

## EDITORIAL COMMENTS

### *Mind the gap!*

Enhancing the “coherence” of the Union’s action on the international scene was one of the key objectives of the Treaty drawn up by the 2007 Inter-Governmental Conference.<sup>1</sup> The text signed in Lisbon includes several innovations in this sense, the most noticeable being the transformation of the High Representative for CFSP into a High Representative for Foreign Affairs and Security Policy, and the establishment of a European External Action Service (EEAS) to support him/her. Remarkably, however, the new Treaty contains as many gaps as detailed indications on how these new mechanisms are supposed to work, the treaty-makers having left those crucial modalities to later decisions.<sup>2</sup>

That the nitty-gritty of constitutional innovations is to be worked out after ratification is not unusual in the EU treaty-making history; suffice to mention the first job-profile of the High Representative, or that of the Ombudsman, or to recall the wrangling about the seat of the EEC institutions. Arguably, however, the loose ends in the new Treaty are in a different league in view of the nature and extent of the details left undecided. They are all the more remarkable given the spirit of ring-fencing that dominated the 2007 IGC and which otherwise coloured the drafting of the agreed text.<sup>3</sup> In the midst of this “competence mania”, it is indeed a paradox that the *Herren der Verträge* have left it to the EU institutions to elaborate significant aspects of the refurbished system of EU external action, aspects which could have weighty implications, notably for the Union’s ability to act coherently on the international scene.

Let us start with the High Representative. As is well known, the ill-fated Constitutional Treaty foresaw the establishment of an EU Minister for Foreign Affairs cumulating the jobs of High Representative (“HR”) and Vice-President (“VP”) of the Commission by taking over the post of the present external relations Commissioner. Such a combination of Council and Commission functions – “double-hatting” – was emblematic of the intention to bolster coherence in EU external action. Though the 2007 Treaty has got rid of the term

1. See the Preamble of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community; see also the IGC Mandate, June 2007.

2. “Unclear EU Treaty provisions causing ‘nervousness’”, *EUObserver*, 28 Nov. 2007.

3. See e.g. Arts. 4(1)–(2), 5(1)–(2) TEU (Lisbon). Unless indicated otherwise, all Articles referred to in this editorial are renumbered in accordance with the table of equivalence included in the Treaty of Lisbon.

Minister and changed the title back to that of High Representative in charge of the Union's Foreign Affairs and Security Policy, the officeholder would still wear the "*double casquette*" of HR and Commission VP (HR/VP).<sup>4</sup> The new Treaty has also kept the primary law-makers' indecisiveness as regards numerous significant features of his/her future function. In particular, the HR/VP's very terms of office remain to be clarified, a clarification which is not merely technical in nature.

For example, as regards the role of the HR/VP within the European Commission,<sup>5</sup> the Treaty contains an ambiguous and rather inelegant provision whereby s/he "shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action".<sup>6</sup> On a *maximalist* view, the HR/VP would take over the portfolios of Commissioners typically involved in the external policies of the EU, viz. trade, development cooperation and humanitarian aid, and would also manage the external dimension of the Union's internal policies, such as energy, transport or environment. Conversely, a *minimalist* approach would be that the Vice-President would take care of Commissioner Ferrero Waldner's current tasks, namely external relations and the European Neighbourhood Policy, leaving development cooperation, humanitarian aid and trade to other Commissioners, never mind the external dimensions of other EU policies.

The legal framework envisaged by the Treaty is sufficiently broad and malleable for either of these scenarios to materialize, each with a host of implications not only for the functioning of the EU system of external action, but arguably for the nature of the Union altogether. Theoretically, an all-embracing HR/VP portfolio, within the Commission, would effectively improve coherence in the EU external action. However, that increased coherence would come at a price, in terms of circumscribing the scope of what is still known as the "Community method".<sup>7</sup> With one foot in the Council, and an ensuing loyalty also towards the Member States, the HR/VP may well be perceived as the embodiment of an "intergovernmental" contamination of the "supranational" nature of the Commission. In this perspective, handing out all external policies to the High Representative would catalyse the watering down of the "Community" nature of external relations which would meet some resistance, notably within the Commission, always eager to protect the bastions of exclusive

4. Art. 18(3) and (4) TEU (Lisbon).

5. It should be recalled that Art. 17 TEU (Lisbon) stipulates that "[w]ith the exception of the [CFSP], and other cases provided for in the Treaties, [the Commission] shall ensure the Union's external representation".

6. Art. 18(4) TEU (Lisbon).

7. The new Treaty no longer refers to the notion of the Community, which is being abolished as a separate entity, or the "*acquis communautaire*".

Community external powers, such as trade. Moreover, a maximalist option would run the risk of overburdening the VP, while reducing an already limited availability of portfolios for 27 Commissioners. At another level, the President of the Commission, who has hitherto represented the institution externally at the highest level, may not be too keen on being outshone by a HR/VP with too much clout. Importantly, the President decides on the internal organization of the Commission, and thus on the distribution of portfolios among Commissioners, including the HR/VP.<sup>8</sup> In other words, it is the President who would determine whether to coalesce or not the different Commission's external relations portfolios under the authority of the HR/VP, even if that decision may be coloured by Member States' intentions, and calendar considerations.<sup>9</sup>

Similar questions relating to the role of the HR/VP arise in the context of the Council-related part of the job description. While it is common to assume that the incumbent would keep at least the current HR's portfolio, the overall role of the HR/VP within the *Justus Lipsius* could actually be thinned down. For example, that role has to be clarified in relation to the new President of the European Council, particularly with respect to the representation of the EU on the international stage.<sup>10</sup> For, here again, the Treaty is far from accommodating. The HR/VP should "represent the Union for matters relating to the Common Foreign and Security Policy" and in particular "express the Union's position in international organizations and at international conferences" in this field.<sup>11</sup> The President, on the other hand, shall "at his level, and in that capacity, ensure the external representation of the Union on issues concerning its [CFSP]", though the Treaty specifies that it is "without prejudice to the powers of the [HR]".<sup>12</sup> In addition, and in connection to this unsettled question of portfolio, the fact that the HR is also VP of the Commission may lead some Member States to try and restrict the officeholder's involvement in the revamped Common Security and Defence Policy (CSDP),<sup>13</sup> on the ground that the Commission, and the "Community" method altogether, should stay out of EU defence issues. The HR role in CSDP could thus be reduced to a minimum.

8. Art. 17(6)(b) TEU (Lisbon), and Art. 248 TFEU.

9. Conversely, an early appointment of the HR could have an effect on the appointment of the Commission's President, in that it might itself depend on the candidate's openness to Member States' wishes regarding the role of the HR/VP within the College.

10. Art. 15(6) TEU.

11. Art. 27(3) TEU.

12. Art. 15(6) TEU.

13. See in this regard pt. 5 of the "issues paper on the European External Action Service" prepared by the HR and the President of the Commission, and annexed to the joint progress report by the Secretary-General/High Representative and the Commission on the European External Action Service; Doc. 9956/05; 9 June 2005.

A split could even be introduced between the CFSP and the reformulated CSDP, a scenario which would most likely have a detrimental effect on the coherence of the EU external action.

The way in which these questions of competence are going to be solved will have a substantial impact on the future of the other innovation of the Treaty, namely the European External Action Service (“EEAS”). Article 27 of the revised TEU stipulates that:

“In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States...”

Akin to the HR/VP, essential particulars of the EEAS are left open. For instance, while it is clear that the new Service will be composed of Council and Commission officials, together with Member States’ seconded staff, little is known of the actual quantitative and qualitative distribution of posts among the different constitutive groups. In particular, it is uncertain whether the Member States’ seconded staff will hold similar types of functions to those occupied by Commission and Council officials, as it is presently the case in the Council with respect to the CFSP. More generally, the nature, structure and scope of activities of the EEAS, as well as the role of EU delegations in this new configuration, remain to be decided. And so does its budget, which will have to be tackled at the same time as the thorny discussion on the mid-term re-evaluation of the financial perspectives at the end of 2008.

As with the HR/VP, different scenarios could be compatible with the broad legal framework set out by the Treaty. On a *maximalist* view, the EEAS, like the HR/VP, could be endowed with powers covering the whole array of EU external activities. The Service could thus include officials from “all relevant” Directorates-General of the Commission, viz. trade and development cooperation, energy and environment, working together with CFSP and CSDP personnel from the Council, and Member States’ officials, including diplomats. Placed under the authority of the HR/VP, such an integrated and comprehensive service would serve coherence well. By contrast, a *minimalist* conception of the EEAS would be to entrust it only with a limited assortment of tasks thus involving limited staff as indeed suggested by some Member States,<sup>14</sup> and ensuing complications in terms of coherence.

14. See in this regard the joint progress report by the Secretary-General/High Representative and the Commission on the European External Action Service; Doc. 9956/05; 9 June 2005.

As foreseen in the Treaty,<sup>15</sup> work has begun to tackle these questions, thus resuming discussions which had started in the aftermath of the signature of the Constitutional Treaty. A Joint Progress Report on the European External Action Service had been prepared by the Secretary-General/High Representative and the Commission for the June 2005 European Council, based on an earlier joint issues paper of the High Representative and the President of the Commission. However, following the two negative referenda, the Joint Report was never submitted to, let alone discussed by, the European Council. The short five-page document contained various preliminary orientations, for instance that the EEAS should be of a “*sui generis*” nature. It also highlighted complex issues that require detailed examination.

The Heads of State or Government have agreed that all such fundamental questions should eventually be settled by a Council decision, to be taken following a specific procedure. According to the Treaty, “[t]he organization and functioning of the European External Action Service shall be established by a decision of the Council [which] shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.” That the organization and functioning of the EEAS should be worked out by the EU institutions themselves is in itself remarkable in view of the Member States’ competence obsession evoked earlier.<sup>16</sup>

What is also notable is the envisaged decision-making procedure, which grants a veto right to the Commission and a consultative power to the European Parliament on the development of the EEAS, which potentially covers matters related to the CFSP and CSDP.<sup>17</sup> Conversely, the Treaty foresees that the Council is to decide on the modalities of the EEAS by acting unanimously,<sup>18</sup> while excluding possible judicial review from the Court of Justice, despite the likely non-CFSP/CSDP elements of that decision.<sup>19</sup>

15. Declaration 15 of the Final Act, which could already be found in the Constitutional Treaty, states: “The Conference declares that, as soon as the Treaty of Lisbon is signed, the Secretary-General of the Council, High Representative for the common foreign and security policy, the Commission and the Member States should begin preparatory work on the European External Action Service.”

16. See in this regard, Declarations 13 and 14, Final Act.

17. Cf. Declaration 14, Final Act.

18. Since Art. 27 TEU (Lisbon) does not provide otherwise, the decision shall be taken by the Council acting unanimously, as foreseen in Art. 31 TEU (Lisbon).

19. Since Art. 27 TEU (Lisbon) is included in the chapter on CFSP (Chapt. 2 – Specific provisions on the Common Foreign and Security Policy), the Court should in principle not have jurisdiction with respect to those provisions, nor with respect to acts adopted on the basis of those provisions, as provided in Art. 275 TFEU.

*L'intendance suivra...*

All in all, the HR/VP and the EEAS sketched out in the Treaty offer potential for improving coherence, by integrating different EU external policies, but also by involving increased cooperation between the EU and Member States' relevant services. Yet, the Treaty's astonishing lack of precision entails that filling the gaps and tying up the loose ends are envisaged as a post-ratification exercise, outside the formal confines of inter-governmental negotiations. This suggests that coherence eventually depends on the different EU external relations actors' ability and willingness to come to an agreement.

In the current "ideological" environment of strict competence control, amplified personification of EU governance and ever increasing number of Member States, future decisions may well lead to inter-institutional, intra-institutional if not inter-personal bickering, which may end up with the new HR/VP and the EEAS being evicted from various facets of EU external action. If this holds true, the latter's coherence would, as presently, depend on the clarity of the distribution of powers among the remaining different actors of the EU system of external relations, workable rules of compliance and conflict, and solid incentives for the actors involved to cooperate.

A brief look at the Treaty suggests that the Treaty-makers have not been particularly helpful in this respect. Some of the mechanisms on competence distribution and rules of conflict that the TEU has hitherto foreseen would indeed be taken away from the EU Treaty framework. For example, while the new Treaty insists on the specificity of the CFSP and ESDP, it does not distinguish its particular CFSP/ESDP objectives from the other general objectives of the Union's external action. Instead, all the external action objectives are regrouped within one single article<sup>20</sup> which raises the question of how institutions would determine in which case a measure should be adopted as a CFSP measure following the specific CFSP procedure, or be adopted as an EU external action, following the standard procedure. Given that the new Treaty would also obliterate the hitherto bias in favour of the "Community method" by suppressing the Union's objective of preserving the *acquis communautaire*<sup>21</sup> and by reformulating current Article 47 TEU,<sup>22</sup> potential disagreement on the legal basis would be a hard nut to crack for the Court of Justice of the EU.<sup>23</sup>

20. Art. 21 TEU (Lisbon).

21. Current Art. 2 TEU.

22. Art. 40 TEU (Lisbon).

23. In this regard, see the Opinion of A.G. Mengozzi in Case 91/05, *Commission v. Council (Small Arms and Light Weapons)*, delivered on 19 Sept. 2007.