EEAS 2.0

Draft recommendations for the 2013 EEAS Review

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Summary

This document offers recommendations for the amendment of Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service (hereinafter 'EEAS Decision'). These recommendations have been distilled from discussions between academics and practitioners during a two-day workshop held at the European University Institute in March 2013 in the framework of the so-called 'EEAS 2.0' project. This research project is a collaboration between independent scholars brought together by SIEPS, the EUI and CEPS. In February 2013, the team published a legal commentary on the EEAS Decision, available on the websites of the participating research centres. The current paper and its recommendations should be read in the light thereof. In formulating the recommendations, attention has been paid to policy papers, non-papers and recommendations that have been initiated by EU institutions, member states, think tanks and academia, notably in the context of the on-going review. As such, we hope to be able to inform, in a precise and legal way, the discussions in preparation of the High Representative's own report. The current paper is work in progress and will be revisited for publication after the summer, taking into account the High Representative's report of July and feedback from other stakeholders.

The current paper sheds light on possible adjustments in the operation of the Decision/Service 'à droit constant', but also includes proposals that could be considered in the context of an amendment of the EEAS Decision. With regard to the latter, several levels of revision may be envisaged: (i) a mere *toilettage* (e.g. deleting out-dated provisions and securing terminological consistency), (ii) technical changes in the text without reopening the political discussion that predated the adoption of the Decision and (iii) a more ambitious revision that could require more extensive legal modifications of collateral secondary measures (e.g. Staff and/or Financial regulations), if not of the founding treaties.

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Article 1 – Nature and Scope

- Para 1 mirrors the terminology of Article 27(3) TEU, and does not raise any particular issue.

- Para 2: The definition of the EEAS as a 'functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission' is ambiguous. Indeed, while stressing the idea of distinctiveness, the unhappy combination of the notions of functional autonomy and separateness does not seem to represent accurately the position of the Service in relation to EU institutions, as articulated in other parts of the Decision. Thus a tension is detectable between the above notions on the one hand, and the different functions of the Service as per e.g. Article 2 EEAS Decision, on the other. For instance, the latter refers to the EEAS as 'assisting (inter alia) the Commission' which is the terminology used to describe the role of Directorates-General within the Commission, thereby suggesting that the Service might sometimes operate as Commission DG, *viz*. when serving the HR/VP as VP.[1] That the Service should 'assist' the Commission (President), and the President of the European Council also conveys an impression of hierarchy, that runs against the notion of functional autonomy. A similar ambiguity concerns the EEAS supporting the HR/VP in his Council functions (i.e. HR qua chair of the FAC, and chairing related working groups), which could be read as the EEAS operating as an extension of the General Secretariat of the Council.

- Should the EEAS Decision be revised, simplification in the formulation of the Service's status would be welcome. In this respect, as para 3 establishes that the EEAS is placed under the authority of the HR/VP, it may be wondered whether the express references to the 'autonomous' and 'separate' character of the EEAS vis-à-vis the Commission and the Council Secretariat General are necessary. Thus, would a simple formula whereby the EEAS supports the HR qua VP and HR be sufficient to establish its autonomy? Can it be assumed that this autonomy naturally flows from the autonomy of the HR? Or would the absence of any reference to the EEAS' autonomy (or separateness) reinforce the perception that the Service sometimes operates as an extension of the Commission, sometimes as a service of the GSC? Indeed, it may be wondered whether the HR/VP is legally autonomous enough. A solution might be to include para 3 in a shorter version of para 2 in the following way: 'The EEAS, which has its headquarters in Brussels, shall be an autonomous body of the European Union, placed under the authority of the High Representative…'. Para 3 would then be devoted to the legal capacity of the Service.

- But the 'legal capacity' with which the EEAS is endowed by Article 1(2) is equally a source of ambiguity in the definition of the Service's status. Established for practical purposes (ie 'legal capacity necessary to perform its tasks'), such legal capacity is also conceived as a tool to permit the EEAS to 'attain *its objectives*'. Yet, such objectives are not mentioned, let alone articulated, elsewhere in the Decision, nor are they evoked in EU primary law. Instead, the Service is formally endowed with 'tasks' (Art 2 EEAS Decision), thus creating uncertainty as to the contours of the legal capacity.

- Indeed, while such capacity appears to include the Service's ability to appear in Court, as illustrated by several Staff cases, the question can be raised as to whether it can also entail EEAS *intervention* in Court's proceedings, and indeed *locus standi*, *e.g.* to challenge actions or inactions of EU institutions that would prevent the EEAS from fulfilling its tasks. To be sure, the Decision is silent on the question of legal representation of the EEAS, notably for dealing with local authorities: Should it be the Executive Secretary General, or the Chief Operating Officer, or perhaps both?

- Technical revision of EEAS Decision could thus include a formulation of the Service's legal capacity. In particular, it should either refrain from referring to the phrase 'attain its objectives' if those are not defined elsewhere, or articulate these in the Decision. Revision could also bring clarification as regards the legal representation of the EEAS.

- Para 4 does not create any particular difficulty.

[1] That the Cabinet of the HR/VP is part of Commission's staff while Heads of EU Delegations, though formally part of the EEAS staff, occasionally act qua Commission (as made clear in the *ELTI* order of the General Court), adds to this tension.

Article 2 – Tasks

- Para 1 reflects Articles 18 and 27 TEU to which it explicitly refers. This connection in itself does not raise particular issues. The second part of para 1 which elaborates the three-fold tasks of the EEAS, by reference to those of the HR/VP, is by contrast fraught with ambiguity, and would benefit from reformulation. The same holds true for the second paragraph, particularly when read in connection with other provisions of the Decision.

- There are two aspects to the EEAS tasks as set out in Article 2: one is *positive*, namely to 'support' and 'assist', and the other is *negative*: its tasks are defined by default namely 'without prejudice to normal tasks' of institutions. Yet, the notion of 'normal' to delimit the tasks of the EEAS is unhelpful as the 'normal tasks' of both General Secretariat of the Council and Commission have been profoundly affected by the very existence of the EEAS, leading to a 'new normal' that thus has to be found.

- Moreover, a question arises as to whether the notion of 'assist' (para 2) entails a lighter task than 'support' (para 1), which perhaps implies policy-making. Indeed, the provision does not make clear what the policy-generating task of the EEAS is, and how far it can go. Thus, can the EEAS engage in self-definition of its tasks, particularly in view of the reference to 'the legal capacity necessary… to attain its objectives' in Article 1(2) EEAS?

- The question may thus be raised as to whether Article 2 could benefit from spelling out the different external policy areas in which the EEAS is tasked to work. At the same time, the absence of specific substantive indications in the list of EEAS tasks may reflect its essentially *coherence building* mandate, rather than a Service endowed with specific *substantive competence*. Thus, the reformulation of Article 2 ought perhaps to focus on reinforcing its *coherence* task, in line with the spirit of the Lisbon Treaty (notably Art 21(3) TEU) and of the Council Decision writ large. In this respect, it maybe wondered whether the formulation of para 1 regarding the EEAS support function in relation to the HR/VP qua VP, should be revised with a view to strengthening the latter's *coordinating function* within the Commission, albeit without infringing the provision of Article 40 (1) TEU.

- Given the breadth of the HR/VP mandate, and in turn of the EEAS as per Article 2, should deputisation of HR/VP be evoked in Article 2(1)? The purpose of such a mention would be, at the very least, to make clear that the EEAS supports not only the HR/VP in all his functions, but also his deputy/ies. Arguably, such an inclusion would depend on the conception of such deputisation: should it be complete, in the sense of allowing the deputy fully to represent the HR/VP in all his functions, preliminary amendment to the founding Treaties would possibly be required, given the triple-

hatted deputisation that it would entail for concerned Commissioners. Thus the Decision's reference to deputies would only be conceivable once primary law has been adjusted. *Partial* deputisation by contrast, in a sense of establishing sectorial deputies (e.g. one for the HR/VP qua VP; one for the HR/VP qua Chair of the FAC, or of Defence), could be easier to establish under the current Treaties. The Decision could thus refer to such deputies without requiring a preliminary Treaty change. That said such a partial or functional deputisation might negate the purpose of the Lisbon Treaty which coalesced those functions to achieve coherence, and make the latter more difficult to achieve.

– As evoked above, para 2 conveys an impression of hierarchy between the Commission (President) and the President of the European Council on the one hand, and the Service on the other, which is at odds with the provisions of Article 1 EEAS Decision. One option to diffuse the tension would be to integrate this paragraph, with an adjusted wording, in Article 3 EEAS Decision which concerns cooperation notably between the Service and EU institutions.

Article 3 – Cooperation

- The multi-layered duty of cooperation foreseen in Article 3 EEAS Decision is a specific application of the TEU-based principle of sincere cooperation binding member states (Art 4(3) TEU) and institutions (Art 13(2) TEU). Indeed, Article 3 envisages it as various obligations of conduct (obligation to 'support', 'work with', 'consult', take part in preparatory work'), which echo the duties that the Court of Justice has articulated in its case law on the principle of loyal cooperation. Hence, paragraph 1 introduces an obligation of cooperation as a general duty of the EEAS to 'support and work in cooperation with, the diplomatic services of the Member States, as well as with the General Secretariat of the Council and the services of the Commission', and 'other institutions and bodies of the Union, in particular the European Parliament' (para 4).[2]

- However, the obligations spelled out in Article 3 EEAS Decision appear to vary depending on the subject matter and/or the actor concerned. The ensuing complexity in its formulation conveys the impression of a more differentiated implementation of the duty of cooperation than under EU primary law, a paradox in view of the importance of its comprehensive application for the Service to achieve its coherence mandate. Thus, the duty to consult foreseen in para 2 is explicitly addressed to the EEAS and the Commission, without mentioning the Council services, or members states' diplomatic services. While textually this could entail that only the Commission is subject to an obligation of consultation with the EEAS, this would arguably sit uncomfortably with the general duty of sincere cooperation that binds all institutions under Article 13(2) TEU.

- In the same vein para 2 shields the CSDP from the operation of the duty of consultation. This CSDP *exceptionalism* is however problematic in terms of permitting the EEAS effectively to support the HR/VP in achieving coherence, given the considerable significance of other external policies of the EU to achieve CSDP objectives. The ability of the HR, and incidentally of the EEAS, to fulfil their coherence-making task primarily depends on the cooperation of both the Commission and Council, in line with the requirement of Article 21(3) TEU.

- The same holds true for the Member States. In para 1, the obligation of cooperation appears to operate only one-way between the EEAS and the member states' diplomatic services, in contrast to earlier drafts of the Decision. Similarly, Article 5(9) EEAS

[2] Indeed, the EEAS duty of cooperation is not limited to those actors mentioned in the first paragraphs. Article 2(2) envisages that the EEAS *assists* the presidents of the European Council and of the European Commission, respectively. As argued above, this provision could be included in Article 3.

Decision no longer expressly foresees that the Union Delegation and diplomatic services of the member states exchange information, *on a reciprocal basis*.[3] Only Article 10(3) EEAS Decision expressly requires assistance from Member States, in the specific field of security.[4] That said, the provisions of Article 4(3) TEU on sincere cooperation entail that the member states are bound to cooperate with EU institutions to achieve the Union's coherence objective as per Article 21(3) TEU, and thus to facilitate the fulfilment of the EEAS tasks, including by cooperation with the Service itself. At the very least, the cooperation from member states is required in organisational terms to fulfil the requirements of Article 27(3) TEU, and ensure the smooth functioning of the EEAS, given the national element of its composition.[5]

- Para 2 foresees that 'this paragraph shall be implemented in accordance with Chapter 1 of Title V of the TEU, and with Article 205 TFEU'. The cooperation between the EEAS and the Commission, both in the form of consultation and preparatory collaboration is thus determined by a specific normative framework. Yet, given that this Chapter 1 sets out the 'general provisions of the Union's external action', it is surprising that the reference to this normative framework should only be made in the specific context of para 2, as if the objectives and tasks it encapsulates were to be achieved only through the cooperation between the EEAS and the Commission, and not also with the member states and the General Secretariat of the Council. All the activities of the EEAS and of other institutions too, and all their interactions within the EU system of external relations are legally determined by the 'general provisions of the Union's external action' set out in that Chapter 1. It is therefore suggested to delete this particular reference to Chapter A of Title V, and to Article 205 TFEU, which should rather be included in the preamble of the Decision.

- Para 4 refers to Regulation 1073/19996 about OLAF's investigation powers, and includes the request that the EEAS adopt a decision on the terms and conditions for internal investigations. It may be wondered whether this request should be deleted given that "the" decision has been adopted, or whether that power should remain for the purpose of amending that decision if need be.

[3] Ashton's proposal of March 2010 read as follows: 'The Union delegations shall work in close cooperation with the diplomatic services of the Member States. They shall, *on a reciprocal basis*, provide all relevant information' (emphasis added).

[4] See Article 10 EEAS Decision, below.

[5] In the same vein, Article 13(1) EEAS Decision foresees that both the HR and the Council (as well as the Commission and the member states) are responsible for implementing the decision, it also says that they 'shall take all measures necessary in furtherance thereof'.

[6] Regulation (EC) no 1073/1999 of the European Parliament and of the Council of 25 may 1999 concerning investigations conducted by the European anti-fraud office (Olaf) [OJ 1999 L 136/1].

– In view of the potential for broad application of the obligation of cooperation encapsulated in Article 3 EEAS Decision, as suggested above, and the general principle of sincere cooperation from which it ultimately derives, a leaner formulation of the obligation of cooperation under Article 3 could be envisaged. It would arguably be beneficial to its operation, and in turn help the EEAS to fulfil its coherence mandate. It would also diffuse possible tensions between Article 3 EEAS and other provisions of the Decision.

Article 4 – Central administration of the EEAS

- The title of the provision ('Central administration') covers all parts of the EEAS bureaucracy. In several respects, the structure it establishes does not entirely correspond to the actual set up of the Service. Synchronisation and clarification are therefore desirable.

- In general, the text of Article 4 could be synchronised with the organogram. In particular, the 'directorates-general' mentioned in para 3 do not exist in practice, being Managing Directorates instead - one may indeed query the choice to have specific terminology for the bureaucratic organisation of the EEAS. The synchronization would also concern the reference to SITCEN (now: INTCEN); the ostensible duplication of units of election observation (both in MD VI A.3 and FPI); the absence in the organogram of a department for inter-institutional relations; and the fact that the division for administration, staffing, budgetary, security and communication and information system matters is in reality rightly managed by the Chief Operating Officer and not by Executive SG. Incidentally, 'Public diplomacy' is now located with the FPI for budgetary reasons, but ought to be transferred to the central administration so that the linkages with the Political Affairs Department (notably DGS 2.2) and SG3 could be made more apparent.

- More specifically, the senior management structure of the EEAS ought to be refined at several levels. Thus, the 'corporate board', which was introduced through an internal organisational decision, would merit a reference in the Decision if its existence is deemed necessary. Its role could then be defined at this level, or in new Rules of Procedure. Such Rules of Procedure should cover all relevant aspects of the EEAS' working methods and its relations with other institutions. A reference to the adoption of the Rules of Procedure should indeed be included in the EEAS Decision.

- The reference in para 1 to the obligation resting upon the Executive SG to ensure 'effective coordination' could be spelled out, for instance in the above-mentioned Rules of Procedure. In the same vein, the responsibility for administrative and budgetary management, a role which according to the EEAS Decision falls to the Executive Secretary General, has per managerial decision been moved to the Chief Operating Officer. Paras 1 and 3(a) second indent should thus be brought in line with practice. Moreover, there needs to be a clearer demarcation between these portfolios and between those of the Chief Operating Officer and that of the 'Managing Director for Administration and Finance', a denomination which also merits synchronisation in an amendment of Article 4. Such clarifications would help in optimising decision-making.

- The Commission's Foreign Policy Instruments Service (FPI) is only referred to in Article 9(6) EEAS Decision as being co-located with the EEAS. A full integration of the FPI into the structures of the EEAS is desirable and would require an adaptation of Article 4 so as to mention its role and function.

- As discussed above, the Decision provides that the EEAS has the necessary legal capacity (Article 1), but is silent on the question of who can act as its legal representative. Arguably, the HR is the legal representative of the EEAS. The EEAS Decision and/or the new Rules of Procedure should state this and delegate this task to the Executive SG ('under the authority of ').

- Finally, the specific obligation of assistance in para 5 should be reformulated so as to stress its reciprocal character (see Art 2(2) EEAS Decision).

Article 5 – Union Delegations

- Pursuant to para 1, a committee composed of Commission and Council staff discusses and decides, by consensus, whether to open or close EU Delegations. One may wonder whether it would, indeed, be helpful that new Rules of Procedure spell out what happens if no consensus is reached (e.g. alternative options) and whether consensus is also required upstream (i.e. in the college of Commissioners and the Council).

- If the text of para 1 were to be adapted, then mention could be made of different types of representations (e.g. liaison offices), possibly distinguishing them in the (inter-institutional) approval procedure.

- Practice has revealed that there is a need to clarify the status of EU diplomats and the potential extension of EU diplomatic passports to them, also in order to prevent members of diplomatic missions to be assessed by third countries on the basis of their nationality. Article 5 would be the *locus classicus* for such textual additions.

- Given that European Union Special Representatives (EUSRs) cooperate closely with the EEAS, it is advisable to integrate them and their staff in the Service's structures. To that end, a reference could best be introduced in Article 6 EEAS Decision. The duty of EU Delegations to support, communicate and consult with EUSRs should be introduced in Article 5. The double-hatting of EUSRs with EU Heads of Delegation deserves to be re-thought and, perhaps under conditions, mentioned..

- In order to ensure that staff profiles and the size of EU Delegations reflect the strategic interests and political priorities of the EU, the EEAS could be granted a greater say in the (re)allocation of Commission staff in EU Delegations and the appointment of staff with specific tasks (e.g. human rights focal points, CSDP attachés). In this context, the authority of the Heads of Delegation over the whole staff (including Commission staff) should be strengthened, whilst ensuring that the Head of Delegation is the addressee of all instructions issued by Headquarters. In Delegations where the number of EEAS staff is small, the Head of Delegation should, in keeping with para 2, be able to task Commission staff to carry out political analysis and political reporting.

- In terms of evaluation, the Delegations are covered by the same rules as other EU bodies (para 5). A similar provision is not included for the EEAS as such, although Article 3(4) does refer to specific inspections by OLAF. If the Decision were to be revised, then it is worth including a similar provision for EEAS itself.

- The practical implementation of para 8 has given rise to many questions which ought to be addressed both at the level of the EEAS Decision and in new Rules of Procedure: Why not include a mention of the representation of the EU to international organisations? Could a Head of Delegation initial international agreements on behalf of the EU? What exactly is the judicial power of a Head of Delegation? Can a Head of Delegation sue on behalf of the Union? If so, under which jurisdictions? In this context it is worth observing that the Head of Delegation has the power to represent the Union, and therefore also the Commission pursuant to Article 17 TEU, but that there are limits, as the *ELTI* case has shown.

- Finally, the specific obligation of assistance in para 9 should be reformulated so as to stress its reciprocal character (see Art 2(2) EEAS Decision).

Article 6 – Staff

- Article 13(3) EEAS Decision pays particular attention to the review of paras 6, 8 and 11 of Article 6. Paras 6 and 8 suffer from some duplication and could in fact be merged into a more succinct text. Rather than relying heavily on the High Representative's involvement in the final stages of recruitment of staff above director level, the amended text should mention the EEAS's Consultative Committee on Appointments (CCA) more explicitly. As the text stands now, the CCA is referred to only implicitly in the last sentence of para 8. Although the CCA was created with selection interviews of senior managers and heads of delegation in mind, it has a more general mandate regarding staffing at other levels, including monitoring selection procedures and developing staffing. A reinforced CCA could be charged with developing currently vague concepts such as the meaning of 'merit', 'adequate' geographical and gender balance, and a 'meaningful' presence of nationals from all of the member states.

- The Conditions of Employment of Other Servants (CEOS), in Article 50b(2), suggest that staff can be engaged for a 'maximum period of four years,' but that contracts may be 'renewed for a maximum period of four years.' Provision is made for renewal for a further two years under 'exceptional circumstances.' One may wonder whether this implies that staff shall have to (re)apply for a vacant position, even if they are the incumbent, upon the completion of a four-year term. The EEAS Decision is ambiguous on this point and the text of para 11 ought to be aligned with the CEOS.

- Paras 2 and 3 are in effect the successor paragraphs to Article 7, which has become obsolete. Para 2 might usefully introduce EU Special Representatives, which are at present not mentioned in the text of the Decision (other than the annex where only *staff on secondment* to EUSRs are mentioned). Since the Special Representatives are appointed by a Council CFSP decision, and that they support the work of the High Representative and in many ways represent the 'face' of the EU and its policies in various countries or regions, their non-inclusion as part of the EEAS is anomalous. Importantly, the EUSRs provide an essential link between the CFSP and the Commission's external actions (Recitals 2-3). All decisions appointing EUSRs have more or less standard provisions (see Art 12 on Coordination) which could provide the relevant wording for a revised EEAS Decision. There would also need to be reference to Article 5 regarding the relationship between EUSRs and Delegations.

- The reference in the latter part of para 3 to rules applicable to national experts and military staff on secondment was adopted on 23 March 2011(2012/C 12/04). It may be asked whether the reference should thus be removed or instead be maintained to allow the HR to adjust the adopted rules if necessary.

- Similarly, the question can be raised whether the reference in para 9 to the end of the transitional period merits deletion. The paragraph mentions 'when the EEAS has reached its full capacity,' implying that such a ratio must be achieved by mid-2013, i.e. the time of the High Representative's review pursuant to Article 13(3). At the end of para 9 the High Representative is required to prepare a report 'each year,' implying that these arrangements go beyond the transitional period. The logic of the paragraph and its sustainability is important since it appears to establish a principle, and it is also linked to para 6. The latter part of para 9 would therefore benefit from clarification.

- Finally, para 12 packs some highly subjective terminology: what is 'adequate' training? What are 'appropriate measures'? The Committee on budgetary control report for discharge to the EEAS of 2011 budget says that quite a lot of staff lack the correct skills (notably in EU Delegations). The last part of the para 12 mentions steps to be taken 'within the year following the entry into force of this Decision.' Arguably, the text needs updating with new longer-term goals, perhaps aiming beyond adequacy. A revised paragraph might appropriately address what 'appropriate steps' might be taken beyond the transition period.

Article 7 – Transitional provisions regarding staff

Obsolete. Can be removed.

Article 8 – Budget

- Article 8 bears no direct reference to the status of the EEAS as an 'institution' for budgetary purposes. Instead, paras 1, 2 and 6 refer to the 'Financial Regulation', currently Regulation No 1081/2010, in which this specific institutional status has been attributed. Para 2 is the one and only place in the EEAS Decision which speaks of the 'powers' of the EEAS, in this context to be understood as those 'tasks' attributed to the Service qua institution under the Financial Regulation. Arguably, the budgetary tasks under Article 8 do not increase the position of the EEAS, but rather the powers of the European Parliament to exert budgetary control over the EEAS. The lack of direct reference to the EEAS' specific institutional status and the inclusion of the word 'powers' instead of 'tasks' creates confusion with the language employed in the rest of the EEAS Decision and would merit clarification.

- Para 1: Arguably, Article 8 should not open with this specific provision, but rather with the issues discussed under the previous indent and partly covered in the current text of para 2. The first two paragraphs of Article 8 should then swap positions.

- The text of para 1 exposes a rift between administrative and operational expenditures, even if in practice the dividing line between the two is not always clear. In practice, this split in financial circuits between the EEAS and the Commission has caused some difficulties, especially in EU Delegations where there is only one EEAS staff member and in places where disbursement of aid constitutes the main portion of the Delegation's activities. The split effectively means that Heads of Delegation cannot sub-delegate the sub-delegated powers from the Commission to 'non-Commission', i.e. EEAS staff (e.g. on FPI, human rights instruments, etc.). This raises questions about the rapidity in disbursement of funds and the attention a Head of Delegation can give to political issues. The difficulties in bridging the split in financial circuits are apparent from the time it took to work out how to operate the system: 13 months to agree on 'Working Arrangements' between the Commission and the EEAS. There is a widely felt need to streamline the current system, which would not necessarily impact on the current language of para 1, but rather on the text of the Working Arrangements. Arguably, such amendments should also relate to the differences in procedural arrangements between each of the external action programmes (see Art 9 EEAS Decision).

- Para 2: As mentioned above, Article 8 should rather open with this paragraph and include an explicit reference to the specificity of the institutional status of the EEAS. The language in this paragraph should be harmonised so as to ensure more consistency with other provisions of the EEAS Decision (notably Art 2 on 'tasks'), and between different language versions (e.g. F/UK).

- Para 3: A possible amendment of the EEAS Decision could offer the opportunity to add the Commissioner responsible for humanitarian assistance and crisis response to those already mentioned in the text. Conversely, and more appropriately, para 3 could be formulated in a more open-ended fashion by simply referring to all Commissioners with an external dimension to their portfolio, insofar as it regards their respective responsibilities in drawing up estimates of administrative expenditure for the EEAS.

- Para 4: There is no need to editorialise this paragraph.

- Para 5: The phrase 'budgetary authority' is EU jargon to indicate the powers held by both the European Parliament and the Council. For the sake of transparency, the text could refer to these institutions specifically.

- Para 6: There is no need to editorialise this paragraph, except if the numbering of the Financial Regulation which flanks the EEAS Decision were to be amended.

Article 9 – External action instruments and programming

- According to para 1, the overall 'management' of the Union's external cooperation programmes remains 'under' the responsibility of the Commission 'without prejudice to the respective roles of the Commission and of the EEAS in programming'. Thus, pursuant to Article 17(1) 4th sentence TEU, the Commission retains overall responsibility for dealing with and controlling the Union's external cooperation programmes, whereas it shares the role of 'programming', i.e. designing, scheduling, or planning such programmes. Yet, Article 9(2) EEAS Decision imposes an obligation ('shall') on the High Representative to 'ensure the overall political coordination (…), the unity, consistency and effectiveness of the Union's external action'. Arguably, the obligation of ensuring 'overall political coordination' by the HR – not the VP – is superimposed on the Commission's responsibility for the management of the EU's external assistance programmes. For that reason, it would make more sense to turn the positions of paras 1 and 2 around.

- In theory, the HR/VP is in an ideal position to match the modus operandi of EU assistance and cooperation programmes with political priorities. In practice, however, this requires the HR to make full use of his powers as VP (see the discussion on deputisation under Art 2 EEAS Decision).

- Paras 3-6 endow the EEAS with the responsibility for strategic programming and planning, and the Commission with the implementation of external action instruments. In practice, this managerial split has hampered the operationalisation of aid and cooperation programmes. For example, the fact that the EEAS takes the lead in programming, except when it concerns thematic programmes (e.g. EIDHR and NSCI), seems a good candidate for streamlining. The detailed Working Arrangements agreed to by the Commission and the EEAS in January 2012 paper over most of the cracks, but do not in and by themselves assure that the differences in expertise and procedural requirements between each of the external action programmes are overcome. For instance, the EEAS is supposed to do country allocations, but this has been slow to materialise. Similarly, one may wonder whether it makes sense to maintain the procedural split in the operationalisation of the Instrument for Stability (cf. paras 2 and 6)?

- Some terminological changes will need to be made to paras 2-6 to bring the text in line with the new terminology employed under the next Multi-annual Financial Framework (e.g. 'European Neighbourhood Instrument' and the 'Partnership Instrument for cooperation with third countries').

- Para 2: Humanitarian assistance, the Instrument for Pre-accession Assistance (IPA) and financial assistance to non-European Overseas Countries and Territories (OCTs) are not covered by Article 9 EEAS Decision. Planning and programming of these instruments are unified and continue to be managed by the Commission, under the responsibility of DG ECHO, DG ELARG, and DG DEVCO respectively. Nevertheless, DG ECHO and DG ELARG consult the EEAS on strategic priorities when preparing the Multiannual Financial Framework for the IPA and on IPA programming, through the inter-service consultation process. Arguably, coherence in this context would be better helped if political oversight for these instruments would also be brought under the responsibility of the High Representative – and strategic programming and planning under the EEAS.

- Para 3: In fulfilling their duty of cooperation vis-à-vis the relevant members and services of the Commission, the High Representative and the EEAS are obliged to follow the former institution's procedures. In compliance with para 3, one should nevertheless ensure that the EEAS plays a leading role in the definition of the strategies of the relevant external financial assistance instruments and that, for this purpose, the EEAS has the relevant expertise to lead in these areas.

- Para 4: Because the ENPI is covered by para 5, and because para 6 covers actions undertaken under the CFSP budget, the part of the IfS other than that referred to in para 2, the ICI, press, communication and public diplomacy actions, and EIDHR election observation missions (EOM), one can reason *a contrario* that the provision in the second sentence of para 4 only applies to the preparation of thematic programmes under the EDF and DCI. Arguably, this is a rather cumbersome way of legal drafting and could be sharpened up.

- Para 6: The Foreign Policy Instruments DG of the Commission is co-located with, but not fully integrated in the EEAS. In view of the points raised at the outset, as indeed calls from member states in several non-papers to give the EEAS a greater grip over operational expenditures, it makes sense to change the formulation of the final sentence of para 6 in this respect.

- Elements which could be introduced in a separate paragraph of Article 9 EEAS Decision concern the evaluation of external assistance and financial responsibility. The inter-service Working Arrangements could hereby be given more legal bite, and the administrative structures which deal with evaluation and monitoring (e.g. the Group of External Relations Commissioners, the EEAS and Commission services) more clout.

Article 10 – Security

- Para 1 is now outdated and needs to be cleaned up in view of an amended Council Decision 2001/264/EC. Para 1 should reflect the adoption of the 2011 EEAS security rules[7] and the 2011 Council security rules.[8] This includes ending, or at least identifying the continuous role of the Council Security Committee after the adoption of EEAS security rules and the establishment of an EEAS Security Committee (Art 9(6) EEAS security rules), which consists inter alia of representatives of the General Secretariat of the Council and the Commission. It could further benefit from clarifying the term 'all appropriate measures'. In this context, one may wonder whether the HR has any specific duties beyond adopting the appropriate legal instruments. Similarly, the term 'duty of care' of the EEAS could be clarified, e.g. by referring to a standard equivalent to the 2011 Council security rules.

- Para 2 needs to be amended in light of para 1. The first indent should refer to the 2011 Council security rules and the second indent should be deleted.

- Para 3 can remain unchanged. The relationship between the department responsible for security matters and the EEAS Security Committee could, however, be clarified.

- Para 4 foresees that the HR/VP shall take 'any measure necessary' in order to implement security rules in the EEAS, but remains unclear as regards the scope (of such measure. Implementation has not yet taken place. The EEAS shall seek advice from the GSC Security Office, relevant European Commission services and relevant services of the member states. The question can be raised whether this duty of consultation should be reciprocal. In practice, the Commission takes a rather subservient role, and the process is very much Council-driven, with its security committee. One should think of a specific responsibility falling upon the EEAS, rather than simply taking over the rules of the Council and the Commission that are adapted to its tasks. In the light of the Treaty of Lisbon which strengthens the principles of democracy and transparency, all rule-making processes should be transparent and visible.

- Is the EEAS not obliged (like the Council) to publish an annual report on (figures of) classified documents and on unclassified but non-public documents? The Declaration on Political Accountability of the HR towards the EP would no doubt require this

[7] Decision 2011/C 304/05 of the High Representative of the Union for Foreign Affairs and Security Policy of 15 June 2011 on the security rules for the European External Action Service, OJ 2011 C 304/7 (hereinafter: EEAS security rules).

[8] Annex to Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, OJ 2011 L 141/17.

(certainly for documents in areas on which the EP has consent). For the moment there is no structured approach yet to the classification of EEAS documents. It is desirable that it is made clear what rules the EEAS is applying and on what grounds and for what types of documents it considers (different categories) of classification as necessary. In short, para 4 should, besides emphasising the protection of classified information, contain a reference to the principle of transparency and identify an EEAS obligation to publish an annual report on classification practices and figures. In addition this will explicitly require the originators of classified information within the EEAS to balance at the moment classification is being considered the public interest in openness.

Article 11 – Access to documents, archives and protection

- Para 1: Regulation 1049/2001 on access to documents applies to the EEAS, which should be regarded as an institution in that respect, and should submit its own report pursuant to Article 17(1). On 19 July 2011, the High Representative adopted Decision 2011/C 243/08 on the rules regarding access to documents.[9] For clarification, Regulation 1049/2001 ought to be amended to reflect that (cf. COM(2011) 137 final). The last sentence of para 1 appears to give a broad implementing power to the HR rather than a one-off implementing task. The sentence could thus be maintained despite the adoption of the decision.

- The mandatory exceptions to access to documents in Article 4(1) Regulation 1049/2001, which are likely to be of particular relevance to the EEAS, are broadly formulated. However, there exists as yet no ECJ case-law on how the EEAS should apply this rule. Nevertheless, the case-law of the Court of Justice and the General Court with respect to access to documents regarding EU institutions in general and the application of the exception in Article 4(1)(a) in particular are likely to be relevant. The EEAS needs to take due account of the recent evolutions in this case law and develop an appropriate policy in accordance therewith.[10]

- Para 2: No need to editorialise.

- Para 3: On 8 December 2011, the High Representative adopted a decision on the rules regarding data protection,[11] which lays down the implementing rules concerning Regulation (EC) 45/2001 as regards the EEAS. As in the case of para 1, the last sentence of para 3 seemingly confers a broad implementing power to the HR which could therefore be maintained.

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[9] Decision 2011/C 243/08 of the High Representative of the Union for Foreign Affairs and Security Policy of 19 July 2011 on the rules regarding access to documents [2011] OJ C243/16.

[10] Indeed, the *In 't Veld* cases (see also T-301/10 *In 't Veld v Commission*) raise the issue of whether the regime of access to EEAS documents for MEPs ought to be reviewed (see recital 6 EEAS Decision; point 4 of Declaration of Political Accountability HR), in particular in the light of Article 218(10) TFEU, which provides for the EP to be immediately and fully informed at all stages of the procedure for negotiating international agreements. Inter alia, the HR should transmit the draft negotiating directives to the EP, in the same way the Commission transmits such documents to the EP.

[11] Decision 2012/C 308/07 of the High Representative of the Union for Foreign Affairs and Security Policy of 8 December 2011 on the rules regarding data protection [2012] OJ C308/8.

Article 12 – Immovable property

Obsolete. Can be removed.

Article 13 – Final and General Provisions

- Para 1: Given the role played by the European Parliament notably as budgetary authority, it may be wondered whether the EP should also be made responsible for the implementation of the Decision, and bound to take the measures necessary in furtherance thereof.

- Para 2: Obsolete. Can be removed.

- Para 3: various parts of the provisions are obsolete and can be removed, most notably the references to the timing of the envisaged review. The duty to undertake an assessment of the operation of the revised Decision could nevertheless be envisaged, along the lines of what is foreseen in this paragraph, with a timing to be determined.

- Para 3 foresees that the revised decision would have to be adopted on the basis of Article 27(3) TEU. In view of the content of the current EEAS Decision, it may be asked whether an additional legal basis ought to be considered when adopting a new decision. Such additional legal basis would make it clear that the scope of EEAS activities is broader than the CFSP, in that the EEAS also supports the HR/VP as VP in Commission territory. Among the possible additional legal basis, some are non-controversial, such as Article 21(3) TEU (already mentioned in the preamble of the Decision) which sets out the coherence task of the HR/VP, which the EEAS is deemed to assist. Other legal bases might be more controversial, such as Article 17(1) TEU, which relates to the Commission's power of external representation. Should the EEAS Decision become more specific, e.g. on programming, other substantive legal bases such as Article 209 TFEU on development cooperation, could in principle be envisioned too. The nature of the Decision, and the process to adopt it would however be altered by such a substantive legal basis located in the TFEU, and may raise issues of compatibility with the provisions of Article 27(3) TEU. Indeed, the European Court of Justice has restricted the possible combination of TEU and TFEU legal bases.[12]

- A modification of the legal basis of the Decision could thus be contemplated should the Decision be revised. Additional legal basis would allow more room to make the

[12] See judgment in C-130/10 *Parliament v Council,* n.y.r.

decision more specific, and would ensure its compliance with Article 40 TEU. Additional legal bases would nevertheless have to be compatible with the procedure of Article 27(3) TEU. It would appear that adding a legal basis such as Article 21(3) TEU (and/or Art 205 TFEU) would meet the above considerations.

- Para 4: the entire paragraph, save its first sentence, is obsolete and can be removed.

- Para 5: Obsolete. Can be removed.

- Para 6: can stay as it is; it could also be combined with the revised provision of para 4.

ANNEX - Departments and functions to be transferred to the EEAS

Obsolete. Can be removed.