analyse this Article in the broader context of EU external relations law, we must conclude that it is in itself (and joint programming as a realisation of this) an expression of the general principle of sincere cooperation between the EU and

[34] Although the EEAS and the Commission are responsible for joint programming, on the ground it is often still the Commission who is taking the lead.

[35] According to this provision, in the area of development cooperation: 'the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs'.

[36] Notice that, in ECJ, Case C-316/91, *Parliament* v *Council* [1994] I-00625, the ECJ established that, due to the distribution of powers in development cooperation policy, member states were free to provide the financial cooperation required by the Fourth ACP-EEC Convention by setting up the 7th EDF and directly assuming responsibility over it. The fact that both the Community and the member states were part of the Convention, the decision-making process by which the EDF had been established, and the responsibilities of Community institutions over its administration were not considered determining factors for the expenditure to qualify as of the Community.

[37] See Council Conclusions, *supra* note 6, at 27.

the member states (Article 4(3) TEU). As an initiative deriving from that principle, there are other provisions in EU law that can be said to be directly relevant to joint programming. This is the case of Articles 221(2) TFEU, 3(1) and 5(9) of the Council Decision on the organisation and functioning of the EEAS,[38] all of which on cooperation duties of EEAS/Union delegations *vis-à-vis* diplomatic (and consular) services of member states.[39] The one-way-street character of these three provisions should not lead to the conclusion that the principle of sincere cooperation, as it applies to EEAS/Union delegations and member states' missions, is a unidirectional principle. These provisions are in fact concrete expressions of the general principle of sincere cooperation, as established in Article 4(3) TEU, the latter being clearly a two-way street.

It is no coincidence that joint programming is, at the same time, an especially suited initiative for a non-preemptive shared competence and an exercise of the principle of sincere cooperation. In fact, this principle, which is of general application to all EU competences, is particularly important in shared ones.[40] This is even more so when a competence is non-preemptive, because in this case the coherence and effectiveness of the EU external action cannot be ensured by delimitation rules and will ultimately depend on the extent to which coordination efforts flowing from the principle of sincere cooperation lead to substantive results.[41]

In short, joint programming can be considered a tailor-made initiative for development cooperation policy, since there is a solid legal framework underpinning it and it responds to the specific needs of a non-preemptive shared competence, in order to ensure that the Union can effectively pursue its external objectives.

3.2 Cooperation in action: between the leadership of Union delegations and the fears of member states

As a specific form of EU 'sincere cooperation', joint programming has a clear leader: Union delegations. This role flows from the character of the exercise as an in-country one, in which engagement from the partner country is deemed

[38] Council Decision establishing the organisation and functioning of the European External Action Service, *2010/427/EU*, (26 July 2010).

[39] Interestingly, only Art., 221(2) TFEU refers to cooperation with consular services of the member states, besides diplomatic services.

[40] As for the general application of the principle of sincere cooperation, see ECJ, Case C-266/03, *Commission* v *Luxembourg* [2005] I-04805, paras. 57 and 58. Besides, in his Opinion in ECJ, Case C-246/07, *Commission* v *Sweden* ('PFOS Case') [2010] I-03317, Advocate General Maduro stated: 'the duty of loyal cooperation between the Community and the Member States has particular significance in the exercise of competences under the Treaty: this is all the more so where those competences are shared'.

[41] A similar approach can be implied from the words of Marise Cremona, when she argues: 'If the EC acts in a field of non-pre-emptive shared competence, such as development cooperation, the need for coherence clearly emerges and is recognised in the Treaty'. M. Cremona, 'Coherence through Law: What Difference will the Treaty of Lisbon make?', 3 *Hamburg Review of Social Sciences* 2008, at 17.

especially important. It is therefore no surprise that Commission delegations,[42] as 'the face' of the EU on the ground, led the early initiatives linked to joint programming, and that Union delegations do so under the current policy framework. With the entry into force of the Lisbon Treaty, and the fact that delegations are now an integral part of the EEAS, they are responsible for chairing HoMs and HoCs meetings, where joint programming processes occur.[43] This new role is allowing them to be persistent in the attempt to convince member states about the added value of joint programming, since they can include it as an agenda item in each and every meeting with the diplomatic missions of member states touching on development cooperation policy matters.

This is not to say that EEAS' and DEVCO's headquarters are not involved in joint programming. In fact, they provide support to delegations throughout the process. To mention some examples, they organise joint programming workshops, where best practices are shared,[44] and DEVCO has hired a team of 'joint programming consultants' to assist delegations in the implementation of the initiative. Besides, EEAS' and DEVCO's headquarters are essential in the endorsement and adoption phases of agreed joint programming documents (a 'bottom-up' process).[45]

The responsibility to reach all the necessary agreements that can ultimately lead to a joint programming document lies, however, on Union delegations. In working towards this end, delegations are constantly faced with a certain degree of reticence from the side of member states to effectively bring the initiative forward. There are different reasons that can be said to be at the root of member states' uneasiness regarding joint programming. Most importantly, as will be analysed in further detail in subsection 3.3, member states 'fear' that joint programming undermines their individual visibility in the partner countries where it is implemented. The so-called 'visibility challenge' linked to joint programming was an important issue at the 'EU Joint Programming Guidance Workshop' (Stockholm, September 2014).[46] A clear intention to calm these fears was behind references to the possibility for member states to claim credit for the whole EU strategy, and also to keep their 'national stickers' on their projects and programmes, while mentioning that they are part of a common strategy.

A second reason why member states might worry about joint programming is the perception that the absolute leading role of the EU in the process is a threat to their independence regarding development cooperation policy. It is

[42] As they were called before the entry into force of the Lisbon Treaty (e.g. ex-Art., 20 TEU).

[43] Notice that HoMs meetings bring together the ambassadors of member states' diplomatic missions and the Head of Delegation, from the EU side; while HoCs meetings assemble the EU and member states' heads of cooperation. Joint programming typically happens in these two contexts.

[44] For example, a regional joint programming workshop was held in Addis Ababa on 13-14 March 2014 bringing together Union delegations from Central, East and Southern Africa.

[45] On the procedure spanning from the in-country agreement on a joint programming document until its final adoption and formalisation, see the 'Instructions for 11th EDF and DCI programming', *supra* note 10, at 13.

[46] See Data presented by EEAS' and DEVCO's, *supra* note 2.

however the case that, within joint programming exercises, member states are always free to decide on the commitments they want to make.[47]

Thirdly, member states are perhaps concerned about the legal obligations created by entering into joint programming commitments. In fact, given the Court's broad interpretation of member states' duties flowing from the principle of sincere cooperation, member states could be considered to be in breach of the principle if they disregard agreements incorporated in joint programming documents. The EU could for instance modify its EDF or DCI programming documents following the commitments made in a joint programming document (e.g. it phases out in a specific sector), while a given member state does not act accordingly. In such a case, the member state could be found to have failed to comply with the principle of sincere cooperation by not respecting an agreement by which it 'intended to enter into a binding commitment'[48] towards the rest of member states and the EU. Interestingly, here the principle of sincere cooperation clearly appears as an expression 'of Community solidarity' not only between the member states and the EU, but among member states.[49]

If Union delegations manage to overcome these difficulties and joint programming becomes the rule in the near future, the initiative might turn into an example of the impact of certain Lisbon Treaty innovations (namely, the new role of the HR/VP and the creation of the EEAS) on a more integrated and less Brussels-centred EU external action. We must not forget that, as explained in subsection 2.2, joint programming in development cooperation policy has been on the agenda for around a decade, with little success in terms of specific commitments until very recently.

3.3 **A test case for the 'sincere cooperation-coherence-effectiveness link'**

Joint programming is a glaring expression of the principle of sincere cooperation (e.g. Article 4(3) TEU), but it is also crucial to other principles organising the functioning of the EU external relations' machinery or 'structural principles':[50] namely, coherence and effectiveness (e.g. Article 13(1) TEU). This has already

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[47] On joint programming within development cooperation policy as a non-preemptive shared competence, see *supra* subsection 3.1, 56-58.

[48] ECJ, Case C-25/94, *Commission* v *Council* ('FAO Case') [1996] *ECR* I-01469, para., 49. Note the clear parallelism between the possible scenario presented and the 'FAO Case', where the Council was found to have breached the duty of cooperation, by disregarding an arrangement with the Commission on a coordination procedure regarding Community and member states' action within the FAO Conference. According to the Court, the arrangement was 'a fulfilment of that duty of cooperation between the Community and its Member States within FAO', by which 'the two institutions intended to enter into a binding commitment towards each other', para., 49.

[49] C. Hillion, 'Mixity and coherence in EU external relations: the significance of the "duty of cooperation"', *2 CLEER Working Papers* 2009, at 8.

[50] Notice that I borrow the terminology coined by Christophe Hillion and Marise Cremona. While the former refers to coherence as a '*principe structurant l'action extérieure de l'Union',* the latter defined the same principle as operating 'to structure' other principles in EU external relations law. C. HILLION, 'Cohérence et action extérieure de l'Union Européenne', *14 EUI Working Papers* 2012; and M. CREMONA, 'Coherence in European Union Foreign Relations Law', in P.

been pointed out in the paper when explaining that, due to the nature of development cooperation policy, sincere cooperation (e.g. through joint programming) is particularly relevant in this area of EU action in order to ensure the coherence and effectiveness of the Union's external action.[51]

The 'sincere cooperation-coherence-effectiveness link' presented in the previous paragraph constitutes a well-established understanding of reality in the treaties and case law of the ECJ. Two clear examples are Articles 210(1) TFEU and 24(3) TEU. The former refers to coordination between Union and member states' development cooperation policies as a means to promote 'the complementarity and efficiency or their action'. In the context of the CFSP, the latter obliges member states not to undertake any action likely to undermine the Union's 'effectiveness as a cohesive force in international relations.' The same logic can be observed in the recent case law of the ECJ on member states' duties flowing from the principle of sincere cooperation. In Case C-266/03, *Commission* v *Luxembourg*, the Court founded the cooperation duties of member states in the context of shared competences on the need 'to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action of its international representation.'[52]

The main interest of joint programming from the legal perspective lies precisely in its ability to prove that the reasoning presented in the foregoing is, at least in some contexts, not a distortion of reality but is evidence-based instead. As analysed in subsection 2.2, the origins of joint programming are to be found in the international aid effectiveness agenda. It can be argued that the attempt to effectively use development cooperation funds led the EU to conclude that it needed to coordinate internally if it really wanted to have an impact on the ground. Interestingly, despite the fact that the line of argument in the treaties and the case law of the ECJ has a different starting point (i.e. the internal organisation of the EU, as opposed to the needs on the ground), the underlying idea is the same: coordination (an expression of principle of sincere cooperation) leads to complementarity (an expression of the principle of coherence) and the latter is a prerequisite for the EU to be ultimately effective on the ground (principle of effectiveness).

A closer look at joint programming shows the connections between these three structural principles in a clear manner. Firstly, as explained in policy documents on joint programming, aid effectiveness linked to the initiative arises from complementarity between Union and member states' development cooperation aid programmes (e.g. absence of funding gaps and duplications). Secondly, joint programming can also increase the effectiveness of the EU external action by strengthening the visibility, the credibility and ultimately the political weight of the EU in partner countries, and thus increasing its leverage to pursue

Koutrakos (ed.), *European Foreign Policy: Legal and Political perspectives* (Cheltenham: Edward Elgar 2011).

[51] See *supra* subsection 3.1, 57-58.

[52] Para., 60. See also ECJ, Case C-459/03, *Commission* v *Ireland*, para., 160, ECJ, Case C-433/03, *Commission* v *Germany* [2005] I-06985 para., 66 and ECJ, Case-246/07*, Commission* v *Sweden*, 'PFOS Case', para., 75.

its external objectives, be these developmental ones or not.[53] EU and member states' coherence at the level of aid programmes, which results from joint programming as an exercise of sincere cooperation, can therefore be said to lead to effectiveness in two different steps. First, by coordinating their policies, the Union and its member states ensure that they are investing their funds reasonably. Second, by appearing as one actor before the partner country, the actorness of the Union is undoubtedly strengthened. By way of example, if the EU and its member states negotiate their aid programmes with a partner country on the basis of a joint EU strategy, their concerns regarding the protection of human rights (e.g. Article 3(5) TEU) in the country will be taken much more into consideration than if they do so separately.

The other side of the coin of a stronger and more visible EU in third states whenever joint programming succeeds, is that member states might lose individual visibility and political influence, which explains why, as analysed in subsection 3.2, they feel uneasy about the initiative. We must not forget that development cooperation policy is a non-preemptive shared competence, to a great extent, because of its political sensitivity. Joint programming clearly shows how difficult it is to ensure that the action of the EU is externally coherent and ultimately effective is this type of competence. It also reflects how the positive dimension of the principle of coherence, represented by the principle of sincere cooperation, can be in tension with the principle of conferral of powers (Article 7 TFEU). On the one hand, the character of development cooperation policy calls for important coordination efforts (such as joint programming). On the other hand, the fear that joint programming can undermine member states' development cooperation policies and individual political actorness in third states could lead them to hide behind the nature of the competence to stop the initiative from moving forward.[54]

It is thus for member states to demonstrate their real commitment to joint programming, and thereby the extent to which they are willing to strengthen the actorness of the EU in developing partner countries, and to make a more effective use of their development cooperation funds and those of the Union. It is ultimately for them to decide whether to realise the 'sincere cooperation-coherence-effectiveness' link in this field of EU action. The truth is that they have committed to implement joint programming both in policy documents and in international fora, on the premise that 'joint EU approaches (…) will collectively leverage more progress that can be achieved individually by Member States and the Commission'.[55] It follows from the foregoing that if member

[53] In its 'Communication on an EU Code of Conduct', the Commission referred to: 'A Europe that delivers more, better and faster in the fight against global poverty. A more vocal Europe, with a political impact that matches the level of its financial generosity', *supra* note 14, at 3.

[54] Stephan Klingebiel *et al* have interestingly referred to the existence of a limit or 'right level' of aid coordination that member states will be ready to accept. S. Klingebiel *et al*., 'Scenarios for Increased EU Donor Coordination: What Is the Right Level of Aid Coordination?', 7 *DIE Briefing Paper* 2014.

[55] Council Conclusions on 'an Operational Framework on Aid Effectiveness', *supra* note 27, conclusion no.5.

states are consistent with their commitments we should see an important number of joint programming documents adopted in the coming years.

4 CONCLUSIONS

At the heart of development cooperation policy, where major decisions on external assistance funds are made, joint programming puts several issues concerning the EU external relations' legal system at stake. It has also an important explanatory value as to why the system is structured as it is (e.g. development cooperation policy as a non-preemptive shared competence).

Joint programming is a 'tailor-made' initiative for development cooperation policy: not only there is a solid legal framework underpinning it (think, for instance, how it suits the wording of Article 210 TFEU), but it responds to the specific needs of a non-preemptive shared competence to ensure the coherence and effectiveness of the Union's external action. In fact, it provides a test case for the link between three structural principles in EU external relations law (sincere cooperation-coherence-effectiveness), which is well established in the treaties and case law of the Court of Justice. Joint programming proves for instance the much-repeated claim that the EU and its member states can have a greater impact if they work together in a coherent manner (through strengthened EU actorness). It is however the case that, given the type of competence the initiative fits into, it is ultimately for member states to decide whether to bring it forward or not; under the fear that it can undermine national development cooperation policies and individual member states' actorness in partner countries. If renewed Union delegations, as absolute leaders of the process, manage to convince member states about the added-value of joint programming and the exercise is progressively implemented, it might become an example of the impact of certain Lisbon Treaty's institutional innovations (the HR/VP and the EEAS) on a more 'coherent, visible and effective' EU external action, and in which the focus moves from Brussels to wherever things occur.

Lastly, I would like to conclude with a note of optimism. Joint programming will not be a reality in all developing partner countries of the Union tomorrow. Like each and every important step in the EU integration process, it is a long-term endeavour. The mere fact that joint programming processes are spreading, even before they lead to final joint programming documents is, however, great news. The initiative is bringing about a level of exchange of information and discussion on EU and member states' development cooperation policies that were probably unthinkable ten years ago.

EU REPRESENTATION TO INTERNATIONAL ORGANISATIONS: A CHALLENGING TASK FOR THE EEAS

Juan Santos Vara

1. INTRODUCTION

The Treaties confer a great importance to cooperation with international organisations. The need to cooperate with those bodies is clearly reflected in Article 220 TFEU. This provision states that the EU 'shall establish all appropriate forms of cooperation' with international organisations, including the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE) and the Organisation for Economic Cooperation and Development (OECD). Effective multilateralism, which constitutes one of the fundamental aspects of EU external action, can hardly be achieved if EU's values and interests are not adequately projected in the context of international organisations.[1] Within international organisations a concerted action of the EU and its Member States is also vital to ensure the EU's desired presence and influence at global level.

The Lisbon Treaty aimed at strengthening EU external representation, in particular through the establishment of the European External Action Service (EEAS).[2] In order to achieve this goal, the 139 Commission delegations, already existing in 2009, were upgraded to the status of EU delegations after the entry into force of the Lisbon Treaty. Those EU delegations have been tasked with representing the Union in third countries and at international organisations, covering both CFSP and non-CFSP aspects.[3] Article 221 TFEU states that 'Union delegations in third countries and at international organisations shall represent the Union'. The purpose of this new Treaty provision was to have 'less Europeans and more Europe'.[4] This implied taking over the representative function from the rotating Presidency and assuming the coordination with the Member States' diplomatic missions on the ground. The transformation of Commission delegations into EU delegations has given much hope as to an improvement in EU external representation. When Mrs. Ashton took up her post in December 2009, she affirmed that the EU delegations 'should be a network that

[1] See European Parliament, 'Report on the EU as a global actor: its role in multilateral organisations', *A7-0181/2011* (April 2011), available at < http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0181+0+DOC+XML+V0//EN>.

[2] Council Decision 2010/427/EU on the European External Action Service, *OJ* [2010] L 201/30, 03.08.2010.

[3] EU delegations are an integral part of the EEAS. See Art., 1(4) of the EEAS Decision.

[4] A. Missiroli, 'The New EU Foreign Policy After Lisbon: A Work in Progress', 25 *European Foreign Affairs Review* 2010, 427-452.

is the pride of Europe and the envy of the rest of the world'.[5] However, only 54 EU delegations were immediately given the powers and instruments necessary to speak on behalf of the entire EU, as well as to assume the role previously carried out by the national embassies of the member states holding the rotating Presidency.[6] The majority of Commission delegations to international organisations, such as the UN in New York or the OSCE in Vienna, were not immediately transformed into EU delegations. The Union delegations and the rotating Presidencies reached transitional arrangements in order to implement the changes arising from the Lisbon Treaty.

Since the entry into force of the Lisbon Treaty and the establishment of EEAS, the assumption of a greater role of EU delegations to multilateral fora has faced multiple legal and political obstacles.[7] As has been acknowledged by the High Representative in her 2011 Report, while the transformation of former Commission delegations to Union delegations has gone remarkably smoothly in bilateral relations, the situation in multilateral delegations has been more challenging 'given the greater complexity of legal and competences issues'.[8] There are various circumstances that have made the change in representation from the rotating presidency to EU delegations in international organisations more difficult.[9] Firstly, the Lisbon Treaty has not brought along a substantial change in the division of competences between Member States and the EU regarding external action. Consequently, shared competences still prevail in the external relations of the EU. This situation gives rise to intricate problems as regards the representation and adoption of EU positions within international organisations or at international conferences. Secondly, the new architecture of EU external representation has not been linked to a substantial improvement of EU status in international organisations. Thirdly, joint participation of Member States and the EU in many international organisations requires strong coordination efforts. In those circumstances, EU delegations have had to face the complex tasks of leading local coordination with permanent representations of Member States and of representing the EU in many international organisations, of which it is generally not a full member.[10]

The EU external representation within international organisations is directly linked to the definition of EU positions, the coordination between Union delega-

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[5] C. Ashton, 'Quiet Diplomacy will get our voice heard' *The Times*, 17 December 2009.

[6] A. Rettam, 'EU Commission 'embassies' granted new powers?, *EU Observer*, 21 January 2010.

[7] The EU has established delegations to the following international organisations: the United Nations (UN) in New York; the UN in Geneva; the World Trade Organisation (WTO) in Geneva; the UN and OSCE in Vienna; the UN in Rome; the Council of Europe in Strasbourg; the OECD and United Nations Educational, Scientific and Cultural Organisation (UNESCO) in Paris; and the African Union in Addis Abeba.

[8] European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission' (22 December 2011), available at < http://eeas.europa.eu/images/top_stories/2011_eeas_report_cor_+_formatting.pdf>. See also EEAS Review (2013), at 10.

[9] See, European Parliament, 'Organisation and functioning of the European External Action Service: achievements, challenges and opportunities' (2013).

[10] See Arts. 3.1 and 5.9. EEAS Decision.

tions and Member States and the EU participation in international organisations. Even though these issues are interrelated, they pose a different set of problems.[11] The question of who represents the EU in a particular international organisation depends on the competences attributed by the Treaties to the Union. Article 5(2) TEU provides that 'under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties'. Consequently, EU delegations only represent the EU in areas where competences have been attributed to the Union. Furthermore, account should be taken of the fact that the power of EU delegations to represent the EU in third countries and within international organisations is not exclusive. Article 221 TFEU does not affect the extent of the representing powers of the President of the European Council, of the High Representative or of the Commission. Furthermore, EU representation should be distinguished from the definition of EU positions. According to Article 219(9) TEU 'the Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision (…) establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement'. This provision has raised the question of to what extent this procedure applies to the definition of EU positions on matters not giving rise to legal effects.[12]

The objective of this contribution is twofold. Firstly, it aims to examine the main difficulties arising from the EU representation to international organisations over the past years. Secondly, it will attempt to assess the extent of the contribution of EU delegations – in their condition as EU representatives and catalysers of coordination between the EU and Member States on the ground – to overcoming those challenges. EU actors involved in external action and Member States see EU delegations as 'key instruments to provide the EU with a common voice in the world'.[13] However, it seems that not all Member States were willing to accept the consequences arising from this achievement as regards the EU delegations to international organisations. In these circumstances, whether the establishment of the EEAS and the transformation of former Commission delegations into Union delegations have allowed the EU to achieve a more coherent, effective and unified representation in multilateral fora should be assessed. This paper will focus on specific problems faced by EU Delegations to international organisations. Therefore, issues affecting EU Delegations as a whole, such as the relations between Union delegations and EEAS Head-

[11] G. Gosalbo-Bono, 'The organisation of the external relations of the European Union in the Treaty of Lisbon' in P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, 3 *CLEER Working Paper* 2011, at 34.

[12] ECJ, Case C-399/12, *Germany v. Council* (OIV), *OJ* [2012] C 343/9.

[13] F. Austermann, 'Towards Embassies for Europe? EU Delegations in The Union's Diplomatic System', *8 Policy Paper* (January 2012), at 2.

quarters, as well as the coordination with the Commission and the Member States' diplomatic missions on the ground fall outside the scope of this paper.[14]

2. EU PARTICIPATION IN INTERNATIONAL ORGANISATIONS AFTER THE LISBON TREATY

One of the main difficulties faced by EU delegations in fulfilling their role has been the different degree of EU participation in international organisations.[15] The EU status in international organisations oscillates between full membership and observer status. The main organisations before which the EU acts as a full member are the following: the World Trade Organisation, the fisheries organisations and the Food and Agriculture Organisation (FAO).The majority of international organisations have opted for using the observer status to fulfil the EU's demand for participation in their proceedings. Since the participation as a mere observer to some organisations has shown its limitations to respond to the EU's needs, it has attempted to get the status of 'full participant' or 'enhanced observer status' in some organisations, such as the UN.

The new structure of EU external representation has not eliminated the obstacles that impede an effective representation and participation of the EU in international organisations. It is not surprising that the Swedish Presidency Report of 2009 on the EEAS, pointed out that further study should be undertaken on the modalities for EU delegations accredited to other organisations on a case-by-case basis.[16] The explicit conferral of international personality to the Union, along with the substitution of the rotating Presidency for the High Representative with regard to international representation of the EU in CFSP matters and the set up of the EEAS, could lead to foreseeing an increased participation of the Union to international organisations and fora. As has been seen in practice, that scenario was far from the truth.

Despite the fact that one of the main goals of the Lisbon Treaty was the improvement of EU external representation, EU participation in international organisations is very often characterised by the difficulties in accommodating

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[14] For an updated research on these issues, See D. Helly and others, 'A closer look into EU's external action frontline', *European Centre for Development Policy Management Briefing Note Nº 62* (2014); and European Court of Auditors, 'The Establishment of the European External Action Service', 11 Special Report (November 2014), paras. 57-64, available at < http://www.eca.europa.eu/lists/ecadocuments/sr14_11/sr14_11_en.pdf>. See also N. Helwing, P. Ivan and H. Kostanyan, 'The new EU foreign policy architecture. Reviewing the first two years of the EEAS', Centre for European Policy Studies (CEPS) (10 February 2013), 62-71; S. Blockmans and others, 'EEAS 2.0', Centre for European Policy Studies (CEPS) (13 November 2013), 31-36; House of Lords, 'The EU's External Action Service' (2013), 18-29.

[15] On the status of the EU in different international organisations, see F. Hoffmeister, 'Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organisations and Treaty Bodies', 44 *Common Market Law Review* 2007, 41-68; J. Wouters, J. Odermatt and T. Ramopoulos, 'The EU in the World of International Organisations: Diplomatic Aspirations, Legal Hurdles and Political Realities", 121 *Leuven Centre for Global Governance Studies, Working Paper* 2013.

[16] Swedish Presidency Report to the European Council on the European External Action Service (23 October 2009), para., 33.

the EU integration process within host organisations. These difficulties lay their roots both in the internal and the external levels. As has been previously pointed out, the EU legal order is characterised by the lack of a clear-cut delimitation of competences between Member States and the EU. The interrelation of EU and Member State spheres of competence is a characteristic of the European integration process which acquires particular complexity regarding EU participation to international organisations.[17] Member States not only keep showing a certain resistance for losing their relevance in international fora in favour of the EU, but also conflicts regarding representation to international organisations between the EU and its Member States have increased after the entry into force of the Lisbon Treaty and the establishment of the EEAS.

Among the external factors which hamper EU participation to international organisations lies the essentially interstate composition of international organisations and, therefore, the inexistence of provisions in their founding treaties aimed at facilitating the adhesion of other international organisations. Besides, the negative of some non-EU States to enhance the role of the EU in some international organisations often stems from an unwillingness to see international bodies dominated by regional organisations.[18]

Even in those international organisations in which a satisfactory model for the projection of EU external competences has been achieved, legal obstacles still remain. These hurdles are particularly evident in joint participation of the EU and its Member States international fora, which requires continuous coordinating efforts from the side of both parties. The participation of the EU in the FAO, alongside its Member States, constitutes a good example. The Council and the Commission adopted in 1991 an arrangement to regulate the internal coordination for the preparation and exercise of membership rights in the FAO.[19] The Commission has recently acknowledged that the application of the FAO arrangement has led to 'time-consuming discussions on the division of competences', not leaving enough time for the relevant Council preparatory bodies to prepare the EU positions to be taken at the FAO meetings.[20]

With the objective of tackling the difficulties faced by EU participation in international organisations, the former President Barroso and Vice-President Ashton adopted on 20 December 2012 a 'Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon' (Barroso-Ashton Strategy), which contained a number of recommendations to address the shortcoming of EU representation

[17] See J. Santos Vara, '*La participación de la Unión Europea en las organizaciones internacionales'* (Madrid: Colex 2002).

[18] See J. Wouters, J. Odermatt and T. Ramopoulos, *supra* note 15, at 1.

[19] Council document 10478/91, 18.12.1991. The arrangement has been revised in 1992 and 1995 (See Council document 9050/92, 7.10.1992 and Council document 8460/95, 26.6.1995).

[20] European Commission, 'The role of the European Union in the Food and Agriculture Organisation (FAO) after the Treaty of Lisbon: Updated Declaration of Competences and new arrangements between the Council and the Commission for the exercise of membership rights of the EU and its Member States', *COM 333* (29 May 2013).

in international organisations, including the UN.[21] Firstly, the Strategy identified several organisations for which concrete steps towards enhancing the EU status should be launched. These included the Artic Council, the Commission on the Protection of the Black Sea against Pollution, the International Organisation of Vine and Wine (IOV), the European and Mediterranean Plant Protection Organisation, the International Maritime Organisation, the International Atomic Energy Agency (IAEA), the International Civil Aviation Organisation (ICAO) and the United Nations High Commissioner for Refugees (UNHCR). One year later, a note on the implementation of the 2012 Strategy was issued, informing on the steps followed to implement it.[22] While in some international organisations the EU status has improved, the results are not satisfactory in others. It is acknowledged that the improvement of EU status in international organisations 'requires sustained efforts in a medium to long-term perspective', since it depends on both internal as well as external factors to the EU.[23]

Bearing in mind the limited scope of this contribution, it is not possible to examine in detail all the initiatives adopted in the past years to enhance the EU status in all international organisations. In turn, the steps adopted in the last years to improve the EU status in the Artic Council, the IMO and the ICAO will serve as an illustration of the difficulties faced by EU actors and, in particular, by EU delegations to many international organisations. Since the latter international organisations play an important role in matters falling within EU competences, the EU has launched an outstanding effort to improve the EU status in these international fora.

The Artic Council is one of the organisations in which the EU has put more effort towards the improvement of its status. In May 2013, the Artic Council biannual meeting held in Kiruna (Sweden) decided to postpone the consideration of the EU application to become an observer, until the EU and Canada agreed on the conflict of the limited exemption to the EU regulation on seal products for Canadian indigenous peoples.[24] It is indeed paradoxical that in the same meeting in which the granting of the observer status to the EU was discussed, the same status was granted to the following countries: China, India, Japan, Korea, Singapore and Italy. Following the Kiruna Declaration, the EU and the HR Catherine Ashton and European Commissioner for Maritime Affairs, Maria Danamaki, issued a joint statement affirming that 'further to previous exchanges with the Canadian authorities the EU will now work expeditiously with them to address the outstanding issue of their concern'.[25] The EU Council has re-

[21] Communication to the Commission from the President in agreement with Vice-President Ashton –'Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon', *C (2012) 9420 final* (20 December 2012).

[22] Note to the College of Commissioners from President Barroso and Vice-Presidente Ashton, 'Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Treaty of Lisbon' (19 December 2013).

[23] *Ibidem*.

[24] Kiruna Declaration on the occasion of the Eight Ministerial Meeting on the Artic Council (Kiruna 15 May 2013).

[25] Joint Statement by HR/VP Catherine Ashton and EU Commissioner Maria Damanaki regarding Arctic Council decision on EU's observer status (15 May 2014).

cently urged Canada 'to help resolve the remaining issue so as to allow for the full implementation of the Kiruna decision regarding the EU's observer status' before the next EU/Canada summit.[26] This constitutes a paradigmatic example of the obstacles faced by the EU regarding its status in other international organisations.[27] It is to be hoped that once the Appellate Body of the WTO has adopted a final report on the seals dispute, Canada would stop blocking the granting of observer status to the EU.[28]

The IMO and ICAO are also two organisations to which the EU has devoted considerable diplomatic efforts with the objective of improving its status. The EU has important competences, which fall under the scope of action of the IMO and the ICAO. Since the EU has adopted significant legislation in these areas, the increasing involvement in both organisations is a strategic goal for the EU.[29] However, it has not been possible to enhance the status of the EU at any of these organisations. In 2002, the Commission proposed a request for authorisation to the Council to negotiate the EU membership at both the IMO and the ICAO, but EU Member States were not willing to follow this step.[30] Although the Commission has enjoyed observer status at the IMO since 1974, the EU role in the IMO is very limited.[31] The Commission is thus seeking to transfer this role enjoyed by the Commission to the EU as a whole, in accordance with the Lisbon Treaty. As to the ICAO, the EU is an ad-hoc observer in many ICAO bodies, but it has no formal status at the ICAO Council. The Commission is invited to participate in Council meetings in areas where it has a special interest. According to settled case-law, when the EU is not a member of an international organisation, Member States have to act on behalf of the Union in matters that fall within its competences, an obligation stemming from the principle of sincere cooperation in Article 4(3) TEU.[32] However, certain Member States – the United Kingdom, in particular – do not seem to be willing to facilitate EU participation at the ICAO on the basis of the duty of cooperation. In 2012, the Council adopted a Decision concluding the 'Memorandum of Cooperation between the European Union and the ICAO providing a framework for cooperation.[33] The purpose of this Memorandum is to ensure deep EU involvement in the activities of the ICAO. The UK accompanied its abstention to the Memorandum with a declaration expressing its opposition to any measure that can involve the expansion of EU competences. Since the UK is bound by the duty of coop-

[26] Council Conclusions on developing a European Union Policy towards the Arctic Region (12 May 2014).

[27] See J. Wouters, J. Odermatt and T. Ramopoulos, *supra* note 15, at 10.

[28] Appellate Body Report, 'European Communities – Measures Prohibiting the Importation and Marketing of Seal Products', *WT/DS400/AB/R, WT/DS4001/AB/R* (18 June 2014).

[29] COM (2009) 8 final, 7.

[30] SEC (2002) 381 final.

[31] See L. Nengye and F. Maes, 'Legal Constraints to the European Union's Accession to the International Maritime Organisation', 43 *Journal of Maritime Law& Commerce* 2012, 279-291

[32] ECJ, Opinion 2/91, [1993] *ECR* I-1064.

[33] Council Decision on the conclusion of a memorandum of Cooperation between the European Union and the International Civil Aviation Organisation providing a framework for enhanced cooperation and laying down procedural arrangements related thereto, *OJ* [2012] C 5560/12, 22.02.2012.

eration, it has to support the implementation of this Memorandum of cooperation, and is precluded from adopting any actions that could potentially impede or harden its implementation.[34]

In conclusion, the establishment of the EEAS and the enhanced political role of EU delegations have not seemed to help in the improvement of the EU status in international organisations, such as the Artic Council, ICAO and IMO. Even in those multilateral fora where the EU status has been significantly improved after the Lisbon Treaty, political obstacles have not disappeared regarding their practical implementation. After an initial setback in September 2010 at the UN,[35] the EU was granted an enhanced observer status at the General Assembly in May 2011 by the UN Resolution 65/276.[36] The EU upgraded status enables EU actors and in particular the EU delegation in New York to carry out most of the tasks previously undertaken by the rotating Presidency within the framework of the General Assembly. However, some States, in particular the CARICOM group, have tried to defend a narrow interpretation of UN Resolution 65/276 in order to avoid the upgraded EU status from having full effects in practice.[37] In these circumstances, it is not surprising that the Barroso-Ashton Strategy emphasises the need to continue in their efforts to ensure the full implementation of UN Resolution 65/276, and the EU Delegation in New York is urged to closely monitor this issue.[38] In any case, practical implementation of Resolution 65/276 offers a successful model of participation that could be extended to the proceedings of other UN specialised bodies and agencies.[39]

3. THE POLITICAL AND LEGAL OBSTACLES FACED BY EU DELEGATIONS TO INTERNATIONAL ORGANISATIONS

According to the High Representative, 'EU delegations are the operational focus of the service, working with national embassies of the Member States in third countries and multilateral fora on the basis of trust, cooperation and burden sharing in all fields'.[40] The HR's thesis did not appear to be shared by all Member States, at least during the first months of functioning of the EEAS. This trend had been reflected at political level through the blocking of the delivery of EU statements in multilateral organisations, in particular in the UN and the OSCE,

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[34] Van Vooren and R. A. Wessel, 'External representation and The European External Action Service: selected legal challenges', in S. Blockmans and R. A. Wessel (eds.), *Principles and Practices of EU External Representation,5 CLEER Working Paper* 2012, at 68.

[35] T. Vogel, 'UN General Assembly postpones vote on special status for the EU', *European Voice,* 14 September 2010.

[36] Resolution 65/276, 'Participation of the European Union in the work of the UN' (3 May 2011).

[37] See J. Wouters, A. L. Chané, J. Odermatt and T. Ramopoulos, 'Improving the EU's status in the UN and the UN system: an objective without a strategy?', 133 *Leuven Centre for Global Governance Studies Working Paper* 2014, at. 9.

[38] See Barroso-Ashton Strategy, *supra* note 22.

[39] P. A. Serrano de Haro, 'Participation of the EU in the work of the UN: General Assembly Resolution 65/276', *4 CLEER Working Paper* 2012, available at < http://www.asser.nl/default.aspx?site_id=26&level1=14467&level2=14468&level3=&textid=40370>.

[40] *EEAS Review* (2013), at 3.

during the second half of 2011, and the difficulties arising in the EU representation in the negotiation of international treaties. Besides, in the *Wine and Vine* case, Germany, supported by a group of countries, has tried to limit the room of action of the EU in those international organisations where it is not itself a member, even though their activities fall within the competences of the European Union.[41] As will be argued below, this state of play has exercised a negative influence on the role of EU delegations to international organisations. Fortunately, the situation of the whole of EU delegations has progressively improved insofar as the 'EU Delegations' relations with Member States missions are moving beyond informing, coordinating and representing, towards genuine cooperation'.[42] The attitude of Member States towards EU delegations has gradually changed as States have understood that 'the EDs emerge as true information and coordination hubs'.[43]

3.1 The blocking of the delivery of EU statements in multilateral organisations

The blocking of the delivery of EU statements in multilateral organisations during the second half of 2011 is an emblematic example of the difficulties faced by the EU delegations to international organisations. Since Article 47 TEU explicitly gives international personality to the EU, the UK argued that the term 'EU' can no longer be used to designate 'EU and its Member States' when delivering statements on behalf of the EU in multilateral fora.[44] In support of this, it was argued that the new model of external representation could imply an extension of EU competences preventing EU Member States from exercising their own competences.[45] The disagreement between the Commission and several Member States led to blocking the delivery of many EU statements and demarches during 2011 in international organisations, in particular at the United Nations and the OSCE.[46] This internal battle had a negative impact on the external action of the Union, as acknowledged by the HR in her 2011 Report.[47] In October 2011, a document entitled 'General Arrangements for EU Statements

[41] ECJ, Case C-399/12, *Germany v. Council* (OIV), 7 October 2014 (not published yet in the report).

[42] H. Merket, 'From Commission to Union Delegations: a legal-institutionalist analysis', Paper presented to the Conference 'European Union International Affairs IV' (22-24 May 2014), at 16.

[43] See F. Austermann, *supra* note 13, at 5.

[44] See B. Van Vooren and R. A. Wessel, *supra* note 34, at 66.

[45] V. Vogel, 'Split Emerges Over Remit of the EU's Diplomatic Service', *European Voice* 2011.

[46] European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission' (22 December, 2011), point 17. See S. Blockmans, 'The European External Action Service one year on: first signs of strengths and weaknesses', *2 CLEER Working Papers* 2012, at 33.

[47] European External Action Service, 'Report by the High Representative to the European Parliament*', The Council and The Commission*, *supra* note 8, point 17.

in multilateral organisations' was adopted in order to give clarifications on how to interpret EU external representation.[48]

It is now relevant to devote some attention to the main novelties included in those Arrangements as well as to their practical implementation. Firstly, the Arrangements say that the Member States agree on a case-by-case basis on whether and how to co-ordinate and be represented externally. The Member States may request the new troika or the Member State holding the rotating Presidency of the Council to represent them.[49] Secondly, Member States will seek to ensure and promote possibilities for the EU actors to deliver statements on behalf of the EU. To this end, the Member States and EU actors will coordinate their action in international organisations to the fullest extent possible. Thirdly, the EU can only make statements where it has competences and when a common position has been reached. Consequently, before a statement is delivered at an international organisation, it is necessary to determine who is competent for which area, and to ensure that the internal division of competences is adequately reflected externally.[50] The Member States were not willing to leave out the possibility to speak on matters falling within EU competence by adding that 'Member States may complement statements made on behalf of the EU whilst respecting the principle of sincere cooperation'.[51] Finally, EU external representation does not affect the distribution of competences or the allocation of powers between the institutions under the Treaties.

It seems that the 2011 Arrangements have provided greater guidance on the respective role of the EEAS, the rotating Presidency and Member States[52] and the discussions on the preparation of statements have remained 'internal and consensual'.[53] However, the efforts required for internal discussions regarding competence issues and the determination of who must speak for the EU can undermine the EU's capacity to deliver its messages and defend its interests in multilateral fora.[54] In any case, the Arrangements are unable to solve the problems deriving from EU representation in areas of shared competences.[55] In spite of the Arrangements having avoided the external visibility of internal conflicts regarding representation before international organisations, they have not led to a more visible and active EU presence in international organisations. Lady

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[48] Council of the European Union, 'EU Statements in Multilateral Organisations', *16901/11* (24 October 2011).

[49] *Ibidem*

[50] See B. Van Vooren and R. A. Wessel, *supra* note 34, at 66.

[51] See Council of the European Union, 'EU Statements in Multilateral Organisations' *supra* note 48, at 3.

[52] *EEAS Review* (2013), at 11.

[53] See Council of the European Union, 'EU Statements in multilateral organisations, *supra* note 48, at 2.

[54] European Parliament, 'Organisation and functioning of the European External Action Service: achievements, challenges and opportunities' (2013), at 80.

[55] According to Van Vooren and Wessel "the arrangement rather goes against pre-existing legal interpretations of shared competences and the duty of cooperation, and seems hardly conducive to the unified diplomatic actor in *substance*, the Lisbon Treaty and EEAS sought to create" (B. Van Vooren and R. A. Wessel, *supra* note 34, at 87. See also J. Wouters and T. Ramopoulos, 'Revisiting the Lisbon Treaty's Constitutional Design of the EU External Relations', 119 *Leuven Centre for Global Governance Studies Working Paper* 2013.

Ashton has been cautious in her assessment as she stated in her 2013 Report that 'residual legal uncertainties in this area continue'.[56] In these circumstances, the coordinating role of EU delegations to international organisations, particularly in New York and Geneva, is essential to avoid problems in the implementation of the 2011 Arrangements. In general, the conduct of local coordination meetings are prepared and conducted by the EU delegations. However, difficulties have arisen in practice as to the conduct of local coordination when non-EEAS Chairs and members of Council Working Parties travelled abroad to participate in multilateral meetings and continue assuming a coordination role.[57]

Obviously, the delivery of EU statements is also dependent on the EU status at a given international organisation and the limitations deriving from it. The situation varies amongst the different EU delegations. While in New York, after the adoption of Resolution 65/276 on the participation of the EU in the work of the United Nations, EU actors can present positions at the General Assembly and its Committees, in Geneva, the Member State holding the Presidency of the Council delivers very often statements on behalf of the EU. This is due to the limitations of the EU's status at various Geneva-based organisations, such as the Human Rights Council. The EU delegation in Vienna also faces some limitations at the OSCE. The EU participation in OSCE formal meetings is channelled through the Presidency of the Council who gives the floor to the EU delegation.[58]

3.2 **EU representation at international conferences**

EU representation in the negotiation of multilateral conventions has also faced similar difficulties regarding the delivery of EU statements to international organisations. On the one hand, EU Member States have tried to protect their competences in areas of shared competences and to maintain their international visibility.[59] On the other hand, the Commission emphasised that, by virtue of Article 17 TEU, it is responsible for external representation in all areas, apart from CFSP. This provision created the expectation that the Commission would be in charge of EU representation before the United Nations Conference on Climate Change in Copenhagen. Nevertheless, the Member States considered that representation should be entrusted to the rotating Presidency in cooperation with the Commission, in order to attain unity in the representation of the Union and its Member States. This difference created a manifest weakness in the representation of EU interests at the Conference in Copenhagen.[60]

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[56] *EEAS Review* (2013), at 11.

[57] Report on EU statements in multilateral organisations – implementation of General Arrangements (2012).

[58] *Ibidem.*

[59] See J. Wouters, J. Odermatt and T. Ramopoulos, *supra* note 15, at 5.

[60] See G. de Baere, 'International Negotiations Post-Lisbon: A Case Study of the Union's External Environmental Policy', in P. Koutrakos (ed.), *The European Union's External Relations a Year After Lisbon,* 3 *CLEER Working Papers* 2011.

In June 2010 a similar conflict was raised regarding the Conference in Stockholm, organised within the framework of the United Nations Programme for the Environment and which aimed at creating a binding instrument regarding mercury.[61] The Commission withdrew its recommendation for a decision on the matter and thus causing an institutional crisis. Finally, a compromise was agreed between the Council and the Commission, according to which the Commission will be the Union's negotiator in areas falling within the Union's competence when the Union has already adopted rules. The Commission will conduct the negotiations 'in consultation with a special committee of representatives of Members States, and in accordance with the negotiating directives'.[62] Furthermore, in a recent judgment the negative denial of EU Member States to accept the Commission's exercising representation on behalf of the whole Union regarding the negotiation of the Convention of the Council of Europe on the protection of the rights of broadcasting organisations, has led the Commission to lodging an application for annulment of the Council Decision authorising the opening of negotiations. The Court of Justice held that those negotiations fell within the exclusive competence of the European Union.[63]

3.3 **The adoption of EU positions at international organisations**

The participation in international organisations and the determination of EU positions that must be adopted on behalf of the EU in the context of international organisations are clearly intertwined. Consequently, the possibility for the EU to present its positions in different international organisations and fora may vary considerably depending on the EU status. In the *Wine and Vine* case, Germany, supported by a group of countries, has tried to limit the room of action for the EU at those international organisations where the EU is not a member itself, even though their activities fall within the competence of the European Union.[64] Germany challenged a Council Decision 'establishing the position to be adopted on behalf of the EU with regard to certain resolutions to be voted in the framework of the International Organisation for Wine and Wine (OIV)'. Germany argued that Article 218(9) TFEU only applied where the Union itself was a member of the international organisation concerned. Furthermore, a Union position could, according to Germany, only be established for the adoption of international binding legal acts.

The outcome of this case has important consequences for the daily work of EU delegations to international organisations. In addition to the adoption of EU positions by the institutions following the procedure laid down in Article 219(9)

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[61] M. Emerson *et al*., 'Upgrading the EU's Role as Global Actor: Institutions, Law and the Restructuring European Diplomacy', Centre for European Policy Studies (CEPS) Commentaries (25 January 2011).

[62] Council Decision on the participation of the Union in negotiations on a legally binding instrument on mercury further to Decision 25/5 of the Governing Council of the United Nations Environment Programme (UNEP), *doc. 16632/10* (6 December 2010).

[63] ECJ, Case C-114/12, *European Commission v. Council*, 4 September 2014 (not published yet in the report).

[64] See ECJ, Case C-399/12, *supra* note 41.

TFUE, EU positions can be further elaborated in the local coordination meetings between the EU delegations and the representations of Member States. As has been pointed out above, EU delegations at international organisations play an important role leading local coordination with permanent representations of Member States.

In deciding whether to grant primacy to the defence of the interests of the EU as a whole or of the Member States parties themselves to the OIV, the Court of Justice has not been hesitant in siding for the former. In its view, references to the positions to be adopted 'on the Union's behalf' found in Article 218(9) TFEU do not presuppose that the EU has to be party to the agreement which set up the international body in question. The Court held that 'there is nothing in the wording of Article 218(9) TFEU to prevent the European Union from adopting a decision establishing a position to be adopted on its behalf in a body set up by an international agreement to which it is not a party'.[65] Consequently, the fact that the EU is not a member of an international organisation does not prevent it from applying Article 218(9) TFEU. The legal reasoning developed by the Court of Justice differed completely from the conclusions of Advocate General Cruz Villalón. In his Opinion, a textual as well as a systematic and teleological interpretation of Article 218(9) TFEU supported the thesis that the wording of this provision is restricted to those international organisations to which the EU is a member.[66] According to Advocate General Cruz Villalón, this provision is a *lex specialis* for the establishment of positions in international organisations, which is intended to create a simplified procedure by comparison with the more elaborate procedure for the conclusion of agreements.

The Court of Justice already had to rule on the formulation of EU positions in international organisations in the past.[67] In the *FAO* case, the Court of Justice dealt with the exercise of the alternate voting rights of the EU and its Member States when they were both full members of another international organisation.[68] In two more recent cases, namely *Commission v. Greece*[69] and *Commission v. Sweden,*[70] the Court held that by unilaterally submitting a proposal in the context of international organisations, where a prior Union position or common strategy was already established, individual Member States had infringed the obligations arising from Article 4 TEU. However, the *Wine and Vine* case was the first time the Court was called to decide on whether Article 218(9) TFEU was indeed a suitable legal basis for establishing positions in international organisations of which the European Union is not a member.[71]

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[65] See ECJ, Case C-399/12, *supra* note 41, para., 50.

[66] ECJ, Opinion of Advocate General Cruz Villalón C 399/12, *Federal Republic of Germany v Council of the European Union*, 29 April 2014.

[67] See I. Goevaere, 'Novel issues pertaining to EU Member States membership of other international organisations: the OIV Case", in I. Goevaere and others (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden: Martinus Nijhoff Publishers 2014), 225-243.

[68] ECJ, Case C-25/94, *Commission v. Council* (FAO) [1996] *ECR* I-01469.

[69] ECJ, Case C-45/07, *Commission v. Hellenic Republic* (IMO) [2009] *ECR* I-00701.

[70] ECJ, Case C-246/07, *Commission v. Sweden* [2010] *ECR* I-03317.

[71] The *Wine and Vine* case presents certain similarities with the CITES case, which referred to the breach of the duty of motivation of Council decisions establishing EU positions (ECJ, Case C-370/07, *Commission v. Council* [2009] *ECR* I-08917).

The second novel issue raised by Germany concerned a question of interpretation of Article 218(9) TFEU and, in particular, the wording 'acts having legal effects' with regard to certain resolutions to be voted in the framework of the OIV. OIV resolutions, to which the contested Decision referred, contain recommendations which are in principle not binding. The Court of Justice did not hesitate to follow the legal reasoning developed by the Council and the Commission. Consequently, the cases of acts not having legal effects but which acquire a binding force *ex post* through transposition in domestic law, as is the case of the recommendations of the OIV, would fall under Article 218(9) TFEU. The Court of Justice's legal reasoning is quite similar to the approach adopted in *Commission v. Greece* case in relation to IMO.[72] The Court held that the Greek initiative to submit a proposal to the IMO initiated a procedure that could have led to the adoption by the IMO of new rules which may have an effect on an EU Regulation.[73] Even though the *Commission v. Greece* case did not concern the interpretation of Article 218(9) TFEU with respect to the adoption of a decision establishing a Union position, it would have been illogical not to follow a similar reasoning in the *Wine and Vine* case. Otherwise, it would have amounted to accepting that the mere fact that the Union is not a member of an international organisation authorises the Member States, acting individually in the context of its participation in an international organisation, to submit proposals which are likely to affect Union rules adopted for the attainment of the objectives of the Treaty.

Had the Court of Justice followed the reasoning defended by Germany, additional limitations would have been introduced in the EU representation to international organisations and local coordination on the ground. It is important to point out that the EU delegations cannot overcome the lack of an EU common position as regards the adoption of 'acts having legal effects' by an international organisation. Furthermore, the legal questions posed in the *Wine and Vine* case are of great relevance in relation with the projection of EU interests at all those international organisations to which the EU is not a member, but to which Member States are. The Court of Justice seemed to have understood in the *Wine and Vine* case that possibilities to achieve a more coherent, effective and unified representation in multilateral organisations must not be reduced.

4. CONCLUSIONS

There is no doubt that the enhanced political role assumed by EU delegations has allowed the EU to gain more visibility and impact in third countries and at international organisations. EU delegations provide more continuity in the international representation and in local coordination with Member States' representations. However, the representation of the European Union to multilateral

[72] See Govaere, *supra* note 67, at 238.

[73] The Court held that "in those circumstances, since it set in motion such a procedure with the contested proposal, the Hellenic Republic took an initiative likely to affect the provisions of the Regulation, which is an infringement of the obligations under Arts. 10 EC, 71 EC and 80(2) EC" (ECJ, Case C-45/07, *supra* note 69, para. 23).

organisations has faced important challenges that in a certain way have diminished the potential of EU delegations to assert a relevant influence within international organisations. EU representation to international organisations has created new tensions between Member States and the new actors to which EU representation is entrusted, in particular in the area of shared competences. As internal division of competences in the EU is not easily transposed to international fora, coordination between Member States representatives and the EU delegations is paramount for the defence of the interests of the EU as a whole.

Despite the fact that one of the main goals of the Lisbon Treaty was the improvement of EU external representation, EU participation in international organisations is very often characterised by the difficulties in accommodating the EU integration process within host organisations. The establishment of the EEAS and the enhanced political role of the new EU delegations have not seemed to help in the improvement of the EU status in the majority of international organisations. Even in those multilateral fora where the EU status has been significantly improved after the Lisbon Treaty, political obstacles have not disappeared regarding their practical implementation. The difficulties faced by the EU at the UN after the former was granted an enhanced observer status at the General Assembly in 2011 is a good example. Furthermore, the problems deriving from the lack of an effective representation and participation in many international fora hampers the effective fulfilment of the tasks entrusted to EU delegations before international organisations, in particular, those of leading local coordination with permanent representations of Member States and representing the EU.

It is indeed rather paradoxical that certain Member States have adopted behaviours aimed at hampering the fulfilment of the objective to achieve a more coherent, effective and unified representation at multilateral organisations. This trend had been reflected in the political level through the blocking of the delivery of EU statements in multilateral organisations, in particular in the UN and the OSCE, during the second half of 2011, and the difficulties arising in the EU representation in the negotiation of treaties at international conferences. Besides, in the *Wine and Vine* case, Germany, supported by a group of countries, has tried to limit the room of action of the EU in those international organisations where it is not itself a member, even though their activities fall within the competences of the European Union.

The legal and political obstacles arising from the transformation of Commission delegations to international organisations into EU delegations is a good example of the difficulties the EEAS has experienced in the last years to gain the Member States' confidence. Some Member States have not considered EU delegations to international organisations as an instrument to strengthen the EU's and the Member States' capacity to project EU values and interests in the context of multilateral fora. The strengthening of EU representation to multilateral organisations greatly depends on whether Member States accept the new role assumed by the EU delegations in fostering local coordination and representing the Union at multilateral fora.