

## EDITORIAL COMMENTS

### *The 2013 review of the European External Action Service: A missed opportunity?*

In the dead of summer, as Brussels was packing for the break, Catherine Ashton, the EU High Representative for Foreign Affairs and Security Policy published her awaited “review” of the European External Action Service (“EEAS review”).<sup>1</sup> The 15-page document exposes “what works and what doesn’t” in the EEAS,<sup>2</sup> two years after it was officially launched,<sup>3</sup> and puts forward a three-page list of “proposals for change”.<sup>4</sup> An interesting contribution to improving the working of the EEAS, the review also gives a fresh, if not cooling, impression of the operation of the post-Lisbon EU system of external action.

#### *A legal reminder*

The establishment of the EEAS was one of the principal innovations crafted by the authors of the Lisbon Treaty to improve the EU’s external policy.<sup>5</sup> By bringing together in one “multi-hatted” job the previously distinct functions of the Commissioner for External Relations, the High Representative for CFSP, and the rotating Council presidency in the area of foreign affairs, while amalgamating their respective administrative supports within a single Service, it was surmised that some of the root causes of inconsistency and inefficiency in the Union’s external action would be remedied.

Legally, the creation of the Service is based on Article 27(3) TEU, though that provision merely establishes its purpose, *viz.* to assist the HR/VP in fulfilling her mandate, and its initial composition, namely staff transferred from the Commission and Council, together with seconded Member States’ diplomats. Details on the organization and functioning of the Service had to be set out in a subsequent decision, following a procedure stipulated in the same Treaty article.<sup>6</sup>

1. Available at: <eeas.europa.eu/top\_stories/2013/29072013\_eeas\_review\_en.htm>.

2. EEAS review, p. 2.

3. The EEAS was officially launched on 1 Jan. 2011.

4. EEAS review, pp. 16–18.

5. Further on this, “Editorial Comments: ‘Mind the Gap!’” 45 CML Rev. (2008), 317.

6. According to Art. 27(3) TEU: “The organization and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act

Decision 2010/427/EU establishing the organization and functioning of the EEAS was adopted in July 2010,<sup>7</sup> following months of intricate negotiations to bridge the conflicting interests of Member States, Commission and European Parliament (“EP”) as to the Service’s actual set-up. In the event, this “EEAS Decision” allowed what it defines as the “functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with legal capacity necessary to perform its tasks and attain its objectives”,<sup>8</sup> to start performing.

The agreed text is a masterpiece of ambiguity.<sup>9</sup> Possibly anticipating difficulties in its implementation, an early review clause was included in the Decision’s Final Provisions. Hence, according to Article 13(3), the HR has to provide “a review of the organization and functioning of the EEAS, which shall cover inter alia the implementation of Article 6(6), (8) and (11).<sup>10</sup> The review shall, if necessary, be accompanied by appropriate proposals for the revision of this Decision. In that case, the Council shall, in accordance with Article 27(3) TEU, revise the Decision in the light of the review by the beginning of 2014”.

### *A sobering diagnosis*

In her review, the HR proudly declares that the EEAS has “developed into a modern and operational foreign policy service, equipped to promote EU interests and values in [the Union’s] relations with the rest of the world”;<sup>11</sup> that it “ensures effective and timely delivery of EU foreign policy through a global

on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.”

7. Council Decision 2010/427/EU establishing the organization and functioning of the European External Action Service, OJ 2010 L 201/30. On the process leading to the adoption, see e.g. Erkelens and Blockmans, “Setting up the European External Action Service: An institutional act of balance” 8 EuConst (2012), 246–279, and Van Vooren, “A legal-institutional perspective on the European External Action Service”, 48 CML Rev. (2011), 475.

8. Art. 1(2), EEAS Decision.

9. Further on this, see e.g. Blockmans and 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*, (SIEPS – 2013:1 / CEPS, February 2013).

10. Art. 6 of the EEAS Decision relates to staff matters. Para 6 establishes the bases for the recruitment of EEAS staff, namely “merit”, “geographical and gender balance”; para 8 endows the HR with the power to establish the selection procedures for EEAS staff, and requires that representatives of Member States, the General Secretariat of the Council and of the Commission be involved in the recruitment for vacant EEAS posts. Para 11 concerns the Service’s staff coming from Member States diplomatic services, as EEAS temporary agents; it notably requires the Member States to guarantee immediate reinstatement of their own officials at the end of their period of service to the EEAS, which in principle is a maximum of eight years.

11. *Foreword*, EEAS review, p. 2.

network of EU delegations, crisis management structures and CSDP missions".<sup>12</sup> She also considers that the Service's success "rests on its unique capacity to bring together all the EU institutions and contributions to maximize influence and at the same time reduce costs to our citizens and Member States".<sup>13</sup>

Against this yardstick, though, the practice exposed in the review comes as a sobering read, if not as an anti-climax. Going well beyond an assessment of the implementation of Article 6(6), (8) and (11) of the Decision, the HR evaluation presents a sizeable, though non-exhaustive, list of shortcomings in the EEAS' overall operation, using blunt language such as "institutional challenges, sometimes battles", "duplication", "confusion", "limited resources", "missed opportunities", and providing a host of illustrations to substantiate the points. Admittedly, these observations are not entirely surprising, echoing as they do many of the views expressed earlier in a string of academic analyses, as well as in non-papers produced by groups of Member States,<sup>14</sup> and a recommendation by the Committee on Foreign Affairs of the European Parliament.<sup>15</sup> Yet, coming from the person who has been in charge of setting up and running the Service, they naturally carry a particular weight.

For instance, the review points out that the appointment of commissioners with an external relations portfolio, e.g. neighbourhood or development, "when the geographical responsibilities for [the] countries [concerned] were transferred to the HR/VP and EEAS risked confusion".<sup>16</sup> It also notes that while the EEAS is increasingly expected to provide the Foreign Affairs Council with ideas and policy proposals on the external aspects of internal EU policies (e.g. "energy security, environmental protection and climate change, migration issues, counter-terrorism, financial regulations and global economic governance"), it lacks the capacity to respond to requests, as "following the allocation of responsibilities and resources at the creation of

12. EEAS review, p. 3.

13. Statement by EU High Representative Catherine Ashton on EEAS review, European Parliament, Strasbourg, 12 June 2013, A314/13, p. 2.

14. E.g. *Non Paper – Strengthening the European External Action Service*, Ministries of Foreign Affairs of Austria, Belgium, Denmark, Estonia, Finland, Germany, Italy, Latvia, Luxembourg, Netherlands, Poland Slovakia, Spain, Sweden (1 Feb. 2013); *Non Papier – Renforcer l'expertise « Sécurité – défense » du SEAE*, France, 2013.

15. See particularly: Recommendation to the High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the European Commission, to the Council and to the Commission on the 2013 review of the organization and the functioning of the EEAS, Co-rapporteurs: Elmar Brok and Roberto Gualtieri, Committee on Foreign Affairs, 26.4.2013, adopted on 13 June 2013. See also the study prepared for the EP Committee on Foreign Affairs, *The organisation and functioning of the European external action service: achievements, challenges and opportunities*, February 2013.

16. EEAS review, p. 8.

the EEAS, virtually all the expertise and capacity to manage the external aspects of these policies remained in the Commission services”.<sup>17</sup>

The “potentially unclear” division of responsibilities between the EEAS and other “other Brussels institutions”<sup>18</sup> may equally explain the high level of duplication of staff and functions. The review notably points out that the Council Secretariat General retained “more than 20 AD [i.e. “Administrators”] posts for residual external policy tasks”,<sup>19</sup> though its external relations staff was supposed to have been transferred to the EEAS. In the same vein, the review mentions that the Commission has created its own 24/7 Emergency Response Centre (ERC), alongside the EEAS’ Situation Room, leading the HR to suggest “creat[ing] a single EU ERC generating savings and avoiding duplication”.<sup>20</sup>

Complexity has also characterized the institutional framework of EU external action, as typified by the financial arrangements governing the operation of the Service. The review recalls that the Commission set up a new Service for Foreign Policy Instruments (FPI), in charge notably of the financial management and implementation of operational budgets for CFSP and the instrument for stability, alongside its Directorate General for Development which manages various other financial instruments within the political framework defined by the Service. Under the authority of the HR/VP and co-located with the EEAS, the FPI is nevertheless separate from the latter in administrative and functional terms, given the Commission’s exclusive responsibility for the management of operational chapters of the EU budget. The review admits that “it is not possible to integrate the activities of the FPI fully in the EEAS because of the Treaty responsibilities for the execution of the budget”, but states that “more efficient and closer working with the EEAS should be explored”.<sup>21</sup> Even more intricate is the dual financial circuit operating within EU delegations, as the execution of EU financial programmes relates to Commission functions even though delegations formally belong to the EEAS.<sup>22</sup> The review stresses that it is of “paramount importance to solve this quickly” and the HR looks “to this review to effect some change in the shortest possible timescale”; it is recommended that the Commission put forward proposals on this “at the earliest opportunity”.<sup>23</sup>

While the coexistence of the Service and EU institutions reveals a degree of competition, duplication and complexity, the internal organization of the

17. Ibid.

18. Ibid.

19. EEAS review, p. 14.

20. EEAS review, p. 5.

21. EEAS review, p. 9.

22. Art. 1(4), EEAS Decision.

23. EEAS review, p. 12.

Service is not exempt from malfunctions either. Alongside the problematic dual management of EU delegations,<sup>24</sup> the review suggests that the in-house EEAS operation is handicapped by the persistent line of demarcation between the CFSP/CSDP structures transferred from the Council Secretariat General, and the geographical “Managing Directorates” inherited from the previous Commission Directorates General for External Relations, and Development, respectively.<sup>25</sup> Though joined in the same administration, these sub-structures in effect continue to run according to different modes,<sup>26</sup> challenging the ability of the EEAS to activate the different EU policy instruments at once, and thus to fulfil its mission. The latter is further impeded by the unanimity requirement retained for the CFSP, and described as “a limiting factor on decision-making”.<sup>27</sup>

The review goes beyond the EEAS organization and functioning *stricto sensu*, notably by including an entire section on the “role of the HR/VP”,<sup>28</sup> albeit not governed by the Decision. Commending the benefits of combining jobs, the HR concedes that “this concentration of responsibilities in a single post generates a huge and relentless workload for one person”. Indeed, in her function as vice-president of the European Commission, the HR/VP has been struggling to coordinate effectively “other aspects of the Union’s external action”, one of her essential responsibilities within the Commission. In particular, it appears to have been difficult to use the meetings of the External Relations Group of Commissioners to that effect, as those meetings were rare and in any case chaired by the President of the Commission.<sup>29</sup>

Remarkably, none of the EEAS flaws exposed in the review is expressly related to potential deficiencies in the legal arrangements governing its operation. The silence on possible legal root causes could be explained by the formulation of the HR’s mandate in Article 13(3) EEAS Decision, which foresees a review of “the functioning and organization of the EEAS” rather

24. EEAS review, p. 11.

25. EEAS review, pp. 5–6. See Annex of the EEAS Decision for details of the transfer of departments and functions to the Service.

26. Alongside the primary line of demarcation between CFSP and geographical and thematic attributes of the Service, reminiscent of the pre-Lisbon situation, the organigram of the EEAS, based on the EEAS Decision, discloses duplication and overlaps in its administrative organization. For example, the top layer constituting the so-called ‘corporate board’ includes high civil servants without clearly allocated tasks. The review indeed calls for a more streamlined and integrated structure. See also the letter of the EP Committee on legal affairs, annexed to the EP Recommendation on the 2013 review, cited *supra* note 15.

27. EEAS review, p. 7.

28. EEAS review, p. 13.

29. EEAS review, p. 8. See also the study prepared for the EP Committee on Foreign Affairs, *The organisation and functioning of the European external action service: achievements, challenges and opportunities*, February 2013; p. 32 et seq.

than of the *implementation of the Decision* on the functioning and organization. However, it may be doubted that the intention of the authors of the review clause was to dissociate the two, given the Decision's background recalled earlier, but also considering that the sentence defining the HR review mandate further refers to particular provisions (e.g. Art. 6(6), (8) and (11)), thereby indicating that the assessment of the functioning and organization inherently relates to that of the implementation of the Decision. That the review should not shy away from evaluating the Decision as such is indeed confirmed by the possibility envisaged that the HR may submit "appropriate proposals for [its] *revision*" (our emphasis).

In fact, the causal link between the EEAS' failings and its legal foundations can readily be established. For instance, the confusion of responsibilities between the Service on the one hand, and the Commission and Council on the other, was predictable in view of the Decision's undecided definition of the EEAS' responsibilities. According to Article 2, those are to be determined "without prejudice to the normal tasks" of the Commission and Council Secretariat General. Also, the internal compartmentalization of the Service's organization and operation is in line with the requirement of Article 4(3)(a) of the EEAS Decision, according to which the "specificities of the CSDP structures, as well as the particularities of their functions, recruitment and the status of the staff shall be respected". The very provisions of the EEAS Decision, particularly Articles 8 and 9, can equally explain the complexity of the budgetary and financial arrangements, which could otherwise be anticipated given the rules of the Financial Regulation and the primary law basis of the Commission's powers. In short, several deficiencies highlighted in the HR's assessment are closely connected with, if not directly rooted in, the legal arrangements underpinning the EEAS operation. One could have therefore expected that the review be somewhat more articulate on that level, not least to provide a more solid basis for proposing specific remedies.

*If it's broke, fix it!*

Indeed, following the critical diagnosis, the review makes short and medium term recommendations in a "Summary of Proposals for Change", some more articulated than others. For example, to eliminate duplication and improve efficiency, the HR recommends "[c]larify[ing] [the] division of labour between [the] EEAS and [the] Commission/Council Secretariat services with external relations responsibilities", evoking in this context possible additional "staff transfers".<sup>30</sup> As regards the financial and budgetary predicaments, the review suggests "simplify[ing] [the] administrative budget of delegations to

30. Short-term recommendation 20, EEAS review, p. 17.

ensure single source of funding (combining money from EEAS and Commission budgets)”, “reinforc[ing] [the] EEAS-Commission co-ordination on management of resources in delegations”<sup>31</sup> and “modify[ing] [the] Financial Regulation to address problems of dual financial circuits in delegations”.<sup>32</sup> Regarding the HR/VP workload, it recommends “clarify[ing] [the] system of political deput(ies) for the High Representative” “either within the EEAS structures or through [a] clearer responsibility for HRVP over other Commissioners”, while calling for the conclusion of “formal arrangements for existing practice where Foreign Ministers, members of the Commission and senior EEAS officials can deputize for the HRVP”.<sup>33</sup> And on the lack of integration within the Service’s structure, it is suggested that the December European Council debate on security and defence “could also cover structural issues (e.g. integration of CSDP structures within the EEAS, reporting lines, mission support)”.<sup>34</sup>

In general, the review does not specify whether the introduction of such changes might necessitate a modification of the EEAS Decision or of its broader legal biotope. Indeed, like the enumeration of deficiencies, the catalogue of recommendations hardly points to particular legal provisions, nor a fortiori does it suggest any legal adaptations. As admitted by the HR in the conclusion of her report, “[a]t this stage, the review deliberately concentrates on policy issues and possible improvements without addressing what these would require in terms of internal organizational change, modifications in legal texts or other wider issues to be considered as part of the institutional transition in 2014”. In other words, the practicalities are left for later.

One possible understanding of this is that the author’s intention is to leave the hands-on articulation of the recommendations to the Council/Member States, Commission and/or European Parliament, to which the review is addressed.<sup>35</sup> She might also be asked to return to the drawing board to come up with more specific proposals, if need be. However, another interpretation of the omission, in view of the provisions of Article 13(3) EEAS Decision, could be that the HR “at this stage” does not consider the Decision’s revision “necessary”.<sup>36</sup> In that case, the submitted “proposals for *change*”, however

31. Short-term recommendations 17–18, p. 17.

32. Medium-term recommendation 7, p. 18.

33. Medium-term recommendation 3, p. 18.

34. Medium-term recommendation 1, p. 18.

35. EEAS review, p. 2.

36. In the French version of Art. 13(3) EEAS Decision, “if necessary” is rendered as “le cas échéant”, which would tend to suggest a softer requirement.



“important and necessary,”<sup>37</sup> are *not* to be understood as “appropriate proposals for the revision of [the] Decision” accompanying the review (our emphasis).

If the latter reading is correct, the question of the ultimate purpose of the HR recommendations could then be raised, particularly since her abstention might formally preclude the said revision. In view of the last sentence of Article 13(3), which stipulates that the Council revises the Decision “in that case”, i.e. in case the HR submits “appropriate proposals for the revision of this Decision”, the possibility to revise appears to depend on the HR’s initiative. This is further supported by the requirement that such revision be carried out in accordance with the procedure of Article 27(3) TEU, which is itself initiated by the submission of a “proposal” by the HR. The HR thus has the monopoly of initiative formally to propose changes to the EEAS Decision. In view of this, and the absence of another amendment procedure to that effect,<sup>38</sup> and considering the critical substance of her review as well as the fact that (some of) the “proposals for change” cannot be introduced *à droit constant*, it is surprising that the HR should abstain from formulating “appropriate proposals for the revision of [the] Decision”.<sup>39</sup> In this respect, the EEAS review may well be a missed opportunity.

The blame should not be put solely on the HR though. After all, it is unlikely that the position she has taken in this review process is purely of her own making. Instead, it arguably reflects the lack of appetite of (some of) the Member States to venture into a formal revision of the Decision, which would possibly entail strenuous negotiations with the Commission and possibly with the EP, at a time when the reform of the Service might not be among the priorities of the EU’s political agenda, or that of the Member States.<sup>40</sup> The review thus reflects that the HR, assisted by the EEAS, essentially represents the Member States’ collective will, or lack thereof.<sup>41</sup> The HR is not, as yet, a “policy entrepreneur” emulating the Commission in the external sphere.

37. EEAS review, p. 2.

38. Unless it is considered that the procedure of Art. 27(3) TEU may be used as the standard procedure for regulating the organization and functioning of the EEAS, and thus amending and replacing the 2010 EEAS Decision, outside the context of Art. 13(3) EEAS Decision.

39. It may be wondered whether the reference to the procedure of Art. 27(3) TEU in Art. 13(3) EEAS Decision requires that another formal “proposal” from the HR be submitted, or whether the “appropriate proposals for the revision” referred to in Art. 13(3) qualify as the HR “proposal” for the purpose of Art. 27(3) TEU.

40. Not to mention the existence of recurring disagreements among the Member States as to what the EEAS and in turn the EU external action should be.

41. The review suggests that the need for “collective political will and agreement between Member States”, given that “the Lisbon Treaty left the CFSP intergovernmental and therefore subject to unanimity”, is “a limiting factor on decision-making”; see p. 7.



Moreover, the notion that the EEAS' shortcomings might be remedied outside the Decision itself, and the legal sphere altogether, should not be excluded. Perhaps one should not overrate the Decision's actual contribution to the organization and functioning of the Service. Indeed, various changes proposed by the HR do not require legal adaptation. As such, their introduction does not depend on the procedure of Article 13(3) EEAS Decision (and/or Art. 27(3) TEU) with an HR initiative.<sup>42</sup> For instance, a strengthened coordinating role of the HR as vice president of the Commission would not need formal legal change, but rather a political *modus vivendi* between the HR/VP and the President of the Commission.

Of course, revising the EEAS Decision might not *ipso facto* fix all faults.<sup>43</sup> For while the legal underpinnings are problematic, other non-legal elements do influence the operation of the EEAS. In this regard, the reference in the review's conclusion to "wider issues to be considered as part of the institutional transition in 2014" is noteworthy. Arguably, the phrase "institutional transition in 2014" does not relate to the change of voting rules within the Council,<sup>44</sup> which is of little relevance to the discussion, nor to the envisaged diminution of the number of Commissioners, which has been abandoned by the Member States.<sup>45</sup> Instead, it probably points to 2014 as a year of considerable turnover at the helm of the EU's institutional framework, and its potential consequences on its functioning. Hence, alongside the European Parliament elections, and the selection of a new President of the European Council, a new Commission will be appointed, including a plausible new president. As suggested in the review, this provides an opportunity to discuss and possibly alter the organization of the college, the allocation of Commissioners' portfolios,<sup>46</sup> but also to reformulate the interactions between the president and her/his new vice president/HR, who will also be replaced.

42. In the same vein, some changes might entail amendments of legal instruments other than the EEAS Decision itself: e.g. the streamlining of the chairmanship of working groups related to the Foreign Affairs Council, suggested in the list of short-term recommendations, would have to be done by amending the Council Decision of 1 Dec. 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (O.J. 2009, L 322/28).

43. Indeed, the revision of the EEAS Decision may depend on other actors, given that such a revision might necessitate the amendment of related legal instruments. For example, a revised formulation of Art. 8 EEAS Decision could require a revision of the Financial Regulation, and thus an initiative from the Commission (as recalled by the review itself, p. 12), and the consent of the EP, if not possibly an amendment of primary law. Similarly, *full* deputization of the HR/VP may necessitate a Treaty change.

44. See Art. 16(4) and (5) TEU.

45. See Art. 1, European Council Decision (2013/272/EU) of 22 May 2013 concerning the number of members of the European Commission, OJ 2013 L 165/98.

46. EEAS review, p. 8.

The personalities chosen for those jobs, not least as HR/VP, might say as much about the future of the EEAS as does the review. For this choice will also reflect the Member States' disposition, or lack thereof, to improve the operation of the Service, and to deliver on the proclaimed ambitions of the Lisbon Treaty as regards the EU external action.