

GUEST EDITORIAL

Calling Europe by Phone

Has the lack of a specific phone number, many years ago lamented by U.S. Foreign Secretary Henry Kissinger as a symbol of the weakness of government structures in the European integration system, been remedied by the entry into force of the Lisbon Treaty? In fact, the European Union can now boast of two outstanding figures. On the one hand, the Treaty on European Union provides for the election of a President of the European Council (Art. 15(5)). On the other hand, although being deprived of the title of “Minister” for Foreign Affairs, as planned by the abortive Treaty establishing a Constitution for Europe (Art. I-28), a High Representative of the Union for Foreign Affairs and Security Policy has been introduced (Art. 18 TEU). High expectations had been entertained with regard to both offices. But disillusionment set in as soon as the 27 governments of the Member States had made known the names of their holders. Herman van Rompuy, the new President of the European Council, was hardly known outside his home country Belgium before his appointment. And the same was true of Catherine Ashton, who even in the United Kingdom, notwithstanding the high political posts she occupied, ultimately as the British member of the European Commission, was not counted as a popular politician and was considered rather more as an efficient technocrat within the EU machinery. Do both personalities, in spite of their low political profile, have a chance of establishing themselves as major actors in European policies, based on their undeniable experience, their skills and their obvious determination to make the best of the mandates with which they have been entrusted?

While journalists focus primarily on personal credits and stamina, lawyers have to give priority to the institutional background. Looking closely at the relevant provisions of the EU Treaty is therefore the first thing to do. Not infrequently, Van Rompuy has been – and still is – referred to in commentaries as the “President of the European Union”. Thus, comparisons with the President of the United States easily come to mind. However, it was never envisaged to introduce a President of the European Union. In Article 15(6) TEU, one finds a short but accurate description of the functions of the President of the European Council. He shall chair it and “drive forward its work”; he shall ensure the preparation and continuity of its work in cooperation with the President of the Commission and on the basis of the work of the General Affairs Council; he shall endeavour to facilitate cohesion and consensus within the European Council; and he shall also present a report to the European Parliament after

each of the meetings of the European Council. Lastly, he is entrusted with ensuring the external representation of the Union on issues concerning its Common Foreign and Security Policy, having to respect, however, the powers of the High Representative of the Union for Foreign Affairs and Security Policy. All this is important. With the enlargement of the Union to 27 members, internal divergences have increased both in depth and in quantity. Europe must make intense efforts to maintain its internal cohesion in order to accomplish the vital challenges it has to cope with. Its basic aim is internally to introduce common policies and externally to speak with one voice. However, it emerges quite clearly from the list established in Article 15(6) TEU that Van Rompuy and his successors are not conceived of as office holders endowed with a true power of initiative or, even less so, of decision-making. Rather, the President of the European Council is seen as a moderator who should mediate between the heads of State and Government acting therein.

The analysis of the new texts reveals indeed a consistent pattern. In the first place, the drafters of the Lisbon Treaty had visibly no intention of diminishing the role of the Presidency of the Council, which continues to rotate on a six-monthly basis among the Member States, in the special form of a triplet (groups of three Member States).¹ They feel that it falls to them to come up with a comprehensive programme at the beginning of their mandate. Thus, in November 2009, Spain, Belgium and Hungary issued a common strategy paper for the time from 1 January 2010 to 30 June 2011.² No similar paper was presented by Van Rompuy – although he possibly might have insisted on his duty to “drive forward” the work of the European Council; apparently, however, he was surprised by his election and was unable, on that ground alone, to react swiftly by producing a text that would have constituted some kind of counterweight. Initially, the strategy paper of the three nations was characterized as “remarkably anodyne” by the economic press,³ but the Spanish Prime Minister, Mr Zapatero, has in the meantime added hefty accents to his six-month programme (“EU Strategy 2020”) by requesting that more powers should be conferred on the European Commission: it should even be authorized to sanction Member States not complying with their economic duties. In no way could the President of the European Council have come up with similarly far-reaching proposals. Indeed, his political legitimacy shrinks as soon as he has accepted his new post. Article 15(6) TEU explicitly requires him to abandon any national office. Van Rompuy belongs to the European Council not any longer as Prime

1. See Declaration No. 9 of the Treaty Conference: Declaration on Article 16(9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council.

2. European Council Document 16771/09, POLGEN 219, 27 Nov. 2009.

3. Financial Times, 5 Jan. 2010: “A stumbling Spain must guide Europe.”

Minister of Belgium, but exclusively as the person whose political legitimacy derives now exclusively from his appointment by the European Council. *Vis-à-vis* the European Council, he has no independent source of legitimacy. All this accords perfectly well with his primary function as moderator and promoter of consensus.

A good deal of wisdom lies in the restriction of the mandate. The European Union is not a political arena where unilateral decisions of prominent political individuals are appropriate to facilitate the political processes. Inevitably, the larger nations must blaze the trail and put their weight behind crucial decisions. Nonetheless, a reasonable moderator is required almost on a daily basis. The President of the European Council is part of the mechanics which sustain the political process in Europe. Thus, he stands far above figures like the German Federal President, for instance, who sometimes is pejoratively called the “federal notary public”. Institutionally, however, the fact remains that the President of the European Council is poorly equipped – which does not detract from the importance of his mandate. His phone does not carry the number which one would immediately dial when trying to overcome a political crisis situation if a hard and fast decision is needed.

The High Representative of the Union for Foreign Affairs and Security Policy has been given a more independent field of activity. Article 18(2) TEU specifies explicitly that “he” shall conduct the Union’s common foreign and security policy. “His” power of initiative is explicitly recognized. The text provides that “he” shall contribute by his proposals to the development of that policy.⁴ Of course, the European Council itself remains the master of that policy by imparting the relevant instructions to the High Representative. But the High Representative enjoys a considerable margin of discretion in handling those matters, all the more so since the European External Action Service – a complicated name for the simpler term “diplomatic service” – will be placed under his responsibility (Art. 27(3) TEU). It is easy to guess that when drafting the relevant articles the experience with Javier Solana, the former High Representative for the Common Foreign and Security Policy, gave a determinative orientation. Considerably more caution presided over the drafting of the provisions on the President of the European Council.

It is common knowledge that the High Representative will become a personal bridge element between the Council and the Commission. He will preside over the Foreign Affairs Council and will at the same time be one of the Vice-Presidents of the Commission (Art. 18 TEU). Thus, the institutional tensions

4. The drafters of the Lisbon Treaty defied all current rules of political correctness by simply using the male form. Apparently against all expectations, the first High Representative is a woman.

which formerly existed between the competences of Javier Solana and those of the Commissioner for External Affairs, Mrs. Ferrero Waldner, have been made to disappear. The often divergent requirements of the two institutional ties will now have to be amalgamated in one and the same person – who will need a lot of resolve to master this challenge. Lastly, it should not be overlooked that the Council Presidency will not be totally displaced in the management of external representation. In the General Assembly of the United Nations, in particular, the non-European Member States of the world organization will still witness different institutions speaking on behalf of the European Union, in particular in the field of trade and development policies.

Regarding one further point, the High Representative is far ahead institutionally of the President of the European Council. His mandate is not limited in time. Javier Solana exercised his functions during a span of no less than ten years, and Catherine Ashton will certainly wish to emulate him, provided that no unforeseen incidents prevent her from continuing for such a long period. Through her extended powers, the High Representative will be a strong competitor in particular for the Council Presidency. Inevitably, the question must arise who will provide the general orientations of the foreign policy of the Union. In any event, the common strategy paper submitted by Spain, Belgium and Hungary contains no less than 13 lengthy pages on the objectives of the common foreign and security policy from 2010 to mid-2011. Manifestly, the Governments of the Member States are not of the view that the High Representative – ultimately the personal link between the Council and the Commission – should have the decisive say in establishing the general framework for the external action of the Union, although her voice may carry considerable weight when she submits proposals elaborated in accord with the Commission. And there can be no doubt that the European Council will remain the key actor in this respect. It is the European Council which holds the authority to define the mandate of the High Representative.

However, one may expect that in the coming years the High Representative will *de facto* attain an enviable and unique position. Through the European External Action Service, he will enjoy the benefit of comprehensive information on all matters concerning the Union. By making carefully considered proposals, he will be able to compete with the degree of expertise which the larger nations have acquired over many decades – or even centuries. He therefore has the potential to lay the foundations for a truly uniform external policy of the Union. Accordingly, more than the President of the European Council, the High Representative may in the future become the one telephone number Henry Kissinger was so desperately looking for. It would of course be an illusion to believe that the person to be reached by that number can be the true and genuine decider. The institutional imbroglio, no matter how impenetrable

for outsiders, should not be felt as a sign of weakness. The most recent past has evidenced that also the U.S. President, often lightly called the most powerful politician of the world, does not have the power to effectively enforce all his political wishes. The Guantánamo prison, the closure of which President Obama had made a primary objective of his electoral campaign, exists to this very day. Democracies placed under the rule of law are difficult and sophisticated entities. This is true of the European Union as well. Instead of being ashamed that their decision-making may sometimes take frustratingly long, the Europeans should be proud of the checks and balances built into the system, which in most instances reliably exclude rash and inconsiderate decisions.

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